

# Integrating the “Socialist Core Values” into Legal Judgments: China’s New Model of Authoritarian Legality

*This Note examines China’s latest project of integrating the “Socialist Core Values” (SCVs)—an official set of moralistic social norms—into legal judgments. It argues that through this project, the Party-state is effectively imposing a new conception of what Chinese law is, according to which the contents of the SCVs are now conceived to be the normative core that grounds the entire Chinese legal system. Accordingly, the Chinese judiciary is now required to decide cases under the assumption that they must go beyond statutory language to “find” law that conforms to the SCVs. This new jurisprudence departs from legalism, which used to be China’s predominant model of legality for many years, and gives rise to a new model of authoritarian legality featuring the incorporation of the extralegal, moralistic social norms mandated by the authoritarian state into the contents of law itself. Overcoming the problems associated with legalism, this new model features a destabilized legal system that allows the authoritarian ruler to flexibly exercise its power in the name of law.*

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## INTRODUCTION

Authoritarianism has a love-hate relationship with law. Modern authoritarian regimes have made various attempts to utilize law as an instrument to preserve their rule.<sup>1</sup> However, authoritarian leaders are also concerned about the possibility that law, in turn, constrains their arbitrary exercise of political power.<sup>2</sup> Even though written legal

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1. For a general overview of how authoritarian regimes use law, see Kathryn Hendley, *Legal Dualism as a Framework for Analyzing the Role of Law Under Authoritarianism*, 18 ANN. REV. L. & SOC. SCI. 211, 211 (2022); see also Po Jen Yap, *Authoritarian Regimes*, in THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW 339 (Peter Cane et al. eds., 2021). For a discussion of legalism under authoritarianism, see Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 545 (2018) (arguing that autocrats can deploy law to dismantle constitutional systems they inherited). For how authoritarian regimes use the constitutional law to achieve their aims, see Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 391 (2015) (arguing that authoritarian countries may adapt a modest normative commitment to constitutionalism to further their own aims).

2. See Hendley, *supra* note 1; see also ERNST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP 23 (E. A. Shills trans., Oxford Univ. Press 2017) (1941) (classical work proposing the dual state theory according to which the authoritarian prerogative power exists in a separate domain unconstrained by its own law). For a discussion of how the Chinese Party-state managed to scorn legality when following the law was against its interest, see Eva Pils, *China's Dual State Revival*, 46 FORDHAM INT'L L. J. 339, 351 (2022) (arguing that China has been increasingly employing extralegal means, especially in areas concerning the stability of the Party rule).

rules can carry the authoritarian's will and justify their actions, any departure from those rules might conversely undermine their legitimacy. This tension gives rise to the skepticism of whether the notion of authoritarian legality is self-consistent at all. This Note sheds light on this issue by examining an ongoing judicial practice in the largest authoritarian country in the world. In recent years, under the command of the Chinese Communist Party (CCP), Chinese courts have initiated a project of integrating the so-called "Socialist Core Values" (SCVs)—an official set of moralist social norms that allege to represent the essential Chinese values and guide Chinese society as a whole—into courts' legal judgments. The Supreme People's Court (SPC) issued several guidelines and exemplary decisions, and the lower courts responded by citing the SCVs in an increasing number of cases.<sup>3</sup> Yet it is still far from clear how courts are supposed to achieve this task, what kind of new understanding of Chinese law is involved in the process, and how we should rethink the notion of authoritarian legality in light of this new development.<sup>4</sup>

This Note argues that this project demonstrates a new form of legality that the Party-state has been promoting in response to the dilemma it faced in its legal development, a version that is distinct from its previous conception of law itself. For decades, the People's Republic of China (PRC) constructed a legal regime to facilitate governance and enhance the legitimacy of the Party-state. In doing so, it relied on a mode of legality called legalism, which features strict enforcement of written rules with little regard to law's normative contents.<sup>5</sup> However, under legalism, law was unable to provide robust

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3. See discussion *infra* Section II.A.

4. A 2019 paper by Delia Lin and Susan Trevaskes remains the only scholarly work in the English-speaking literature touching on the relationship between the SCVs and law. See generally Delia Lin & Susan Trevaskes, *Creating a Virtuous Leviathan: The Party, Law, and Socialist Core Values*, 6 *ASIAN J. L. & SOC.* 41 (2019). It provides an account of the moralizing governance under the Xi era and how the CCP understood the relationship between law and morality from a broad perspective. In contrast, this Note focuses on unexplored questions of how the SCVs are systematically integrated into legal judgments in the most recent two years and what kind of innovated jurisprudence is signified by this development.

5. For a comprehensive account of China's legal development, see RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* 55—125 (2002). For an account of the notion of legalism in contemporary Chinese politics, see Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 59 *VA. J. INT'L L.* 306, 306 (2019) [hereinafter Zhang & Ginsburg, *China's Turn Toward Law*] (arguing that China had become substantially more law-oriented under the ideal of legalism); see also discussion *infra* Section II.B. For the practices of legalism in the socialist China's early political history, see generally PITMAN B. POTTER, *FROM LENINIST DISCIPLINE TO SOCIALIST LEGALISM* (2003). For the role of legal institutions in the process of China's legal development, see Peter H. Solomon Jr., *Authoritarian Legality and*

legitimization for governmental actions and was incongruent with the Party-state's interest and ideology.<sup>6</sup> These problems often forced China to retreat from using law to solve disputes.<sup>7</sup> China's dilemma with legalism is also symptomatic of the difficulty inherent in the notion of authoritarian legality—strict enforcement of top-down written rules does not guarantee favorable results to authoritarian rulers, even though they make laws.

The project of integrating the SCVs into legal judgments represents China's attempt to resolve the problems associated with legalism by proposing a new conception of what law is. According to this new jurisprudence, law is no longer merely constituted solely of written codes, but also merged with authoritarian moral norms that used to be seen as extralegal. In other words, the SCVs now constitute the inner core of the system of Chinese law. Instead of simply applying the statutes in a technical manner, Chinese judges now must use their *prima facie* "discretionary" power to "find" law beyond written statutes that conforms to the norms contained in the SCVs.<sup>8</sup> As a result, the Party-state is more capable of using law to legitimize its actions in a way that better complies with its ideology and interests.<sup>9</sup> Ultimately, the transformation of Chinese law signifies a new model of authoritarian legality, which extends the concept of law itself to accommodate the state-imposed, moralistic social norms. This allows authoritarian rulers to improve the perceived authority of law and legal institutions while furthering the explication, promotion, and enforcement of those authoritarian moralistic norms. This authoritarian innovation could have profound implications far beyond Chinese law.<sup>10</sup>

Section I reviews the background of China's judicial project and introduces the problems associated with legalism. Section II analyzes relevant documents and cases to explicate the new conception of Chinese law signified by the integration of SCVs. Section III examines how this new legal conception purports to resolve the legalistic problems presented and how it provides a new model of authoritarian legality.

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*Informal Practices: Judges, Lawyers and the State in Russia and China*, 43 COMMUNIST & POST-COMMUNIST STUD. 351, 357–60 (2010).

6. See *infra* Section I.B.

7. See *infra* Section I.C.

8. See discussion *infra* Section II.B.

9. See discussion *infra* Section III.A.

10. See *infra* Section III.B.

## I. SOCIALIST CORE VALUES AND THE DILEMMA OF CHINESE LAW

## A. Socialist Core Values in Chinese Courts

## 1. Background

In the early hours of November 3, 2016, Jiang Ge, a 24-year-old female Chinese graduate student, was fatally stabbed by her roommate's ex-boyfriend, Chen Shifeng, outside of her apartment unit in Tokyo.<sup>11</sup> The roommate, Liu Nuanxi, had moved to Jiang's apartment months earlier to escape from Chen's harassment following their breakup.<sup>12</sup> Several hours before the murder, Chen stalked Liu and threatened her several times. Fearing for her own safety, Liu asked Jiang to walk home with her without revealing the full extent of the threats to Jiang.<sup>13</sup> When they entered the apartment building, Chen, with a knife in his hand, was waiting in the hallway to attack Liu. Liu entered the unit quickly, but the belligerent Chen began stabbing Jiang before she could enter the unit.<sup>14</sup> Liu, fearfully hiding in the apartment, locked the door and made no attempt to help Jiang as she was stabbed to death outside of their unit.<sup>15</sup>

As Jiang Ge would not have been killed if she had not been there to help Liu, the tragedy invoked fierce controversy on the Chinese Internet over Liu's inaction.<sup>16</sup> Jiang Ge's heartbroken mother, Jiang Qiulian, also became increasingly skeptical of Liu and a clash between the two quickly ensued.<sup>17</sup> Jiang Qiulian accused Liu of refusing to talk to her for almost 300 days despite having agreed to meet with her.<sup>18</sup> Deeply humiliated by Liu's attitude, she posted Liu's and her parents' personal information online, including pictures, names, phone numbers, and government-issued ID numbers. Liu responded by sending irritative messages to Jiang Qiulian, including some deeply

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11. Jiang Qiulian Su Liu Nuanxi Shengming Jiufen An (江秋莲诉刘暖曦生命纠纷案) [Jiang Qiulian v. Liu Nuanxi, A Dispute Over Rights to Life], (Chengyang District of Qingdao City, People's Ct. Dec. 25, 2021) (China) [hereinafter Jiang Qiulian v. Liu Nuanxi].

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Ma Chi, *Chinese Student's Murder Case Sparks Controversy*, CHINA DAILY (Nov. 13, 2017, 5:56 PM), [https://www.chinadaily.com.cn/china/2017-11/13/content\\_34484851.htm](https://www.chinadaily.com.cn/china/2017-11/13/content_34484851.htm) [<https://perma.cc/VFV9-N7JC>].

17. Yichang Chidao 294 Tian De Jianmian (一场迟到 294 天的见面) [A Meeting That Was Late for 294 Days], TENGXUN XINWEN (腾讯新闻) [TENCENT NEWS] (Dec. 12, 2017), <https://daily.zhihu.com/story/9656658> [<https://perma.cc/5UEG-X35W>].

18. *Id.*

hurtful ones in reference to her daughter's death.<sup>19</sup> The clash drew further public attention and elevated moral criticism against Liu, who was treated on the Chinese Internet as a diabolical figure embodying betrayal, lack of gratitude, and cold-bloodedness.<sup>20</sup>

The Japanese court sentenced Chen to 20 years in jail.<sup>21</sup> Unsatisfied, Jiang Qiulian filed a tort proceeding in China against Liu, claiming that Liu was liable for the death of her daughter.<sup>22</sup> In the much-watched decision, the court ruled in favor of Jiang Qiulian<sup>23</sup> (the ruling was later confirmed on appeal).<sup>24</sup> The legal basis of that decision was not uncontroversial—the court made an arguably unprecedented move to assert that Liu was liable because she had not actively helped Jiang Ge.<sup>25</sup> Notably, the court relied on outspokenly moralistic language in its opinion, including in the following portion that was particularly highlighted in the SPC's official news report of the case:<sup>26</sup>

Our court holds that helping others in danger is a traditional virtue of the Chinese nation and that honesty and friendliness are important contents of the Socialist Core Values. Judicial decisions ought to protect the baseline

19. *Id.*

20. See Yang Yu, *Jiang Ge An De Yulun Fengbao, Shi Wangluo Baoli Hai Shi Minyi Zhengyi?* (江歌案的輿論風暴，是網絡暴力還是民意正義?) [The Public Opinion of the Jiang Ge Case: Internet violence or Justice through Popular Opinion?], DUAN CHUANMEI (端传媒) [THE INITIUM] (Nov. 18, 2017), <https://theinitium.com/article/20171119-youropinion-jiangge> [<https://perma.cc/3SME-7WG9>].

21. See Alice Yan, *Jiang Ge Murder: Chinese Mother Sues Friend Whose Ex-Boyfriend Killed Her Daughter in Japan*, S. CHINA MORNING POST (Jan. 12, 2022, 9:00 AM), <https://www.scmp.com/news/people-culture/social-welfare/article/3162967/jiang-ge-murder-chinese-mother-sues-friend-whose> [<https://perma.cc/M2Z3-S4FD>].

22. *Id.*

23. Jiang Qiulian v. Liu Nuanxi, *supra* note 11.

24. See Xinhua News Agency, *Jiang Qiulian Yu Liu Nuanxi Shengmingquan Jiufen An Ershen Bohui Shangsu Weichi Yuanpan* (江秋莲与刘暖曦生命权纠纷案二审驳回上诉、维持原判) [The Second Instance Proceeding of Jiang Qiulian v. Liu Nuanxi's Right to Life Dispute Rejected Appeal and Upheld the Original Judgment], XINHUA WANG (新华网) [XINHUA NET] (Dec. 30, 2022), [http://www.news.cn/legal/2022-12/30/c\\_1129244193.htm](http://www.news.cn/legal/2022-12/30/c_1129244193.htm) [<https://perma.cc/KKG2-TUP6>].

25. *Id.* For a discussion on why the decision was legally controversial, see *infra* Section II.B.1.

26. Press Release, Xinhua News Agency, *Jiangge Muqin Jiang Qiulian Su Li Nuanxi Shengming Quan Jiufen An Yishen Xuanpan* (江歌母亲江秋莲诉刘暖曦生命权纠纷案一审宣判) [Judgment Announced for the First Instance Proceeding of Jiang Ge's Mother Jiang Qiulian v. Liu Nuanxi's Right to Life Dispute], Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan (中华人民共和国最高人民法院) [The Supreme People's Court of the People's Republic of China] (Jan. 10, 2022) (on file with author).

of social morality, promote virtuous behaviors, and lead society toward virtue and goodness. . . . We must point out that as a female student pursuing studies abroad, Jiang Ge offered help to her fellow Chinese citizen in danger, provided genuine care and assistance, and lost her life because of illegal assault. Her altruistic act of helping others reflected the traditional virtues of the Chinese nation, conformed to the Socialist Core Values and public order and good customs, and should be praised. She should receive legal relief for her harm. As Jiang Ge's good friend and the one being helped, Liu Nuanxi not only did not feel grateful or offer condolences to the dead's family, but also irritated [Jiang Qiulian] with inappropriate language, further deepening the harm. Her behavior is at odds with common sense and morality and should be condemned. She is liable for civil damages and all attorney fees.<sup>27</sup>

In the passage, the court relied on the "Socialist Core Values" to justify its legal conclusion. This opinion is just one of the tens of thousands of judgments in the past two years citing to the SCVs.

