

UCLA

UCLA Pacific Basin Law Journal

Title

Defamation, Invasion of Privacy, and the Press in the People's Republic of China

Permalink

<https://escholarship.org/uc/item/47j9n9s0>

Journal

UCLA Pacific Basin Law Journal, 11(2)

Author

Josephs, Hilary K.

Publication Date

1993

DOI

10.5070/P8112022039

Copyright Information

Copyright 1993 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at <https://escholarship.org/terms>

Peer reviewed

ARTICLES

DEFAMATION, INVASION OF PRIVACY, AND THE PRESS IN THE PEOPLE'S REPUBLIC OF CHINA

Hilary K. Josephs†

I. INTRODUCTION

The degree of media participation and reporting of the Democracy Movement demonstrations in the spring of 1989¹ distinguished the Movement from other incidents of civil unrest since 1949.² For perhaps the first time since the founding of the People's Republic of China, the news media reported on significant events not as the government leadership wished, but as they occurred. Because an independent press plays a critical role in the creation and maintenance of democratic political institutions, the Chinese media acts as an important element in the development of representative govern-

† Professor of Law, Syracuse University College of Law. The author would like to acknowledge the generous support of the Syracuse University College of Law and the U.S. Committee on Legal Education Exchange with China. The Institute of Law of the Chinese Academy of Social Sciences was most hospitable during a research visit in July 1992. To Zhang Xinbao, my mentor in the subject of Chinese tort law, and my research assistants Michael Laws and Josh McKniff I owe a debt of gratitude. However, all errors that remain are my own.

1. See generally Hilary K. Josephs, *The Chinese Democracy Movement in U.S. Perspective*, 10 UCLA PAC. BASIN L.J. 285 (1992).

2. See generally Seth Faison, *The Changing Role of the Chinese Media*, in THE CHINESE PEOPLE'S MOVEMENT: PERSPECTIVES ON SPRING 1989, at 145 (Tony Saich ed., 1990); Judy Polumbaum, *The Tribulations of China's Journalists After A Decade of Reform*, in VOICES OF CHINA 33 (Chin-Chuan Lee ed., 1990); Andrew G. Walder, *The Political Sociology of the Beijing Upheaval of 1989*, PROBS. OF COMMUNISM, Sept.-Oct. 1989, at 30; ANDREW J. NATHAN, CHINESE DEMOCRACY 152-92 (1986). The press had ambivalent feelings about the proposed enactment of a press law, on the one hand viewing it as a source of protection and on the other as a potential instrument of repression. The reasons for this ambivalence have been borne out by the issuance of administrative regulations which explicitly subject the press to registration requirements and prior restraints. See *First Provisions on Press Management Promulgated*, BBC Summary of World Broadcasts, Mar. 15, 1991, available in LEXIS, Nexis Library, BBCSWB File.

ment in the People's Republic.³

Numerous reasons account for the increasing outspokenness and prominence of the media in the 1980s. For instance, the government, under the leadership of a "reformist" faction since 1978, encouraged freer dissemination of information as a means of preventing the abuses of power and corruption of the sort that occurred during the Cultural Revolution. The torrent of criticism against "hardliners" or "leftists" that Deng Xiaoping encouraged to gain support