In May 2018, the CCP issued a plan demanding the SCVs be integrated into law with respect to its "whole process"—including both legislation and interpretation.<sup>28</sup> The SPC then issued the "Working Plan on Comprehensively Implementing the Socialist Core Values in Judicial Interpretation (2018-2023)," aimed at cultivating and practicing the SCVs, unifying judicial standards and measures, and working hard to make people feel fairness and justice in every legal case.<sup>29</sup> On January 19, 2021, the SPC issued the "Guiding Opinion on Deeply Promoting the Integration of Socialist Core Values into the Analysis

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27. Jiang Qiulian v. Liu Nuanxi, *supra* note 11.

28. Xinhua News Agency, *Zhonggong Zhongyang Yinfa "Shehuizhuyi Hexin Jiazhi Guan Rongru Fazhi Jianshe Lifa Xiufa Guihua"* (中共中央印发《社会主义核心价值观融入法治建设立法修法规划》) [Central Committee of the CCP Published "Plan on Integrating the Socialist Core Values into Legal Constructions, Legislations, and Amendments"], REMIN FAYUAN BAO (人民法院报) [People's Court Daily], May 8, 2018.

29. Sun Hang (孙航), *Zuigao Renmin Fayuan Chutai Gongzuo Guihua Zai Sifa Jieshi Zhong Quanmian Guanche Shehuizhuyi Hexin Jiazhi Guan* (最高人民法院出台工作规划在司法解释中全面贯彻社会主义核心价值观) [The Supreme People's Court Issued a Working Plan on Comprehensively Implementing the Socialist Core Values in Judicial Interpretation], REMIN FAYUAN BAO (人民法院报) [People's Court Daily], Sept. 19, 2018, at 1 [hereinafter Working Plan].

and Reasoning of Adjudicative Instruments” (*Guiding Opinion*).<sup>30</sup> The document demanded that all levels of Chinese courts integrate the SCVs into courts’ judgments.<sup>31</sup> Immediately, the number of cases on China Judgments Online containing the keyword “Socialist Core Values” skyrocketed:<sup>32</sup> there were only 765 such cases in 2020, and further in 2021, the number rose to 11,514.<sup>33</sup> With the sudden introduction of the SCVs, it appears that Chinese judges are obliged to rethink how they approach cases.

## 2. A Moralistic Guide to National Ethos

The “Socialist Core Values” are a body of state ideology that claims to govern the ordinary moral and social life of Chinese people. They were inaugurated by the CCP in the report of the landmark 18<sup>th</sup> Party Congress, where Xi Jinping was first promoted to become the supreme leader of the Party-state. This report of the Party Congress set the tone for the first few years of the Xi Jinping era.<sup>34</sup> Since 2012, the CCP views the SCVs as a vital part of its official ideology, claiming that the SCVs are the core of the value system under socialism and reflect its fundamental nature and basic characters<sup>35</sup> to be integrated into the entire process of education, economic practices, and governance of society.<sup>36</sup> Specifically, the SCVs consist of three sets of values corresponding to three domains. In the political domain, they include “prosperity,” “democracy,” “civility,” and “harmony;” in the societal

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30. Guanyu Shenru Tuijin Shehuizhuyi Hexin Jiazhi Guan Rongru Caipan Wenshu Shifa Shuoli De Zhidao Yijian (关于深入推进社会主义核心价值观融入裁判文书释法说理的指导意见) [*Guiding Opinion on Deeply Promoting the Integration of Socialist Core Values into the Analysis and Reasoning of Adjudicative Instruments*], Sup. People’s Ct. Guiding Case No. 21, Feb. 18, 2021 (China) [hereinafter *Guiding Opinion*].

31. *Id.*

32. Zhongguo Caipan Wenshu Wang (中国裁判文书网) [China Judgments Online] [hereinafter China Judgments Online], <https://wenshu.court.gov.cn>. China Judgments Online is an official website the SPC launched to publish most court judgments online. In July 2022, the website had 133 million cases. See generally Benjamin L. Liebman, Margaret Roberts, Rachel E. Stern & Alice Z. Wang, *Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law*, 8 J. L. & CTS. 177 (2020).

33. See *Guiding Opinion*, *supra* note 30.

34. See People’s Daily, *Shehuizhuyi Hexin Jiazhi Guan Jiben Neirong* (社会主义核心价值观基本内容) [Basic Contents of the Socialist Core Values], RENMIN WANG(人民网) [PEOPLE.CN] (Feb. 12, 2014), [http://www.news.cn/legal/2022-12/30/c\\_1129244193.htm](http://www.news.cn/legal/2022-12/30/c_1129244193.htm) [<https://perma.cc/K52Y-GLZR>].

35. *Id.*

36. *Id.*



domain, they include “freedom,” “equality,” “justice,” and “rule of law;” and in the individual domain, they include “patriotism,” “dedication,” “integrity,” and “friendship.”<sup>37</sup>

The SCVs frame a variety of values in moralistic terms, covering virtually all domains of life, including those that ought to be governed by per se non-moral criteria, such as private matters and economic activities.<sup>38</sup> The moralistic stance of the SCVs is reminiscent of the traditional Confucian ethics that claims to govern all aspects of social and political life through the notion of “virtue,”<sup>39</sup> and reflects the recent trend that the CCP is promoting a governance mode that prominently features morality.<sup>40</sup> For the CCP, the SCVs constitute a moral authority that governs all activities of every Chinese person, as they manifest the essential ethos of the Chinese ethnonational identity rooted in its culture, history, and customs.<sup>41</sup> Under a highly

37. See Xinhua News Agency, Zhonggong Zhongyang Bangongting Yinfa “Guanyu Peiyu He Jianxing Shehuizhuyi Hexin Jiazhi Guan De Yijian” (中共中央办公厅印发《关于培育和践行社会主义核心价值观的意见》) [General Office of the Chinese Communist Party Issued “Opinion on the Cultivation and Practice of the Socialist Core Values”], ZHONGHUA RENMIN GONGHEGUO ZHONGYANG RENMIN ZHENGFU (中华人民共和国中央人民政府) [THE CENTRAL PEOPLE’S GOVERNMENT OF THE PEOPLE’S REPUBLIC OF CHINA] (Dec. 23, 2013, 6:09 PM) [hereinafter Opinion on Cultivating and Practicing the SCVs], [http://www.gov.cn/zhengce/2013-12/23/content\\_5407875.htm](http://www.gov.cn/zhengce/2013-12/23/content_5407875.htm) [https://perma.cc/9SP9-ZUY8].

38. See Lin & Trevaskes, *supra* note 4, at 41. The authors characterized this stance as “pan-moralism,” defined as problematically extending the moral point of view even into domains which essentially ought to be governed by criteria that are non-moral per se, such as legal rules. *Id.*

39. See Michael Gow, *The Core Socialist Values of the Chinese Dream: Towards a Chinese Integral State*, 49 CRITICAL ASIAN STUD. 92, 108 (2017). The SCVs bear strong resemblance to the concept of “six virtues and six virtuous actions” in Confucianism. *Id.* The Confucian “six virtues” include wisdom, benevolence, good faith, righteousness, loyalty, and harmony, while the “six virtuous actions” include filial piety, friendship, kindness, love of kin, endurance, charity, honesty, respect. Evidently, these values significantly overlap with the SCVs. *Id.*

40. See Lin & Trevaskes, *supra* note 4, at 61. In 2019, the CCP even issued a comprehensive list of morality guidelines that “instruct people on how to be model citizens in virtually all aspects of life, from defending China’s honor to be ‘civilized’ eaters, sort garbage and lower one’s carbon footprint while traveling. These instructions arguably reflected the worldview of Xi himself. See Miriam Berger, *China’s New Morality Guidelines Describe How to Eat Right, Lower Carbon Footprints — and Think Just Like President Xi*, WASH. POST. (Oct. 30, 2019), <https://www.washingtonpost.com/world/2019/10/30/chinas-new-morality-guidelines-describe-how-eat-right-lower-carbon-footprints-think-just-like-president-xi> [https://perma.cc/3T3A-PUUC].

41. Ethos is defined as “the distinguishing character, sentiment, moral nature, or guiding beliefs of a person, group, or institution.” *Ethos*, MERRIAM-WEBSTER, <https://www.merriam->

romanticized and homogenized conception of Chinese history, the CCP claims that the SCVs are grounded in the Chinese tradition consisting of its imperial and socialist past, while also serving as guidance for the nation's future.<sup>42</sup> In a 2014 speech, Xi Jinping asserted that the SCVs answer the question of “what core values our nation should hold on to” and reflect the “spirit and value ideals” of our era.<sup>43</sup> Importantly, he emphasized the distinctively Chinese character of the SCVs, claiming that they conform to the culture and history of this nation, the struggle its people are undertaking, and the epochal problems that it shall solve.<sup>44</sup> The most fundamental thing about being Chinese, Xi said, is to have the “spiritual world distinct to the Chinese people and values we subconsciously use every day.”<sup>45</sup> In another speech, he put this

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webster.com/dictionary/ethos [https://perma.cc/699D-3TY3]. It is distinct from abstract moral theories based on *a priori* moral reasoning applicable to the entire humankind as rational beings but rather gives rise to normative claims only to this particular group. One classical example of “ethos” is the Protestant ethos in the post-reformation Western societies that Max Weber described. According to Weber, the Protestant ethos consists of a set of spiritual characters that include asceticism, discipline, and a sense of duty based on the understanding that God calls someone to occupy a certain profession of work. See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Stephen Karlberg trans., New York: Oxford Univ. Press 2010) (1904–05). The notion of “ethos” also figures itself into American jurisprudence. Philip Bobbitt argued that there exists a distinct mode of constitutional interpretation called ethical reasoning. This mode of reasoning relies on a conception of American national ethos defined as the unique character of the American national identity and institutions. This reasoning, furthermore, is distinct from the modality of moral reasoning because it appeals to the history and tradition of the nation rather than abstract normative concerns. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 94 (Oxford Univ. Press 1982). An example of such reasoning is *Moore v. City of East Cleveland*, in which the Court struck down a zoning ordinance that limited occupancy of a dwelling unit to members of a single family, effectively prohibiting many grandparents, uncles, aunts, and cousins from living along with parents and children. 431 U.S. 494 (1977). In reaching the conclusion, Justice Powell emphasized the institution of family as “deeply rooted in the Nation’s history and tradition” and is supported by “the accumulated wisdom of civilization, gained over the centuries and honored throughout the history.” 431 U.S. at 503-505.

42. See Ying Miao, *Romanticising the Past: Core Socialist Values and the China Dream as Legitimation Strategy*, 49 J. CURRENT CHINESE AFFS. 162, 162 (2020) (arguing that the SCVs are designed to provide legitimizations to the Chinese government by constructing a highly romanticized nationalistic narrative).

43. Xinhua Net, *Xi Jinping: Qingnian Yao Ziju Jianxing Shehui Zhiyi Hexin Jiazhi Guan* (习近平: 青年要自觉践行社会主义核心价值观) [Xi Jinping: Young People Must Self-Consciously Practice the Socialist Core Values], XINHUA WANG (新华网) [XINHUA NET] (May 4, 2014) [hereinafter Xi’s 2014 Speech on the SCVs], [http://www.xinhuanet.com/politics/2014-05/05/c\\_1110528066.htm](http://www.xinhuanet.com/politics/2014-05/05/c_1110528066.htm) [https://perma.cc/B2CM-MSL2].

44. *Id.*

45. *Id.*

idea even more straightforwardly: Insofar as someone is Chinese, he should self-consciously cultivate and practice the SCVs.<sup>46</sup>

The CCP sees the importation of Western values, which it has labeled “universal values,” as a war on China’s ideological sovereignty.<sup>47</sup> For the CCP, to promote the SCVs is to fight an ideological counter-war.<sup>48</sup> The CCP regularly emphasizes the fundamental distinction between the SCVs and Western values and even denounced those who used the SCV values of freedom and democracy to promote Western-style liberalism as having vicious motives.<sup>49</sup> Xi himself demanded in his 2014 speech on SCVs that by practicing the SCVs, Chinese people must never accept sanctimonious preaching from those who feel they have the right to lecture us.<sup>50</sup> To be Chinese is to consciously reject Western values and instead conform to the moral requirements imposed by the SCVs, which cannot be subjected to any external standards of evaluation.

## B. China’s Legalism and Its Problems

### 1. Legalism in China

To understand the purpose of the integration of the SCVs into legal judgments, it is helpful to briefly examine the state of Chinese

46. Xi Jinping, President, People’s Republic of China, Speech on the Forum in Minzu Primary School, Haidian District, Beijing (May 31, 2014).

47. See Reuters Staff, *China Minister Warns Against Seduction of Values by Western Nations*, REUTERS (Nov. 16, 2017, 10:31 PM), <https://www.reuters.com/article/us-china-politics-culture/china-minister-warns-against-seduction-of-values-by-western-nations-idUSKBN1DH0AU> [<https://perma.cc/Q6CC-7R76>].

48. See Lin Shengyin (凌胜银), Hu Zhibin (胡志彬), Chen Maoxia (陈茂霞), *Juebu Yunxu Yong Xifang “Pushi Jiazhi” Xiaojie Shehuizhuyi Hexin Jiazhi* (决不允许用西方“普世价值”消解社会主义核心价值观) [Never Allow Using the Western “Universal Values” to Dissolve the Socialist Core Values], RENMIN WANG (人民网) [PEOPLE.CN] (June 9, 2017, 8:47 AM), <http://theory.people.com.cn/n1/2017/0609/c143843-29329097.html> [<https://perma.cc/G74K-PSRF>].

49. See *Guangming Daily* (光明日报), *Shenke Lijie Shehuizhuyi Hexin Jiazhi De Xingzhi He Linghun* (深刻理解社会主义核心价值观的性质和灵魂) [Deep Understanding of the Nature and Soul of the Socialist Core Values], XINHUA WANG (新华网) [XINHUA NET] (Sept. 10, 2015), [http://www.xinhuanet.com/politics/2015-09/10/c\\_128215924.htm](http://www.xinhuanet.com/politics/2015-09/10/c_128215924.htm) (last visited Dec. 5, 2023).

50. Xi’s 2014 Speech on the SCVs, *supra* note 43. The same phrase also appeared on high-profile occasions including the 100th anniversary of the CCP’s establishment and the 40th anniversary of the “Open and Reform” Policy. See, e.g., Xi Jinping, President, People’s Republic of China, Speech on CCP’s 100th Anniversary Celebration at Tiananmen Square, Beijing (July 1, 2021); Xi Jinping, President, People’s Republic of China, Speech at the Conference Celebrating the 40th Anniversary of Reform (Dec. 18, 2018).

law at the time the project began. Scholars argue that China's legal development featured the mode of legalism, which emphasizes strict compliance with written legal rules and empowerment of those institutions responsible for enforcing and executing the law.<sup>51</sup> Legalism has its roots in traditional Chinese political theory.<sup>52</sup> According to traditional legalism dating back to the sixth century BC, society must be governed not through Confucian moral education and self-cultivation but through rigorous legal administration and punishment that force the masses to comply.<sup>53</sup>

The influence of legalism has been present throughout China's hundred-year effort to modernize the law and legal institutions.<sup>54</sup> Underlying the practice of modern legalism is the theoretical proposition that pure legality, defined as the mere quality of being law stripped of any robust normative components essential to genuine rule of law, is capable of independently enhancing perceived legitimacy and inducing compliance.<sup>55</sup> The concept of law itself possesses prima facie normativity such that a rule should be followed merely by virtue of being the law, without resorting to any further substantive justifications. In other words, something can be taken as justified simply because it is the demands of the law. Under the assumption that governmental actions are legitimized insofar as they are legalized, legalism primarily emphasizes the sanctity of written codes themselves. Accordingly, the legalistic authority "takes no position of what the law's substantive

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51. See Zhang & Ginsburg, *supra* note 5, at 310. Legalism is characterized by "a willingness to both operate in accordance with the written law and to strengthen the institutions charged with its enforcement." *Id.* Furthermore, the authors argued that in a legalistic fashion, China had been "empowering courts against other state and Party entities, insisting on professionalism, and bringing political powers under legal regulation." *Id.* at 306; see also David K. Schneider, *China's Legalist Revival*, THE NAT'L INT. (Apr. 20, 2016), <https://nationalinterest.org/feature/chinas-legalist-revival-15845> [<https://perma.cc/8Z4F-FR7K>].

52. See Schneider, *supra* note 51.

53. *Id.*

54. See generally Potter, *supra* note 5, at 1–11.

55. See Yiqin Fu, Yiqing Xu & Taisu Zhang, *Does Legality Produce Political Legitimacy? An Experimental Approach* YALE L. & ECON. RSCH (forthcoming), (defining pure legality under the Chinese context as the quality of being legal, stripped from the normative components that are conceptually necessary for 'the rule of law'). Furthermore, the normativity of pure legality is supported by the widely accepted philosophical proposition that the bare fact that something is law may independently give rise to reasons for action. In other words, people have a reason to obey the law simply because it is the law and nothing else. See Andre Marmor & Alexander Sarch, *The Nature of Law*, STAN. ENCYCLOPEDIA PHIL. (May 27, 2001) <https://plato.stanford.edu/entries/lawphil-nature/> [<https://perma.cc/8YVT-CPDZ>]. It is arguably in this sense that pure legality can be said to enhance legitimacy: if a governmental action is legally supported, people have an independent reason to obey it and take it to be legitimate.

content should be, merely that this content should be faithfully enforced and executed.”<sup>56</sup>

The legalistic thesis on the legitimizing function of law does capture some truth about the function of law under authoritarianism. An empirical study based on public surveys of the Chinese population shows that investment in legality could independently enhance the perceived political legitimacy even as it boosts state control.<sup>57</sup> Therefore, it is unsurprising that the Party-state utilized law to legitimize itself in areas ranging from ordinary tort and administrative litigation to highly political matters such as granting life tenure to Xi Jinping.<sup>58</sup> It seems that “the Party-state is moving towards legality in which the *letter* of the law is enforced more rigorously and afforded greater political respect.”<sup>59</sup>

## 2. The Problems with Legalism

Yet the intrinsic dilemma of legalism constrains the extent to which the CCP may utilize law as an instrument to legitimize itself and solve disputes. The dilemma has two aspects that will be discussed respectively: the incompleteness problem and the incongruence problem.

### *i. The Incompleteness Problem*

The legitimizing function of law conceived under legalism is inherently incomplete. Legalism features strict enforcement of written rules in a way that is indifferent to substantive legal outcomes. However, ordinary Chinese people are still more likely to conceive the

56. Fu, Xu & Zhang, *supra* note 55, at 6.

57. *See id.*

58. For a comprehensive account of how China used law to bolster legitimacy in various areas, see Zhang & Ginsburg, *supra* note 5, at 306 (arguing that China has embraced law virtually in all respects of social and political life, even including matters related to top leadership); *see also* MARY E. GALLAGHER, *AUTHORITARIAN LEGALITY IN CHINA: LAW, WORKERS AND THE STATE* 30 (2017) (recognizing that authoritarian rulers, including the Chinese Communist Party, do use law to bolster their legitimacy rather than simply avoiding it). For the area of tort litigation, see Benjamin L. Liebman, *Ordinary Tort Litigation in China: Law versus Practical Justice?*, 13 J. TORT L. 197, 200 (2020) [hereinafter Liebman, *Ordinary Tort Litigation in China*]. For administrative litigation, see Su Lin Han, *Administrative Enforcement in China*, Paul Tsai China Center at Yale Law School (Dec. 2017), <https://law.yale.edu/china-center/resources/administrative-enforcement-china> [<https://perma.cc/YK6C-T8DN>].

59. Zhang & Ginsburg, *supra* note 5, at 316 (emphasis added).

legitimacy of governmental actions in terms of their outcomes.<sup>60</sup> Consequently, the legitimacy-enhancing function of law is often limited unless legal rules happen to yield results that conform to people's normative expectations. In turn, the inability to yield such results would undermine the legitimacy of law and legal institutions themselves. This problem is highlighted by the failure of Chinese law to address social instabilities, such as protests or social conflicts, as a result of the peoples' grievances with governmental actions.<sup>61</sup> Back in the 2000s, Chinese leaders "were uncertain about the utility of legal procedures and institutions as mechanisms for addressing perceived threats to stability."<sup>62</sup> Although the Party-state had devoted extensive resources to building a legal system featuring a "rule-based model of authoritarian governance,"<sup>63</sup> it often felt pressure to retreat from using law to address protests, citizen complaints, and social discontent. Faced with the threat of civil unrest, the Party-state instead had to sacrifice law to produce socially desirable outcomes.<sup>64</sup>

The highly influential 2006 Peng Yu case was a precise reflection of this problem. Peng Yu, a Nanjing man who assisted a fallen old lady, was subsequently sued by the lady for having caused her fall.<sup>65</sup> The court ruled in favor of the old lady in a very technical

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60. See Benjamin L. Liebman, *Legal Reform: China's Law-Stability Paradox*, 143(2) *DAEDALUS* 96, 103 (2014) [hereinafter Liebman, *Legal Reform*] (arguing that under the preexisting political regime, the legitimacy of the Party-state is linked with the outcomes that governmental actions render, as the CCP has long perpetuated the idea that governmental officials, including judges, are "father and mother officials" responsible for substantively addressing people's ordinary grievances); see also Yuchao Zhu, "Performance Legitimacy" and China's Political Adaptation Strategy, 16 *J. CHINESE POL. SCI.* 123, 124 (2011) (arguing that the legitimacy of law depends on its facilitation of socially desirable outcomes); see also Benjamin L. Liebman, *Legitimacy Through Law in China?*, PBS (June 1, 2009), <https://www.pbs.org/wnet/wideangle/uncategorized/legitimacy-through-law-in-china/4332> [<https://perma.cc/923H-JWU5>] (acknowledging that there is a tension between getting a decision right according to legal standards and satisfying the public or official opinions). Liebman noted that widespread legal education in China gave rise to the expectation that law should substantively protect ordinary people, and yet actual engagement with the formalistic legal system might actually lead to disillusionment over law and legal institutions. *Id.*

61. See generally Liebman, *Legal Reform*, *supra* note 60.

62. *Id.* at 102.

63. *Id.* at 97.

64. *Id.* at 96–97.

65. Xu XX Su Peng Yu Renshen Sun Hai Peichang Jiufen An (徐某某诉彭宇人身损害赔偿纠纷案) [Xu XX v. Peng Yu, Personal Injury Compensation Dispute], (Nanjing Mun. Gulou Dist. People's Ct. Sept. 3, 2007) (China) [hereinafter Xu XX v. Peng Yu]. See generally Melody W. Young, Comment, *The Aftermath of Peng Yu: Restoring Helping Behavior in China*, 22 *PAC. RIM. L. & POL'Y J.* 691, 693 (2013); see also Adam Minter, *China's Infamous*

manner, inferring from experience that no one in Peng Yu's circumstance would in good conscience help the old lady in that particular manner unless they felt guilty.<sup>66</sup> The decision immediately sparked intense national controversy, as people were unsatisfied with the legal outcome which seemed to discourage Good Samaritanism.<sup>67</sup> The episode severely shook people's faith in the legitimacy of Chinese law and became "a talisman of modern China's failings, the easiest and most accessible example available to the social commentator looking to make a point about Chinese flaws and moral inferiority."<sup>68</sup> After the Peng Yu decision, people began to refuse to help fallen pedestrians, fearing a potential suit.<sup>69</sup>

The controversy around the Peng Yu decision showed how socially undesirable legal outcomes might, in turn, damage law and legal institutions and even demoralize the society.<sup>70</sup> The deficiency of the Peng Yu decision underscores precisely what the incorporation of the SCVs seeks to address: The analysis in the decision was exceedingly technical and showed little regard for the possible effects that the decision might have on people's perception of how they shall behave.<sup>71</sup> Popular reactions to the Peng Yu decision showed that mere technical legal analysis, without resorting to additional practical considerations,

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'Good Samaritan' Case Gets a New Ending: Adam Minter, BLOOMBERG NEWS (Jan. 18, 2012, 9:07 AM), <https://www.bloomberg.com/opinion/articles/2012-01-17/china-s-infamous-good-samaritan-case-gets-a-new-ending-adam-minter> (last visited Nov. 27, 2023).

66. Xu XX v. Peng Yu, *supra* note 65.

67. See Minter, *supra* note 65.

68. *Id.*

69. See *id.*; see also Daniel Schwartz, *Was the Law at Fault in Chinese Toddler Tragedy?*, CBC NEWS: WORLD (Oct. 22, 2011, 12:33 PM), <https://www.cbc.ca/news/world/was-the-law-at-fault-in-chinese-toddler-tragedy-1.1034814> [<https://perma.cc/2GN3-BP8P>]. On October 13, 2011, a toddler was hit by a van and eventually died. For several minutes, eighteen people passed by without helping the two-year-old. In the wake of the tragedy, people attributed such moral indifference to the Peng Yu case well as other similar cases in which the helper was accused by the beneficiary of being responsible for the accident. They saw them as having significantly undermined people's motivation to be Good Samaritans. See *id.*

70. Ironically, it was later revealed that Peng Yu did collide with Xu. He actually "actively solicited the local news media and online forum moderators to promote him as a martyred Good Samaritan." Minter, *supra* note 65. Even so, the legal reasoning was still criticized as deficient. See generally Liao Yong'an (廖永安) & Wang Cong (王聪), *Lujing Yu Mubiao: Shehuizhuyi Hexin Jiazhiguan Ruhe Rongru Sifa* (路径与目标: 社会主义核心价值观如何融入司法) [The Path and Objective: How Does Core Values of The Socialism Embed in Justice], 40 XINJIANG SHIFAN DAXUE XUEBAO (Zhaxue Shehui Kexue Ban) (新疆师范大学学报(哲学社会科学版)) [J. Xinjiang Normal Univ. (Edition Phil. & Soc. Sci.)], no. 1, 43 (2019).

71. See Liao & Wang, *supra* note 70.

may not justify itself when the legal outcome is at odds with popular morality. When the Jiang Ge decision came out, some Chinese media indeed contrasted it with the Peng Yu case and praised it as an example of “humanization,” resembling the proper use of SCVs in judicial opinions.<sup>72</sup>

*ii. The Incongruence Problem*

The way pure legality enhances legitimacy can be incongruent with the Party-state’s own interests and ideology. Under legalism, law promotes governmental legitimacy only when the government itself strictly follows the letters of law. Yet, too much dependence on this legitimization function also pressures the Party-state to lawfully constrain its own actions in a way that may counter its interests and ideological commitments.

The problem is twofold. First, there can be clashes between substantive Party-state interests and the legalistic requirement to follow the law.<sup>73</sup> When strictly following the law may bring unpleasant results to the Party-state, the Party-state may either selectively follow the law or refuse to allow people to litigate a certain body of law at all—at the price of undermining the legitimization effect of law and legal institutions.<sup>74</sup>

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72. For example, an article on The Paper, a newspaper popular among Chinese intellectuals, remarked the following:

It is true that law should be rational, objective, and neutral and judicial opinions shall analyze liability, causation, facts, and evidence. But judicial decisions needed by and understandable to the people is ultimately the integration of common sense (情理), value, and law as well as the humanization and personification necessary to judicial opinions. The Jiang Qiulian v. Liu Nuanxi opinion provided sufficient reasonings, introduced public order and good customs, and introduced the Socialist Core Values, transforming judicial adjudication from merely “visible justice” to “tellable” justice.

Bi Chen (陈碧), *Fazhi De Xijie: Yifeng Panjueshu De Zhengyi* (法治的细节 | 一封判决书的正义) [Details of the Rule of Law: Justice in a Legal Opinion], PENGPAI (澎湃) [THE PAPER] (Jan. 10, 2022, 6:00 PM), [https://www.thepaper.cn/newsDetail\\_forward\\_16220946](https://www.thepaper.cn/newsDetail_forward_16220946) [<https://perma.cc/P7P8-5WEZ>].

73. See Liebman, *Legal Reform*, *supra* note 60, at 104. Liebman points out that there is “official reluctance to commit to greater use of law” that is “evident both in the failure to follow laws on the books in complex or sensitive cases and in reliance on nonlegal institutions in a wide range of routine cases.” *Id.*

74. For an example of selectively enforcing the law for the sake of Party interests, see generally Xin Sun, *Politicised Enforcement in China: Evidence from the Enforcement of Land Laws and Regulations*, 41 J. PUB. POL’Y 66 (2021). The author examined “politicized enforcement” in Chinese land laws and regulations, finding that “politicised enforcement can be a



Second, legitimacy induced by adherence to legal rules is distinct from the way the CCP conceives of its own legitimacy. The CCP sees its legitimacy as rooted in its role in China's struggle for independence and modernization, as well as popular support from the people.<sup>75</sup> Government performance in socioeconomic matters has been an important source of legitimacy since the "Open and Reform" Era.<sup>76</sup> In recent years, the Party also started to rely on nationalism and Confucianism.<sup>77</sup> None of these sources of legitimacy can be captured by sheer legalism, as they represent substantive values that can hardly be captured by written legal codes alone. Even though the CCP rhetorically emphasizes the importance of rule of law and claims to promote it, adherence to legal procedures is not a primary source of its legitimacy.<sup>78</sup> When legal doctrines come into conflict with the substantive sources of its political legitimacy, the CCP often sacrifices legal enforcement.<sup>79</sup> The Party-state has also prioritized other extralegal means over legal mechanisms to resolve issues in order to better

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consequence of the strategies adopted by authoritarian ruling elites to maintain political survival." *Id.* at 66. An example removing the entire body of law from any possibility of litigation would be the Chinese Constitutional Law. Constitutional litigations were virtually impossible in China after the SPC rejected an interpretation that was "meant to trigger explicit use of the Constitution by the courts." See Thomas E. Kellogg, *The Death of Constitutional Litigation in China?*, JAMESTOWN FOUND. (Apr. 2, 2009, 6:58 PM), <https://jamestown.org/program/the-death-of-constitutional-litigation-in-china/> [<https://perma.cc/A66R-KWP5>]. The Chinese Constitution contains clauses such as freedom of speech, freedom of assembly, and freedom of religious beliefs, but they have never been enforced. See James A. Dorn, *China's Constitutional Rights: A Grand Illusion*, CATO INST. (Sept. 1, 2021, 5:17 PM), <https://www.cato.org/blog/chinas-constitutional-rights-grand-illusion> [<https://perma.cc/4MJQ-RCZD>].

75. See, e.g., Lotus Yang Ruan, *The Chinese Communist Party and Legitimacy: What is the Chinese Communist Party's Official Discourse on Legitimacy?*, DIPLOMAT (Sept. 30, 2015), <https://thediplomat.com/2015/09/the-chinese-communist-Party-and-legitimacy> [<https://perma.cc/5HNL-PRY9>].

76. See Hongxing Yang & Dingxin Zhao, *Performance Legitimacy, State Autonomy and China's Economic Miracle*, 24 J. CONTEMP. CHINA 64, 65 (2014).

77. See Andrew J. Nathan, *The Puzzle of Authoritarian Legitimacy*, 31 J. DEMOCRACY 158, 166 (2020).

78. Liebman, *Legal Reform*, *supra* note 60, at 97.

79. For example, the Chinese government has selectively enforced law when it came to ultra-nationalistic anti-Japan protests. See *Anti-Japan Riots in China: Questions Raised Over Role of Police*, FRANCE 24: OBSERVER (Sept. 18, 2012, 18:12 PM), <https://observers.france24.com/en/20120918-anti-japan-riots-china-questions-raised-over-role-police-islands-dispute-authorities-protests-demonstrations> [<https://perma.cc/8N88-YWHK>].

comply with the demands of other sources of legitimacy, such as economic and social harmony.<sup>80</sup>

### C. *The Dilemma of Authoritarian Legality*

China's problem with legalism represents the difficulty authoritarian regimes often encounter in instrumentalizing law.<sup>81</sup> Under the classical mode of legalism used to capture law under authoritarian regimes, the term "authoritarian legality" is used to describe authoritarian governments that "wrap [their] actions, even the most coercive and repressive of them, in a fig leaf of legality" in order to bolster their legitimacy.<sup>82</sup> Emphasizing strictly legal compliance, these regimes lay claim to society in the name of law and take legality as "an end unto itself."<sup>83</sup> Even though the authoritarian state still monopolizes law-making and even judicial power, it still has to abide by law in a somewhat predictable fashion.

Another theory of law under authoritarianism is the theory of "dual state."<sup>84</sup> The theory takes genuine authoritarian legality as theorized by legalism to be impossible because authoritarian rulers cannot be truly constrained by law.<sup>85</sup> Specifically, the theory proposes that an authoritarian state is composed of two parts: a normative state and a prerogative state. In the normative state, officials do comply with the law on the books, especially when it comes to mundane, trivial cases.

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80. For example, the CCP prioritized speedy dispute resolution over law. See Liebman, *Legal Reform*, *supra* note 60, at 97. Officials often intervene to encourage people to seek redress outside of the legal system. See Yang Su & Xin He, *Street as Courtroom: State Accommodation of Labor Protests in South China*, 44(1) L. & SOC'Y REV. 157, 159 (2010). Another example is China's financial market, where legal protection of investors and creditors was replaced by extralegal means designed to provide stability and predictability. See Shitong Qiao, *Finance Without Law: The Case of China*, 64 HARV. INT'L L. J. 431, 431 (2023) ("Overall, the network of financial intermediaries that controls access to the international capital market, the industry specific communities of Chinese entrepreneurs and corporations that need access to that market, and the Chinese state, which promotes stability and predictability in both markets despite their extralegal contractual basis, replaces judicial enforcement in supporting financial development of a remarkable duration and scale.").

81. See Hendley, *supra* note 1, at 220.

82. *Id.*

83. *Id.* at 221.

84. See Fraenkel, *supra* note 2, at 43 (first proposing the theory of dual state by analyzing the Nazi legal regime and distinguishing between the normative state and the prerogative state); see generally Hendley, *supra* note 1 (providing a helpful overview of the dual state theory); see generally Pils, *supra* note 2 (applying the theory of dual state to the Chinese context).

85. See Hendley, *supra* note 1, at 219.

In contrast, the prerogative state is a realm of arbitrary political power in which the higher authority is free to break the law when it sees fit, exercising unrestrained discretion.<sup>86</sup> For proponents of the dual state theory, the language of authoritarian legality is misleading because the extralegal authority is able and willing to “scorn legality whenever this seemed opportune.”<sup>87</sup> In other words, there is no “law” that carries with it binding authority in authoritarian states. The mere fact that authoritarian rulers create rules in the name of law does not give rise to any substantive notion of authoritarian legality.

Behind the contention between the two theories is the dilemma of authoritarian legality, which is precisely reflected by China's problem with legalism. The appropriation of law by authoritarian regimes seems to suggest that legality is somehow compatible with authoritarianism under certain institutional arrangements. In the Chinese case, the Party-state did try to build a legal system featuring legalism and to rhetorically advocate for the “rule of law.”<sup>88</sup> Yet the fact that authoritarian law often fails to carry binding force constantly raises skepticism about the concept of authoritarian legality.<sup>89</sup> As some suggest, recent developments in Chinese law may lend support to the dual state theory.<sup>90</sup> If authoritarian legality conceived in terms of legalism is inherently unstable, a more robust model of authoritarian legality is needed to provide a firmer ground for authoritarian states to effectively appropriate law as a governance tool. As the remaining part of this Note shall argue, the incorporation of the SCVs into legal judgments precisely reflects an effort to build a new model of authoritarian legality.

## II. SOCIALIST CORE VALUES: THE PATH INTO LAW

### A. *The General Patterns*

Two sets of materials provide insight for assessing the patterns of integration of the SCVs into legal judgments. The first is the instruction documents issued by the SPC to lower courts, particularly the *Guiding Opinion*, which outlines the higher authority's basic

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86. See Fraenkel, *supra* note 2, at 43.

87. Pils, *supra* note 2, at 374.

88. See discussion *supra* Section I.B.1.

89. See discussion *supra* Section I.B.2.

90. See Pils, *supra* note 2, at 369–70 (examining the dual state theory to show that the CCP has been trying to tightly control the prerogative state—employing extralegal power arbitrarily—and build an efficient legal system in the normative state).

theoretical understanding of the project.<sup>91</sup> The second includes the guiding cases issued by the SPC that act as examples for lower courts to study. The SPC published a few sets of guiding cases years before the issuance of the *Guiding Opinion*.<sup>92</sup> Another ten civil cases were published in May 2020.<sup>93</sup> The latest set of civil cases was published in February 2022.<sup>94</sup> They demonstrate how the abstract guidelines shall be understood on a more practical level. Put together, the two sets present a holistic picture of the legal system's integration of SCVs.

### 1. The *Guiding Opinion*

The 2021 *Guiding Opinion* lays out the basic approach of integrating the SCVs into legal judgments.<sup>95</sup> It notes that all levels of courts must adhere to three basic principles: (1) the combination of

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91. The Chinese judicial system is highly hierarchical. Not only are opinions from higher courts binding for lower courts, but lower courts are also under the supervision of higher courts, and the SPC often issues guiding cases to guide lower courts' work. *See generally* Yulin Fu, *Functions of the Supreme People's Court in Transition*, 3 PEKING UNIV. L. J. 299, 318 (2015).

92. Ten cases were published in March 2016. *See* Press Release, Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan (中华人民共和国最高人民法院) [Supreme People's Court of the People's Republic of China], Zuigao Renmin Fayuan Gongbu 10 Qi Hongyang Shehuizhuyi Hexin Jiazhi-guan Dianxing Anli (最高人民法院公布 10 起弘扬社会主义核心价值观典型案例) [The Supreme People's Court Announced 10 Typical Cases of Promoting Socialist Core Values] (Mar. 10, 2016) (on file with author). Another ten cases were published in August of the same year. *See* Press Release, Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan (中华人民共和国最高人民法院) [Supreme People's Court of the People's Republic of China], Zuigao Renmin Fayuan Guanyu Hongyang Shehuizhuyi Hexin Jiazhi-guan Dianxing Anli (最高人民法院关于弘扬社会主义核心价值观典型案例) [A Typical Case of the Supreme People's Court's on Promoting Socialist Core Values] (Aug. 23, 2016) (on file with author).

93. Press Release, Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan (中华人民共和国最高人民法院) [Supreme People's Court of the People's Republic of China], Renmin Fayuan Dali Hongyang Shehuizhuyi Hexin Jiazhi-guan Shida Dianxing Minshi Anli (人民法院大力弘扬社会主义核心价值观十大典型民事案例) [Top Ten Typical Civil Cases of the People's Court' Vigorously Promoting Socialist Core Values] (May 13, 2020) (on file with author) [hereinafter *Ten Typical Civil Cases*].

94. Press Release, Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan (中华人民共和国最高人民法院) [Supreme People's Court of the People's Republic of China], Di Er Pi Renmin Fayuan Dali Hongyang Shehuizhuyi Hexin Jiazhi-guan Dianxing Anli (第二批人民法院大力弘扬社会主义核心价值观典型案例) [The Second Batch of Typical Civil Cases of People's Courts Vigorously Promote Socialist Core Values] (Feb. 23, 2022) (on file with author) [hereinafter *Second Batch*].

95. *See generally* *Guiding Opinion*, *supra* note 30.

rule of law and the rule of virtue, (2) centeredness around the people, and, (3) organic unity of political effects, legal effects and social effects.<sup>96</sup> Specifically, these principles mean that the court shall interpret the law based on its value objectives that can be identified with the help of the SCVs.<sup>97</sup> In doing so, the court must actively respond to people's expectations and demands for just justice, incessantly improve people's satisfaction for judicial judgments, and lead social justice through the judicial process.<sup>98</sup> Moreover, courts shall, on top of law itself, also consider common sense and reason based on the requirements of era, culture, and conditions of the country, in order to make legal judgments more persuasive.<sup>99</sup>

Though the language is highly bureaucratic, the general demand is clear: Courts must not only consider technical legal texts but should combine law with moral propositions and practical concerns as reflected in the SCVs. The direct purpose of this combination is to make various parties, especially the general public, feel satisfied with legal judgments. This purpose is apparent where the *Guiding Opinion* mentioned that courts should increase the use of SCVs in certain categories of cases covering issues such as national interests, public concerns, and societal order.<sup>100</sup> Those cases may be seen as sensitive not just for political reasons but also because they might invoke negative public sentiment—necessitating careful, nuanced judgments. The Peng Yu case, for example, would be a bad judgment in that regard.<sup>101</sup> Given the sensitivity of the Peng Yu case in relation to the maintenance of societal order, the legalistic rationale would be an improper judgment under the SCVs.

As the language in the *Guiding Opinion* suggests, the function of legal interpretation is to merge SCV-based reasoning with specific legal doctrines. It is true that the abovementioned principles might be read to replace legal reasoning with SCV-based ethical reasoning. However, the SPC explicitly rejected this understanding in a subsequent official interview, emphasizing that the *Guiding Opinion* is not

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96. *See id.*

97. *See id.*

98. *See id.*

99. *Id.*

100. *Id.*

101. The Peng Yu case was regarded as an example of judicial opinion that led to negative public sentiments precisely because it did not incorporate what was later coined “Socialist Core Values.” *See supra* text accompanying notes 69–72.

meant to replace law with SCVs or prioritize SCVs over law.<sup>102</sup> To engage in SCV-based reasoning is not to arbitrarily disdain legal doctrines. Instead, the point is to let the SCVs “set their feet” within specific legal doctrines and principles, so as to require judges to use the Socialist Core Values *within* the legal framework.<sup>103</sup>

## 2. Guiding Cases

Guiding cases give us a glimpse at how to merge the SCVs with the legal framework through a parallelism of reasoning. The decisions are often supported by two parallel lines of reasoning: doctrinal reasoning based on written statutes and SCV-based reasoning framed in moralistic language. For instance, in one guiding tort case, a villager climbed on a bayberry tree at a tourist attraction to harvest fruits without permission.<sup>104</sup> She died after falling from the tree, and her family sued the tree owner—the local government—for failing to give safety warnings. The municipal court ruled in favor of the defendant,<sup>105</sup> reasoning that the duty to ensure tourists’ safety should not exceed the owner’s managerial capacity. The tree itself was not dangerous, and requiring a good-faith owner to set up warning signs would be unreasonable. Yet, while affirming the decision, the SPC also highlighted the SCVs by noting that the villager’s behavior “violated the social morality of taking care of public properties and traveling in a civilized manner” and was “contrary to public order and good morals.”<sup>106</sup> The SPC praised the decision because it “advocated public observation of rules, civilized traveling, caring of public properties, and environmental protection, co-built and shared social civilization matching with the new era, and achieved good social effects.”<sup>107</sup> Evidently, there are two independent lines of reasoning justifying the decision: one from the

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102. Press Release, People’s Court News, Shenru Tuijin Shehuizhuyi Hexin Jiazhiguan Rongru Caipan Wenshu Shifa Shuoli Yi Gongzheng Caipan Yinling Shehui Fengshang: Zuigao Renmin Sigaiban Fuzeren Da Jizhe Wen (深入推进社会主义核心价值观融入裁判文书释法说理以公正裁判引领社会风尚——最高人民法院司改办负责人答记者问) [Deeply Promote the Integration of Socialist Core Values into the Judgment Document Interpretation and Reason to Lead the Social Trend with Fair Judgment: The Person in Charge of the Reform Office of the Supreme People’s Court Answered Reporters’ Questions] (Feb. 18, 2021) (on file with author) [hereinafter Answered Reporters’ Questions].

103. *Id.* (emphasis added).

104. *Ten Typical Civil Cases*, *supra* note 93.

105. *Id.*

106. *Id.*

107. *Id.*

technical, doctrinal aspect, and the other from the SCV-based moralistic aspect.

This parallelism manifests in another guiding tort case that stands in sharp contrast with the Peng Yu case. A boy fell on the ground after a collision with Guo, a cyclist. Sun, a pedestrian, stopped to help the boy. Sun also tried to prevent Guo from leaving the scene, and the two began quarreling with each other. Two minutes later, the infuriated Guo suffered a heart attack and died.<sup>108</sup> Guo's family sued Sun for tort damage. Denying the existence of legal causation between Sun's behavior and Guo's death, the court ruled in favor of Sun.<sup>109</sup> The SPC went beyond affirming the doctrinal reasoning and praised Sun's helping behavior. Implicitly referring to the Peng Yu case, it noted that public morality had been challenged by prior cases in which Good Samaritans were sued by those they helped, such as "helping [a] fallen lady but ending up getting extorted."<sup>110</sup> The SPC celebrated the decision for signaling that law protects Good Samaritans and, in doing so, promotes the core values of honesty, friendliness, and mutual assistance.<sup>111</sup> The two lines of reasoning—the legalistic rationale and the moralistic judgment rooted in the SCVs—again complement each other. As such, a judgment that properly integrates the SCVs is one that is justified by both lines.

The parallel reasoning allowed judges in guiding cases to clearly allocate liability with moral force. In the past, Chinese courts were reluctant to explicitly determine which party was at fault, and often spread liability among both parties in order to avoid controversy, even at the price of "ignor[ing] or stretch[ing] legal rules."<sup>112</sup> Underlying this phenomenon was exactly the legalistic dilemma identified earlier: compliance with written rules did not always successfully resolve social disputes, especially when substantive outcomes were at stake. When legalism fails to satisfactorily address social disputes in China, judges often resort to measures such as spreading liability. The existence of such measures precisely demonstrates the limit of legalism. In many cases, following the law is not the safest option for judges.<sup>113</sup> Rather, they have often found it necessary to deviate from the written rules and mechanically spread liability among litigating

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108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. Liebman, *Ordinary Tort Litigation in China*, *supra* note 58, at 198–99.

113. *Id.* at 228.

parties to prevent grievances and unrest.<sup>114</sup> One primary purpose for integrating the SCVs into legal judgments is to tackle this phenomenon. Indeed, Chief Justice Zhou Qiang of the SPC explicitly demanded that when promoting the SCVs, judges should not try to appease both parties in a way that blurs the line between right and wrong.<sup>115</sup>

The two aforementioned cases met Chief Justice Zhou Qiang's demand, as the courts categorically rejected the plaintiffs' suits for damages by either condemning the plaintiff's wrongfulness or praising the defendant's virtue. Another set of exemplary civil cases published in February 2022 also featured decisions in which courts categorically cleared a party from liability instead of balancing damages.<sup>116</sup> For example, a court ruled that a cable news channel that exposed food safety problems is not liable for libel, praising the defendant's bravery and honesty.<sup>117</sup> In another case, a Good Samaritan cleared logged water on the hallway of a hospital, accidentally causing the floor to be slippery. Another patient later slipped on the floor and was seriously injured. The court ruled that the Good Samaritan was not liable, citing the traditional value of helping others.<sup>118</sup> The SPC also praised cases in which courts determinatively imposed liability on a single party. In one instance, citing the value of filial piety, the court forced a person to compensate the local authority who paid for medical fees of the person's elderly parents.<sup>119</sup> In another case citing the value of honesty, the court demanded a student to pay damages to his former employer who funded his study on the condition that he return to work for the employer upon graduation, a promise he later broke.<sup>120</sup>

Underlying these cases is the idea that legal decisions themselves become moral judgments: to impose liability is to impose moral condemnation, and acquittal from liability is often accompanied by moral praise. When values such as honesty, filial piety, and amicability are attached to the judgments through parallel reasoning, the disputing parties are morally pressured not to resist the decision and accept the result instead. These cases are not extraordinary and arguably

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114. *Id.* at 227.

115. China Youth Review, *Falyu Gongzuo Yao Jianjue He "Huoxini" Zuofa Shuobu* (法律工作要坚决和"和稀泥"做法说不) [Legal Work Must Resolutely Say No to the Practice of "Peace and Mud"], XINLANG WANG (新浪网) [SINA.COM] (Jan. 11, 2021, 10:08 PM), [https://k.sina.com.cn/article\\_3089637603\\_b82820e301900zytf.html](https://k.sina.com.cn/article_3089637603_b82820e301900zytf.html) [<https://perma.cc/M59E-GP97>].

116. *See Second Batch, supra* note 94.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*



can be resolved upon simple doctrinal grounds. Yet the approach now adopted by courts in these cases is manifestly different from the previous method. By demanding that courts insert explicit value attitudes through SCV-based reasoning in conjunction with doctrinal reasoning, the SPC sought to strengthen the authority of judicial decisions.

## *B. Reconceiving Chinese Law*

### 1. Judicial Discretion Without Judicial Authority

The demand to incorporate the SCVs not only poses new challenges to judges but also propels us to reexamine judicial function in China. Unlike common law judges, judges in civil law jurisdictions like China usually have very limited discretionary authority to go beyond statutory texts because the latter is thought to be self-sufficient.<sup>121</sup> Yet the idea that SCVs must be incorporated into legal judgments seems to have presupposed the existence of considerable discretion. As judges now must stretch their doctrinal reasoning to meet the standards of the SCVs, it seems that the scope of judicial discretion must also be expanded to allow judges to assert rules not directly reflected in the statutory texts and thereby reach SCV-demanded results. A problem arises in reconciling this new practice with traditional civil law jurisprudence. Chinese judges now have *prima facie* discretion to assert novel rules beyond written laws, but this does not mean that they have independent authority to make law. Rather, this new trend suggests that the very definition of what counts as law in China is undergoing a fundamental transformation.

The Jiang Ge opinion is an example of the discretionary judicial assertion of novel legal rules that are not in the statutory texts to incorporate the SCVs. The doctrinal rationale provided by the court was premised upon the rescuer's duties to the rescuer, but none of the provisions cited by the opinion contain such duties.<sup>122</sup> Instead, an

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121. See Roberto G. MacLean, *Judicial Discretion in the Civil Law*, 43 LA. L. REV. 45, 47 (1982).

122. See Xibai Gao, *Cong Weiji Jiuzhu Yiwu, Dao Sifa De Kunjing* (从危机救助义务, 到司法的困境) [From the Obligation of Critical Assistance to the Plight of Justice: A Brief Discussion on the Challenges of Jiang Ge's Case to Chinese Law], MEIGUO FAWU (美国法务) [GAOLAWFIRM] (Feb. 04, 2022, 4:54 PM), [https://mp.weixin.qq.com/s/8TrKf\\_nLT8heox4ud0EBQw/](https://mp.weixin.qq.com/s/8TrKf_nLT8heox4ud0EBQw/) [https://perma.cc/A3P8-R73Q] (arguing that the statutory texts cited by the Jiang Ge decision themselves do not support the legal outcome and that judges actually made some doctrinal innovations based on moral reasoning). The Jiang Ge opinion cited three legal codes. The first one is Article 98 of the General Principles of the Civil Law that "citizens shall enjoy the rights of life and health."

official case analysis provided by the *Legal Daily*, the official newspaper of the CCP's legal bureau, implies that judges do have significant discretion to assert specific rules that go beyond the legal texts insofar as the SCVs support them.

According to the case summary, the court made a three-step argument.<sup>123</sup> First, the rescuer-rescued relationship between Jiang and Liu implied that Liu owed a “duty of safety guarantee” to Jiang. Second, Liu was in a better position to understand the danger imposed by her ex-boyfriend. Third, since Liu failed her duty, she was liable.<sup>124</sup> The case summary acknowledged the controversy over the use of the “duty of safety guarantee” in the opinion, as the duty is commonly limited to business managers and event organizers.<sup>125</sup> The court's assertion of the existence of this duty in the rescuer-rescued scenario seems to be a novel judicial invention. In response, the case summary conceded that there might be a “minor difference” between the court's doctrinal reasoning and the precise standards of the law; nevertheless, it asserted that the legal conclusion is still “persuasive” and within the “reasonable framework” of legal interpretation.<sup>126</sup>

This practice seems to depart from the civil law jurisprudence that judges are not supposed to construct novel legal rules.<sup>127</sup> Rather, it is reminiscent of the common law jurisprudence that judicial discretion empowers judges to “make” law. Some comments on the Jiang

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Zhonghua Renmin Gongheguo Minfa Tongze (中华人民共和国民法通则) [General Principles of the Civil Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 98, 1986 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 371. The second one is Article 5 of the same law that “the lawful civil rights and interests of citizens and legal persons shall be protected by law.” *Id.* at 5. Finally, the third one is Article 6 of Tort Law: “One who is at fault for infringement upon a civil right or interest of another person shall be subject to the tort liability.” Zhonghua Renmin Gongheguo Qinquan Zeren Fa (中华人民共和国侵权责任法) [Tort Liability Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2020), art. 6, 2020 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 1. None of them was understood to contain the rescuer's duty to the rescuer.

123. Hong Zhao, *Caipan Rule Shuoli? Zaikan Jiangge An Panjue* (裁判如何说理? 再看江歌案判决) [How Does Legal Judgment Reason? A Further Look as the Jiangge Case], FAZHI RIBAO (法治日报) [LEGAL DAILY] (Feb. 24, 2022), [http://m.cyol.com/gb/articles/2022-01/15/content\\_vRZjahl5W.html](http://m.cyol.com/gb/articles/2022-01/15/content_vRZjahl5W.html) [<https://perma.cc/XPY9-VZXX>]. This case summary was provided by *Legal Daily*, the official newspaper of the CCP's legal bureau.

124. *Id.*

125. *Id.*

126. *Id.*

127. See MacLean, *supra* note 121, at 45–46.

Ge decision did compare it with the common law tradition.<sup>128</sup> However, China still refuses to include court-made judgments or case law into the definition of law.<sup>129</sup> The system of guiding cases is rather a tool to train judges and promote uniformity of the law's application.<sup>130</sup> Though exemplary, these judge-made precedents do not themselves have authoritative force. To the contrary, China has undertaken efforts to standardize judicial decision-making, curb judges' authority, and prevent abuse of discretion through a variety of measures including the use of artificial intelligence.<sup>131</sup> The CCP has understood the incorporation of the SCVs as part of this larger effort to limit judicial discretion. Indeed, the *Guiding Opinion* notes that the SCVs shall be an important standard for examining whether judicial discretion has been properly exercised.<sup>132</sup> Similarly, the SPC has also emphasized that the SCVs shall guide the exercise of judicial discretion.<sup>133</sup> Although the way Chinese judges incorporate the SCVs into judgments exhibits some similarity to the common law practice, it would be implausible to assert that Chinese judges have the *authority* to make laws. For Chinese judges, the "power" to assert novel rules is not to be taken for granted as if it were a preexisting and independent power. Rather, judges have such expanded "discretion" only to facilitate the mandated purpose of incorporating the SCVs.<sup>134</sup> Law exists in an objective

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128. See Gao, *supra* note 122 (justifying the use of discretion by noting the common law practice and arguing that the Jiang Ge court actually exercised the role of common law judges by "inferring" new rules based on the basic principles of law and morality); see also Chen, *supra* note 72 (justifying the Jiang Ge decision by appealing to common law practices and cited U.S. Supreme Court cases including *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Cohen v. California*, 403 U.S. 15 (1971)).

129. CJO Staff Contributions Team, *Does China Have Common Law? China Law in One Minute*, CHINA JUSTICE OBSERVER (Nov. 9, 2020), <https://www.chinajusticeobserver.com/a/does-china-have-common-law> [https://perma.cc/362C-6BQ7].

130. Guodong Du & Meng Yu, *Are China's Guiding Cases a Type of Case Law?*, CHINA JUSTICE OBSERVER (Nov. 29, 2020), <https://www.chinajusticeobserver.com/a/are-chinas-guiding-cases-a-type-of-case-law> [https://perma.cc/8UGQ-PPGJ].

131. See generally Rachel E. Stern, Benjamin L. Liebman, Margaret Roberts & Alice Z. Wang, *Automating Fairness? Artificial Intelligence in the Chinese Courts*, 59 Colum. J. Transnat'l L. 515 (2021).

132. *Guiding Opinion*, *supra* note 30.

133. Answered Reporters' Questions, *supra* note 102.

134. For other purposes of judicial discretion, see Press Release, Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan (中华人民共和国最高人民法院) [Supreme People's Court] *Zuigo Renmin Fayuan Yinfa "Guanyu Zai Shenpan Gongzuo Zhong Qieshi Guifan Ziyou Cailiangquan Xingshi Baozhang Falü Tongyi Sheyong De Zhidao Yijian" De Tongzhi* (最高人民法院印发《关于在审判执行工作中切实规范自由裁量权行使保障法律统一适用的指导意见》的通知) [*The Supreme People's Court Issues the Announcement of*

realm independent of judges' will. It seems that those "novel" rules are already there; while not in written form, they are already contained in the spirit of the SCVs.

## 2. Finding Law through the Socialist Core Values

A more illuminating comparison is between Chinese judges who cite the SCVs and pre-*Erie* common law judges who were tasked to *find* law.<sup>135</sup> The project of integrating the SCVs into legal judgments signifies a conception of law that bears striking similarity with the pre-*Erie* jurisprudence. The latter involves the proposition that, underlying the legal system, there is a fully objective "transcendental body of law" comprised of the totality of social norms addressed to society as a whole and perceived as binding.<sup>136</sup> In other words, "the common law had an existence independent of the statements of judges (that it was *discovered*, not made)," and "the sources of the common law accordingly extended well beyond the confines of the legal system."<sup>137</sup> For example, under the slogan, "Christianity is a part and parcel of the common law," 19<sup>th</sup>-century American jurists understood Christianity as an essential grounding component of the common law system.<sup>138</sup> To properly exercise judicial discretion is to *find* law by figuring out a rule applicable to each particular case that conforms to the preexisting (Christian) norms and beliefs. This idea was only abandoned in United States in the early twentieth century.<sup>139</sup>

Chinese judges have a similar and yet more stringent task. They are supposed to *find* law by discovering a rule that conforms to the SCVs given that the SCVs are now a part of Chinese law itself. They constitute a set of grounding norms that the intelligibility of

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"*Guiding Opinion on Concretely Standardizing the Use of Judicial Discretion to Ensure Consistent Usage of Law*" (Feb. 28, 2012) (on file with author).

135. See generally Stephen E. Sachs, *Finding Law*, 107 CAL. L. REV. 527 (2019). The pre-*Erie* understanding of the common law was that judges were tasked to find the law, not to make it. *Id.* at 527. The *Erie* decision arguably overruled this entire way of thinking regarding the relationship between the common law and its judges. *Id.* at 529. According to Sachs, *Erie* and its progeny made two criticisms against the notion of finding law. First, judges cannot discover norms that no one ever made and, therefore, cannot find laws. Second, law involves inherently uncertain cases to the extent that judges must make law in many cases. *Id.* at 530–31.

136. *Id.* at 530; see also *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

137. Stuart Banner, *When Christianity Was Part of the Common Law*, 16 L. & HIST. REV. 27, 53 (1998).

138. *Id.* at 29–43.

139. *Id.* at 45.

Chinese law must ultimately hinge upon. Technical understanding of legal texts alone cannot exhaust the complete meaning of law, which can be fully grasped only in consultation with the SCVs. This understanding is affirmed by the interpretive methods that the *Guiding Opinion* demands judges to adopt in order to better incorporate the SCVs.<sup>140</sup> According to its definitions, to use textual interpretation is to interpret the spiritual meaning of the Socialist Core Value that is contained in the law itself, whereas systematic interpretation requires that judges understand the particular law in relation to the SCV system and the system of the law of socialism of Chinese characteristics.<sup>141</sup> The assumption is that the SCVs are already inhered in the specific legal codes and the entire system of Chinese law themselves. One important task of legal interpretation is to explicate those value propositions. Explaining the 2018 *Working Plan* on integrating the SCVs into legal judgments, the SPC explicitly stated that the SCVs constitute the value basis of judicial interpretation.<sup>142</sup> This point is further supported by another article in the official newspaper *Legal Daily* commenting on the Jiang Ge case:

Judicial judgments are not mechanical fact-finding and law application, but necessarily involve value choices. . . . Helping those in danger or hardship is the traditional virtue of the Chinese nation, and honesty and friendliness are important contents of the Socialist Core Values. Both should not just exist in slogans but also need to be confirmed and promoted by judicial judgments.<sup>143</sup>

In other words, legal interpretation is inherently value-laden. To interpret law correctly—that is, to find the right law—is to figure out an applicable rule that grasps the fundamental norms underlying the legal text. Even though the rule that judges come up with in each case might not come directly from the statutory texts themselves, the

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140. See generally *Guiding Opinion*, *supra* note 30.

141. *Id.*

142. See Interview with Fang Zuigao Renminfayuan Yanjiu Shi Fuze Ren (访最高人民法院研究室负责人) (Head of the Research Office of the Supreme People's Court) on Yi Shehuizhuyi Hexin Jiazhiguan Wei Hun, Quanmian Gongkao Sifa Jieshi De Jiazhi Jichu (以社会主义核心价值观体系为魂, 全面筑牢司法解释的价值基础) [Taking the Socialist Core Values to be the Soul, Comprehensively Consolidating the Value Basis of Judicial Interpretation] (Sept. 18, 2018).

143. Jin Zegang, *Sifa Caipan Xu Wei Chongde Xiangshan Shuli Dianfan* (司法裁判须为崇德向善树立典范) [*Judicial Judgments Must Set Examples for Morality*], FAZHI RIBAO (法治日报) [LEGAL DAILY] (Jan. 12, 2022), [http://www.legaldaily.com.cn/zfzz/content/2022-01/12/content\\_8657181.htm](http://www.legaldaily.com.cn/zfzz/content/2022-01/12/content_8657181.htm) (last visited Dec. 12, 2023).

interpretation could nevertheless still be legally correct insofar as it conforms to the SCVs.<sup>144</sup> If legal truths are not directly apparent in the text of the statutes, they are to be found by judges employing the SCV-based reasoning.

This new jurisprudence regarding what Chinese law essentially is illuminates the nature of judicial “discretion” in China. It is not about granting judges independent, quasi-lawmaking authority. It is only a tool that helps judges arrive at a correct legal conclusion that is supported by the SCVs though not automatically given by the statutes.<sup>145</sup> As such, the SCVs are the criterion to determine whether judges have made the correct discovery. In this sense, Chinese judges are bureaucrats assigned specific tasks and equipped with specific tools.<sup>146</sup>

The new jurisprudence has also been signified by the CCP’s postulation that the SCVs must be understood as the grounding norms underlying Chinese law. As noted earlier, the integration of the SCVs into legal judgments is a part of the grand project of putting them into *law* itself—not just judicial interpretation.<sup>147</sup> In a controlling document on the grand project, the CCP declared that the SCVs are the soul of the construction of the socialist rule of law and demanded for all legislation and interpretations to be guided by the SCVs.<sup>148</sup> As the CCP made it clear, one important purpose of the project is to highlight

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144. See discussion *supra* Section II.A.

145. See discussion *supra* Section II.A.1.

146. The Chinese judicial system is highly bureaucratic, and judges are viewed as cadres with little independence. See generally Benjamin L. Liebman, *China’s Courts: Restricted Reform*, 21 COLUM. J. ASIAN L. 1 (2007).

147. See *Guiding Opinion*, *supra* note 30. The Party-state organs also review whether legislative projects conform to the SCVs. See PEOPLE’S DAILY (人民日报), *Jianli Shehuizhuyi Hexin Jiazhi Guan Rufa Rugui Xietiao Jizhi* (建立社会主义核心价值观入法入规协调机制) [*Establishing the Coordination Mechanism of Incorporating the Socialist Core Values into Laws and Regulations*] (Sept. 28, 2021), <http://www.npc.gov.cn/npc/c30834/202109/7feab08e14294a04848d83d991fd118f.shtml> [<https://perma.cc/CA5K-ECGF>] [hereinafter *Establishing the Coordination Mechanism*].

148. See Xinhua News Agency (新华社), *Zhonggong Zhongyang Bangongting, Guowuyuan Bangongting Yinfa “Guanyu Jinyibu Ba Shehuizhuyi Hexin Jiazhi Guan Rongru Fazhi Jianshe De Zhidao Yijian”* (中共中央办公厅、国务院办公厅印发《关于进一步把社会主义核心价值观融入法治建设的指导意见》) [*The General Office of the Central Committee of the Communist Party of China and the General Office of the State Council Issued the “Guiding Opinions on Further Integrating Socialist Core Values into the Construction of the Rule of Law”*], (Dec. 25, 2016), [http://www.gov.cn/gongbao/content/2017/content\\_5160214.htm](http://www.gov.cn/gongbao/content/2017/content_5160214.htm) (last visited Oct. 22, 2023).

law's orientation toward the SCVs.<sup>149</sup> This idea was made even more explicit in the legislative context. For example, the *Guangming Daily*, an official newspaper run directly by the Central Committee of the CCP, described The Civil Code of the People's Republic of China—a grand civil legislation project completed in 2020—as the legislative expression of the SCVs.<sup>150</sup> The legislative purpose of the Civil Code is permeated with the demands of the SCVs.<sup>151</sup> Such understanding precisely demonstrates that the CCP takes the SCVs to be the essence of Chinese law itself, the totality of grounding norms of which law is an expression. All legislations and legal interpretations must conform to this basic principle.

### III. TOWARD A SYNTHESIS OF AUTHORITARIAN LEGALITY

#### A. *The New Chinese Law*

In sum, according to this new conception of Chinese law imposed by the Party-state, the SCVs ground, precede, and justify all particular laws. In each legal case, the judge is tasked to find the correct legal rule by interpreting the law based on both doctrinal reasoning and SCV-based reasoning. An article posted on the Chinese judiciary's official website put this idea concisely—Law application is an act of value actualization, and legal interpretation is a process of making value judgments: its purpose is to find value behind law.<sup>152</sup> Since law is inherently value-laden, finding the value behind law is part of

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149. See Xinhua News Agency (新华社), *Jinyibu Zhangxian Falvu Fagui De Shehuizhuyi Hexin Jiazhi Guan Daoxiang* (进一步彰显法律法规的社会主义核心价值观导向——中央有关部门负责人就《社会主义核心价值观融入法治建设立法修法规划》答记者问) [*Further Manifesting the Socialist Core Values Orientation of Laws and Regulations: Central Committee Official Responds to Questions by Interviewers Regarding "Plan on Integrating the Socialist Core Values into Legal Constructions, Legislations, and Amendments"*], XINHUA WANG (新华网) [XINHUA NET] (May 7, 2018), [http://www.xinhuanet.com/politics/2018-05/07/c\\_1122796689.htm](http://www.xinhuanet.com/politics/2018-05/07/c_1122796689.htm) [<https://perma.cc/TQ63-KA87>].

150. Zhou Ruili (周悦丽), *Minfadian: Shehuizhuyi Hexin Jiazhi Guan De Lifa Biaoda* (民法典: 社会主义核心价值观的立法表达) [*Civil Code: The Legislative Expression of the Socialist Core Values*], GUANGMING RIBAO (光明日报) [GUANGMING DAILY] (June 6, 2020, 10:23 PM), [http://www.qstheory.cn/llwx/2020-06/06/c\\_1126081265.htm](http://www.qstheory.cn/llwx/2020-06/06/c_1126081265.htm) [<https://perma.cc/X8UN-RVDG>].

151. *Id.*

152. Kong Mengna (孔梦娜), *Shehuizhuyi Hexin Jiazhi Guan Rongru Sifa SHenpan Jizhi De Yanjiu* (社会主义核心价值观融入司法审判的机制研究) [*Study on the Mechanism of Incorporating the Socialist Core Values Into Judicial Judgments*], ZHONGGUO FAYUAN WANG (中国法院网) [CHINACOURT.ORG] (Dec. 31, 2021, 11:07 PM), <https://www.chinacourt.org/article/detail/2021/12/id/6464688.shtml> [<https://perma.cc/MZ2N-W6FH>].

finding the law.<sup>153</sup> The values behind law, as the CCP demands all Chinese recognize, *are* the Socialist Core Values. To integrate the SCVs into law essentially means to ground the latter upon the former.

What the project of integrating the SCVs into legal judgments signifies is a fusion of state-imposed norms, which were previously seen as extralegal, into the very definition of law itself. This marks a new mode of legality that goes beyond legalism. Law is no longer understood as simply composed of technical legal rules to be enforced strictly in terms of their letters but as an extension of the substantive, moralistic norms that the Party-state imposes upon the society in the name of the SCVs. Under the new mode of legality, one has an obligation to comply with legal decisions, not just because they are the law, but also because they allege to represent the moral imperatives they ought to obey.<sup>154</sup> Here, legal requirements become an expression of moral imperatives, and moral imperatives are solidified by their status as laws. This new mode of legality has overarching significance. It not only overcomes the two problems associated with legalism, the incompleteness problem and the incongruence problem, but also allows Chinese law to acquire an ideological function: The legalization of state ideology also facilitates its popularization.

### 1. Overcoming the Legalistic Problems

The new mode of legality purports to resolve the incompleteness problem as legal decisions have the substantive force of moral imperatives while retaining the formalistic aspects of law.<sup>155</sup> In this way, courts claim to be a moral authority that imposes robust obligations on citizens. This function is made possible by the conjunction of doctrinal reasoning and SCV-based reasoning.<sup>156</sup> While doctrinal reasoning helps judicial decisions retain a certain level of statute-based authority, successful SCV-based reasoning allows legal judgments to

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153. The CCP recognizes the value-loaded nature of law. *See supra* text accompanying footnotes 138–142.

154. *See* discussion *supra* Section I.A.

155. *See* Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, 50 *NOMOS* 3 (2011). The formalistic values inherent in the concept of the rule of law emphasizes principles such as generality, clarity, prospectivity, and consistency. *Id.* at 5–6. In addition, the rule of law is also conceived by some in terms of the substantive values underlying the law, such as respect for private property and democratic enfranchisement. *See id.* at 7. This is not to suggest that China is, in any sense, living up to those liberal values. The emphasis in this Note is that the Party-state nevertheless tries to incorporate some substantive values into the law when forming its own authoritarian conception of “rule of law.”

156. *See* discussion *supra* Section II.A.2.



be expressed in a moralistic, paternalistic manner. Legal judgments can hence put immense moral pressure on people to quietly comply even though they may or may not be satisfied with the outcomes. After the Jiang Ge decision, the CCP propaganda immediately began hailing law as the ultimate guard of justice and morality.<sup>157</sup> If the decision embodies morality, those contesting it would likely be perceived as problematically antimoral. Unlike legalism, the new mode of legality left no normative space for people to express their discontentment with the decisions. The Jiang Ge case also demonstrates that under this new approach, the Chinese legal system can produce socially desirable results through legal means, and the public can be more likely to find law to be a reliable means to deliver desirable substantive results in social disputes.

The incorporation of the SCVs into legal interpretation also purports to solve the incongruence problem associated with legalism, which arises because the way pure legality justifies governmental action is distinct from the ideological basis of the Party-state's rule and often requires the Party-state to go against its own interests.<sup>158</sup> As the SCVs become the normative core of Chinese law, the incongruence problem would be solved because the law is no longer alien to the Party-state's own ideology but grounded in it.<sup>159</sup> This would allow the Party-state to use law in a way that aligns with its primary sources of legitimacy, such as nationalism and traditionalism. This alignment is evident in a set of guiding cases regarding the reputation of Chinese Communist martyrs. In a lawsuit that received much attention, Mei Xinyu, a nationalistic Internet influencer, was sued by two authors who wrote an article expressing skepticism against the truthfulness of the Communist martyr story "Five Warriors of the Langya Mountain."<sup>160</sup> Upon reading the article, Mei used abusive language to attack the

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157. See Chang An Jun (长安君) & Su Hang (苏航), *Jiang Ge An Yishen Xuanpan: Falv Bidang Jianding Buyi De Wei Shanlang Chengyao* (江歌案一审宣判: 法律必当坚定不移地为善良撑腰) [*Jiang Ge Case Decision Announced: Law Must Uncompromisingly Support Goodness*], ZHONGYANG ZHENGFAWEI CHANGN JIAN (中央政法委长安剑) [LEGAL AND POL. BUREAU OF THE COMMUNIST PARTY OF CHINA] (Jan. 11, 2022, 11:40 PM), <https://mp.weixin.qq.com/s/f3vDs2IKNcCShOD6rtMZfQ> [<https://perma.cc/X5YK-MM4F>].

158. See discussion *supra* Section I.B.2(b).

159. See discussion *supra* Section II.B.

160. See *Renmin Yifa Baohu "Langyashan Wu Zhuangshi" Deng Yingxiong Renwu Renge Quanyi Dianxing Anli* (人民法院依法保护“狼牙山五壮士”等英雄人物人格权益典型案例) [*Exemplary Cases of People's Courts Protecting Reputation Rights of Heroic Figures Such as "Five Warriors of the Langya Mountain" Based on Law*], ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN (中华人民共和国最高人民法院) [SUP. PEOPLE'S CT.] (Oct. 19, 2016), <https://www.court.gov.cn/zixun-xiangqing-28421.html> (last visited Dec. 12, 2023).

authors. The court ruled in favor of Mei, arguing that the author should have expected fierce criticism and was obligated to be more tolerant because the article “harmed the national sentiments.”<sup>161</sup> The court noted that although Mei’s use of language was inappropriate, it was nevertheless an expression of such sentiments.<sup>162</sup> In another defamation case, the court ruled against a business owner who sold stickers mocking Huang Jiguang and Dong Cunrui, both of whom were martyrs.<sup>163</sup> The overarching message sent by these cases is that nationalistic values are now part of law itself. It is a legal requirement to abide by them.

The flexibility of judicial interpretation can allow the Party-state to achieve a variety of desired outcomes in the name of law—occasionally even including *prima facie* progressive results. In April 2023, the Beijing Second Intermediate Court selected a transgender discrimination case as a typical case for integrating the SCVs into legal judgments.<sup>164</sup> The court ruled on behalf of a transgender plaintiff fired for undergoing a gender-affirming surgery, holding the termination of her employment contract to be illegal.<sup>165</sup> However, this case should not be interpreted as indicating that the SCVs instruct the legal system to be progressive in any meaningful sense. Chinese law still offers little protection to LGBTQ people, whose battles in courts often end in frustration.<sup>166</sup> Rather, the case is better seen as demonstrating the Party-state’s effort to misappropriate progressive demands and sentiments under its own ideological authority. The seemingly progressive gesture in this case was justified not in terms of any independent liberal rationale perceived to be dangerous Western values, but as part of the orthodoxy ideology over which the Party-state exercises absolute control. In so doing, the legal authority effectively produced results that appeal to part of the society’s progressive sympathies, while simultaneously taming those sympathies from possible ideological threats into obedience to the Party-state’s official ideology.

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161. *Id.*

162. *Id.*

163. *Ten Typical Civil Cases*, *supra* note 93.

164. Ding Yuan & Darius Longarino, *2 College Students in China Were Disciplined for Giving Out Pride Flags. Can the Law Help Them?*, THE DIPLOMAT (Apr. 28, 2023), <https://the-diplomat.com/2023/04/2-college-students-in-china-were-disciplined-for-giving-out-pride-flags-can-the-law-help-them/> [<https://perma.cc/9BM8-WQH9>].

165. *Id.*

166. Darius Longarino & Yanhui Peng, *What a Gay Flight Attendant’s Lost Discrimination Case Says About LGBTQ Rights in China*, THE DIPLOMAT (Jan. 24, 2023), <https://the-diplomat.com/2023/01/what-a-gay-flight-attendants-lost-discrimination-case-says-about-lgbtq-rights-in-china/> [<https://perma.cc/LWH3-ZC4G>].

## 2. The Ideological Function of Law

The legalization of state-imposed moralistic norms not only transforms Chinese law into one that possesses a more robust form of legality, but also helps to solidify those norms themselves. Insofar as law embodies those norms, it achieves the ideological function of integrating them into social consciousness. Legal decisions explain and popularize the official norms described in abstract language.<sup>167</sup> By providing concrete examples, the judiciary indeed becomes the official interpreter of the SCVs, messaging a variety of values such as patriotism and altruism to the society, as it did in the martyr cases and the Jiang Ge case. The CCP has explicitly recognized this aim by vowing to push the Socialist Core Values into the people's mind.<sup>168</sup> For the CCP, the SCVs must permeate the entire society on its most basic level. As Xi Jinping said in a speech, the SCVs must be "omnipresent" in our lives, just like air.<sup>169</sup> Another guidance document also shows that the CCP has, from the very beginning, focused on the large propaganda campaign to popularize the SCVs.<sup>170</sup> Indeed, the project to integrate the SCVs into law is also a component of this grand campaign. As the CCP noted, the project has the significant meaning of making the Socialist Core Values the collective value pursuit of all the people.<sup>171</sup> This conforms to its newest understanding of the nature of the legal process: Judicial activity always starts with conflicts of values and

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167. See discussion *supra* Section I.A.2.

168. Fujian Province Research Center of the Theoretical System of Socialism with Chinese Characters, *Tuidong Hexin Jiazhi guan Ru Nao Ru Xin* (推动核心价值观入脑入心) [Pushing the Socialist Core Values into People's Brain and Mind], RENMIN WANG (人民网) [PEOPLE.CN] (Apr. 16, 2020), <http://theory.people.com.cn/n1/2020/0416/c40531-31675411.html> [https://perma.cc/9873-RZ8Q].

169. See Li Zhennan, Inner Mongolia Province Research Center of the Theoretical System of Socialism with Chinese Characters, *Xi Jinping: Rang Shehuizhuyi Hexin Jiazhi guan Xiang Kongqi Yiyang Wusuobuzai Wushibuyou* (习近平: 让社会主义核心价值观像空气一样无所不在无时不有) [Xi Jinping: Make Socialist Core Values as Omnipresent as Air], RENMIN WANG (人民网) [PEOPLE.CN] (Nov. 2, 2015), <http://theory.people.com.cn/n1/2017/0608/c40531-29327183.html> [https://perma.cc/6RE4-ZLWR].

170. See Opinion on Cultivating and Practicing the SCVs, *supra* note 37.

171. *Id.*

ends with the harmony of values—it is actually an activity of *promoting* and *protecting* the mainstream values.<sup>172</sup>

Law has always been a tool for the CCP’s public propaganda agenda. Throughout the PRC’s history, the CCP has initiated several mass legal education campaigns in order to root its own conception of “good citizen” into people’s common sense and society’s consciousness.<sup>173</sup> Modern Chinese governments since the late 19<sup>th</sup> century—from the imperial, the Republican, to the socialist regime—all held the assumption that knowledge of laws was supposed to transform people into subjects or citizens with good moral and societal conduct.<sup>174</sup> The CCP inherited this assumption from its Qing and Republican predecessors and treated law, politics, and morality as intertwined.<sup>175</sup> Innovatively, it embedded mass legal education within its propaganda system.<sup>176</sup> As law involves the classification of behaviors into categories of “good” and “bad,” mass dissemination of legal knowledge helped the CCP to popularize a normative framework that governs people’s lives.<sup>177</sup>

This practice has continued from the Maoist era to the present. In 2021, the CCP rolled out its eighth five-year plan for the popularization of legal knowledge.<sup>178</sup> This time, the SCVs became the focus. The five-year plan demanded China’s educational system treat the promotion of the SCVs as a main task, with the purpose of “establishing morality and cultivating personality.”<sup>179</sup> The Jiang Ge case, once

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172. People’s Court Daily, *Sifa Dengta Zhaoliang Hexin Jiazhi Guan Xingwen Zhiyuan* (司法灯塔照亮核心价值观行稳致远) [Judicial Beacon Lightened, Helping the Core Values Advancing Steadily], ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN (中华人民共和国最高人民法院) [SUPREME PEOPLE’S COURT OF THE PEOPLE’S REPUBLIC OF CHINA] (June 22, 2021), <https://www.court.gov.cn/zixun-xiangqing-310101.html> (last visited Dec. 12, 2023) (emphasis added).

173. JENNIFER ALTEHENDER, *LEGAL LESSONS: POPULARIZING LAWS IN THE PEOPLE’S REPUBLIC OF CHINA, 1949–1989*, at 1–24 (2018).

174. *Id.* at 11–12.

175. *Id.* at 10.

176. *Id.* at 12.

177. *Id.* at 10.

178. See Press Release, Ministry of Education of the People’s Republic of China, Jiaoyubu Guanyu Yinfu “Quanguo Jiaoyu Xitong Kaizhan Fazhi Xuanchuan Jiaoyu De Dibage Wunian Guihua (2021-2025 Nian)” De Tongzhi (教育部关于印发《全国教育系统开展法制宣传教育的第八个五年规划（2021-2025年）》的通知) [Announcement by the Ministry of Education on Publishing “The Eighth Five-Year Plan for the Popularization of Legal Knowledge”], ZHONGHUA RENMIN GONGHEGUO JIAOYUBU (中华人民共和国教育部) [Ministry of Education of the People’s Republic of China] (Nov. 5, 2021) (on file with author).

179. *Id.*

again, is not only an example of how the incorporation of the SCVs helps to strengthen the popular legitimacy of legal judgments, but also a demonstration of how legal judgments in turn promote the SCVs. In the Jiang Ge case, the final legal judgment served as the last word on value disputes and settled fierce social controversy surrounding the case.<sup>180</sup> Equipped with coercive power, legal judgments incorporating the SCVs do not solely describe what is *prima facie* permissible or impermissible; they demonstrate the Party-state's authoritative stance on value issues by morally denouncing or approving certain actions in the public realm.<sup>181</sup> This is in line with the Party-state's attempt to present itself as a "virtuous Leviathan"—an all-powerful, absolutist state dedicated to promote virtue.<sup>182</sup> The CCP now claims not only "unmitigated central power capable of securing and maintaining order, but also supreme moral authority that requires all citizens to submit their will and right to govern themselves to the single entity of the Party."<sup>183</sup>

### 3. The Destabilization of Law

One might ask whether law and the SCVs may end up in conflict with each other. Yet the central innovation of this new conception of law is precisely that the SCVs themselves are part of—indeed the core of—law. Hence, the two, by definition, can never conflict with each other. According to the theory underlying the integration of the SCVs into legal interpretation, such a question is simply the wrong question to begin with. Under this theory, although the SCVs might still clash with the letter of the law, they do not clash with the spirit of the law because they are now defined as the underlying spirit of law. By bringing SCVs, which used to be regarded as extralegal, into the very conception of legality, the Party-state manages to manipulate law

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180. See *supra* text accompanying notes 26–27.

181. For example, one official media commented that the judgment is a "footnote" to virtuous behavior. See CCTV News, *Wangzheng Huigu Jiangmu Su Liuxin An Shimo* (完整回顾江母诉刘鑫案始末) [Comprehensive Review of the Entire Process of Jiang's Mother Suing Liu Xin], XINHUA BAOYE WANG (新华报业网) [XINHUA DAILY MEDIA NET] (Jan. 11, 2022, 11:53 PM), [http://www.xhby.net/index/202201/t20220111\\_7382532.shtml](http://www.xhby.net/index/202201/t20220111_7382532.shtml) [https://perma.cc/YF68-EUHE]. Another commentary noted that the decision showed law's support for social morality. See Wei Zhou, *Jiangge An Xuanpan Beihou, Tixian Falv Dui Shehui Daoyi De Zhichi* (江歌案宣判背后, 体现法律对社会道义的支持) [Behind the Judgment of the Jiang Ge Case Reflected Law's Support for Social Justice], PENGPAI (澎湃) [THE PAPER] (Jan. 17, 2022), [https://m.thepaper.cn/newsDetail\\_forward\\_16310629](https://m.thepaper.cn/newsDetail_forward_16310629) [https://perma.cc/UV63-9KU3].

182. See Lin & Trevaskes, *supra* note 4, at 41.

183. *Id.* at 62.

to a significant degree. This phenomenon is not restricted to the context of the SCVs but can also be seen in projects such as incorporating Party documents into legal interpretations.<sup>184</sup>

However, as the Party-state incorporates various distinct social norms under the umbrella of law, inner tensions within the expanded notion of law might begin to emerge and undermine the integrity of the legal system. This problem suggests that this new conception of the law is characterized by inherent inconsistency. Indeed, such inner tension can already be seen among the guiding cases. In one of the cases promoting filial piety, the court asserted that a grandmother had the right to continue to live in the apartment she gifted to her grandchild.<sup>185</sup> The court reasoned that although the parties did not agree upon any right to use, this right was implied because the grandmother and grandchild had a “factual relationship of cohabitation.”<sup>186</sup> Yet in another guiding case publicized in the same set, the court seems to have taken a different approach when parents tried to remove their adult son from their apartment.<sup>187</sup> The plaintiff, the adult son, argued that the factual relationship of cohabitation between him and his parents implied that he had a right to use the property.<sup>188</sup> Yet the court rejected this argument, emphasizing parents’ authority to exclude others from their property at will.<sup>189</sup> The contrast between the two cases in the same set of guiding cases illustrates how the demands of the SCVs can trump the consistent application of legal doctrines. Even though both cases were supported by doctrines beyond the SCV-based reasoning, the court stretched, tailored, and even manipulated legal doctrines to arrive at a conclusion that conforms to the SCVs.

The destabilization of law might indeed help the Party-state to better instrumentalize law to pursue its own interest. Although the inconsistency inherent in this new conception of Chinese law may indicate that it cannot live up to an ideal rule of law,<sup>190</sup> it does not necessarily mean that the project to incorporate the SCVs into judgments is a self-defeating one. Rather, the destabilization of law is perhaps what

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184. See generally Benjamin L. Liebman et al., *Out From The Shadows: Party Documents in Chinese Courts* (Mar. 9, 2022) (unpublished manuscript).

185. *Second Batch*, *supra* note 94.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. It is widely accepted that rule of law requires the legal system to have some formalistic virtues, including consistency and predictability. If these virtues are lacking in a given legal system, then this system arguably cannot be a genuine system upholding the rule of law. See Waldron, *supra* note 155, at 3.

the Party-state wants. The Party-state needs the enhanced legitimacy brought by legality as well as strong legal institutions to achieve its will, but it does not necessarily need a consistent, autonomous legal system that restricts its own actions. The problem that the Party-state has with legalism is that the legitimacy-enhancing function of legalism is conditioned upon strict enforcement of written rules, even though at times enforcement can be inconsistent with the Party-state's own interest. Consequently, the Party-state often has to make the hard choice between sacrificing its own interests by following the law and sacrificing the enhanced legitimacy brought by law in the pursuit of its own objectives.<sup>191</sup> A destabilized legal system, in contrast, would allow the Party-state to be unrestrained by the formalistic requirements of law to produce substantive outcomes tailored toward its wills without having to disdain the idea of law or weaken the authority of the legal institutions. Although courts arguably have stronger authority over people with the help of moralism,<sup>192</sup> they are more apt to manipulation by the Party-state under the name of law. As this new feature suggests, China is both embracing and destabilizing law at the same time: It is embracing a destabilized system of law to the benefit of the regime.

### *B. A New Model of Authoritarian Legality*

#### 1. Law and the Authoritarian State

The project of integrating the SCVs into legal judgments not only gives rise to a new conception of Chinese law, it also represents a new model of authoritarian legality. This new model fits into neither authoritarian legalism nor the dual state theory.<sup>193</sup> It cannot be captured by legalism because it does not feature strict enforcement of value-neutral written rules but rather adopts a flexible (and manipulable) conception of law that incorporates state-defined social norms at its core. Nor is it captured by the dual state theory. The Party-state does not want the SCV-based judgments to replace the law or step beyond the legal framework, and so it does not intend to scorn legality altogether.<sup>194</sup> The key difference is that a paradigmatic dual state legal system often uses what is extralegal to condemn legality, while the Party-state is actually appropriating its extralegal commitments into law itself.

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191. See discussion *supra* Section I.B.2.

192. See discussion *supra* Section III.A.1.

193. See discussion *supra* Section I.C.

194. See *supra* text accompanying notes 101–103.

What this new mode of authoritarian legality strives to achieve is a synthesis of formal compliance with legal doctrines and substantive adherence to the normative demands that the authoritarian regime arbitrarily imposes on its citizens. These demands can take the form of morality, ethnonational ethos, or claims to the quintessential aspects of some group identity, like the SCVs, but in essence they are under the manipulation of the authoritarian regime.<sup>195</sup> The manipulability of these norms results in the manipulability of law and destabilization of the legal system under this new model of authoritarian legality. As these demands are officially part of law, the authoritarian government can therefore tailor the legal requirements in accordance with its own wishes with few restraints, effectively exercising its arbitrary will. In this process, courts can play a very significant role. They interpret the law in conformity to the state-imposed norms, and by doing so, also explicate those norms to the public. This is precisely what the Chinese courts have been doing.

Most importantly, under this new model of authoritarian legality, law is no longer conceived as alien to the authoritarian state power. Legalism and the theory of dual state all presume that the way law and legal institutions operate must be distinguished from the highly arbitrary way the *quintessential* authoritarian power is exercised. The former is either irrelevant to or incompatible with the latter.<sup>196</sup> The movement to incorporate the SCVs into legal judgments challenges this presumption, as it shows that authoritarian regimes can legalize their arbitrary actions through a novel conception of law and destabilized legal institutions under their control. By incorporating state ideology into the law, authoritarian regimes can use law to accommodate their substantive objectives, such as proscribing behavior codes, propagandizing nationalistic contents, and producing socially desirable results, without having to scorn legality altogether. This can strengthen the regimes' capacity for social control.

One possible objection is that the integration of the SCVs into legal judgments means nothing more than simply turning away from law, and that therefore, it does not signify anything new. Indeed, Professor Pils suggested China's campaign to combine the "rule of law"

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195. See discussion *supra* Section I.A.2.

196. See Hendley, *supra* note 1, at 213. The presumption that authoritarian governments exercise their power through the law differently from their typical ways of exercising arbitrary power is more explicit in dual state theory, which notes that, in the normative state, law on the books matters, while in the prerogative state, the state exercises arbitrary power that must be distinguished. *Id.* See also Zhang & Ginsburg, *supra* note 5, at 306. The authors' argument that China is embracing law in a way that never occurred before seems also to suggest that legalism is something distinct from the traditional way in which the Chinese authoritarian government has exercised power.



and “rule of virtue” is a manifestation of dual state dictatorship’s rejection of rule of law, subjecting itself to the law only conditionally.<sup>197</sup> In other words, the CCP is only rhetorically embracing legality while at the same time effectively dispensing with it. Even though departure from strict enforcement of written rules means a breach of legality under the presumption of legality, China is indeed operating under a new kind of legality whose definition of law is broader than just written rules.

Although the new conception of law is a destabilized one, legal institutions still perform important functions. Part of the purpose of incorporating the SCVs into legal judgments is indeed to strengthen courts themselves, making them more capable of rendering decisive decisions.<sup>198</sup> Insofar as the demand not to disregard the law is not just in public propaganda but also in authoritative official documents issued to the courts, such as the *Guiding Opinion*, there is reason to believe that promoting a certain kind of legality—albeit a destabilized and manipulated one—is still within the Party-state’s intention.<sup>199</sup>

Another concern is that the integration of the SCVs seems to be so far restricted within the normative state in opposition to the prerogative state (as defined by the dual state theory).<sup>200</sup> Although the number of cases citing the SCVs has increased drastically over the past two years, we have not yet seen “extraordinary” cases with strong political sensitivity being decided under the new norm.<sup>201</sup> Some might argue that this means that the new form of legality does nothing more than provide another example of how the prerogative state encroaches the normative state in accordance with the dual state theory. Admittedly, as the integration of the SCVs is still a relatively new project; close monitoring of future development is needed to fully respond to this concern. However, the new form of legality does have the potentiality of breaking through the dualistic distinction between the normative and the prerogative states. If we treat the integration of the formerly extralegal commitments into the very definition of law as the hallmark of this new form of legality, we can see its application in politically sensitive areas, such as national security, and in Xinjiang and Hong Kong, where the Party-state introduced law and used legal

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197. Pils, *supra* note 2.

198. See discussion *supra* Section II.A.2.

199. See discussion *supra* Section II.A.1.

200. See discussion *supra* note 87 and accompanying text.

201. See *supra* notes 32–34 and accompanying text.

institutions to exercise relatively unrestrained power.<sup>202</sup> In doing so, the Party-state has appealed to norms such as national security and used law to express these norms, often in a breach of rule of law values.<sup>203</sup> Though this is beyond the scope of this Note, this new form of legality, defined by the project of incorporating the SCVs into legal judgment, might well go beyond the project itself and explain other developments in the “prerogative state.”

## 2. Moralism and Authoritarian Law

The fusion of distinctively moralistic norms into legal forms is at the core of this new mode of authoritarian legality. Authoritarian regimes may or may not have rule of law, but they cannot be seen as normless societies. As China’s massive project to push the SCVs into social consciousness indicates, authoritarian regimes often do need to build a norm-based social order besides mere coercion. The integration of the SCVs into legal judgments is essentially an attempt to legalize those state-imposed moralistic norms by making them the inner normative core of the legal system to which any given decision should conform. Under this new form of authoritarian legality, there is no inherent distinction between law and norms. This conforms to the tendency that authoritarian governments frame a variety of values into quintessentially moral requirements. Under the SCVs, various aspects of social values, from friendship to patriotism, are taken to be moral virtues in the first place.<sup>204</sup> This tendency is indeed global. Russia clearly represents this phenomenon, as the Putin regime has promoted

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202. China has introduced the National Security Law in Hong Kong, granting itself broad power to crack down the dissents on a variety of political crimes under vague definitions. See Javier C. Hernández, *Harsh Penalties, Vaguely Defined Crimes: Hong Kong’s Security Law Explained*, N.Y. TIMES (Oct. 11, 2021), <https://www.nytimes.com/2020/06/30/world/asia/hong-kong-security-law-explain.html> (last visited Dec. 12, 2023). China has also passed counter-terrorism law in conjunction with its political suppression in Xinjiang, legalizing its oppressive measure. See Ben Blanchard, *China Passes Controversial Counter-Terrorism Law*, REUTERS (Dec. 27, 2015, 11:49 PM), <https://www.reuters.com/article/us-china-security/china-passes-controversial-counter-terrorism-law-idUSKBN0UA07220151228> [<https://perma.cc/8XNC-JP52>].

203. For example, China explicitly referred to upholding the principle of “patriots governing Hong Kong” as the goal of the Hong Kong National Security Law. See PEOPLE’S DAILY (人民日报), “Aiguozhe Zhignag,” *Xianggang Caiyou Meihao Weilai* (“爱国者治港”，香港才有美好未来) [*Hong Kong Has Future Only If “Patriots Govern Hong Kong”*] (Mar. 13, 2021), [https://paper.people.com.cn/rmrb/html/2021-03/13/nw.D110000renmrb\\_20210313\\_1-02.htm](https://paper.people.com.cn/rmrb/html/2021-03/13/nw.D110000renmrb_20210313_1-02.htm) [<https://perma.cc/W34A-FJSV>].

204. See discussion *supra* Section I.A.2; see also *supra* notes 38–40 and accompanying text.

Russian Orthodox-based moralism as an important part of its global propaganda.<sup>205</sup> In the United States, far-right extremism has also often been associated with traditional morality and the maintenance of the ethical status quo.<sup>206</sup>

Morality always bears a close relation to law. But public morality, under a conception of the common good, can be easily manipulated by the powerful into conformism, intolerance, and moralism.<sup>207</sup> This opens the door for authoritarian regimes to insert substantive behavior codes into law in the name of morality for the purpose of social control. Again, this is not unique to China. Under the Nazi legal regime, criminal judges often appealed to the precepts of the regime, including the “moral sentiments” of the people.<sup>208</sup> Those departures from the prevailing statutory language “were rationalized in the most outspoken terms by the leading ‘legal theorists’ of the new regime.”<sup>209</sup> As German-Jewish lawyer and political theorist Ernst Fraenkel pointed out, the Nazi regime was a “theocracy without God,” prosecuting its opponents not as criminals but as heretics.<sup>210</sup> Even in societies upholding basic political liberties, like the United States, invocations of traditional moralistic discourses also destabilize the law.<sup>211</sup> With centralized orders, detailed guidance, and the participation of the entire judiciary as a bureaucratic system, China’s project of integrating the SCVs into legal judgments is perhaps the first-ever systematic attempt to actualize the legalization of authoritarian moralistic norms. In doing so, it offers a paradigmatic expression of a new model of authoritarian legality.

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205. See generally KRISTINA STOECKL & DMITRY UZLANER, *THE MORALIST INTERNATIONAL: RUSSIA IN THE GLOBAL CULTURE WARS* (2022) (arguing that the Russian state and Russian Orthodox Church have been engaging in a global moralistic culture war).

206. SEYMOUR MARTIN LIPSET & EARL RAAB, *THE POLITICS OF UNREASON: RIGHT-WING EXTREMISM IN AMERICA, 1790–1977*, at 3–4 (2d ed. 1978).

207. Lynne Henderson, *Authoritarianism and the Rule of Law*, *IND. L. J.* 379, 430 (1991) (“[Q]uite obviously the definition of public good historically has been determined by powerful and dominant elites, and it can easily be corrupted into conformism, intolerance, and moralism.”).

208. Stanley L. Paulson, *Lon L. Fuller, Gustav Radbruch, and the ‘Positivist’ Theses*, 13(3) *L. & PHIL.* 313, 332 (1994); see also JENS MEIERHENRICH, *THE REMNANTS OF THE RECHSSTAAT* 6 (2018).

209. Paulson, *supra* note 208, at 332.

210. Fraenkel, *supra* note 2, at 48–49.

211. See e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); see also Jill Elaine Hasday, *On Roe, Alito Cites a Judge Who Treated Women as Witches and Property*, *WASH. POST* (May 9, 2022, 5:00 PM), <https://www.washingtonpost.com/opinions/2022/05/09/alito-roe-sir-matthew-hale-misogynist> [<https://perma.cc/JY2Z-PJHV>].

## CONCLUSION

Scholars have debated whether China has embraced or disdained legality.<sup>212</sup> However, as the project of incorporating the SCVs into legal judgments demonstrates, the Party-state is transforming its conception of law itself and developing its own so-called “rule of law” accordingly. Law is now conceived to be an expression of the state-mandated norms of the SCVs, and the “rule of law” is hence the enforcement of those norms in the form of law. This novel change is not just a matter of linguistic dispute. It guides China’s judicial practice. As this ongoing experiment proceeds, law is not seen as a constraint upon what the authoritarian state must do but rather provides a vehicle for it to take actions and deliver messages according to its own interests and ideology in a forcible way. A wide range of governmental actions can be implemented, and authoritarian norms can be preached—all in the name of law. It is still unclear to what degree this judicial experiment as well as this new model of authoritarian legality can succeed, as the phenomenon this Note covers is still recent and less than fully mature. We need to pay close attention to its future developments, as examining this practice will help us better understand the nature of law under authoritarianism.

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212. For accounts arguing that China is disdaining the rule of law, see generally Carl F. Minzner, *China’s Turn Against Law*, 59 AM. J. COMP. L. 935 (2011) (arguing that the China undermined law and legal institutions for social stability); see also Pils, *supra* note 2 (arguing that China utilized law only in mundane matters with little political sensitivity). For an opposite account, see generally Zhang & Ginsburg, *supra* note 5.

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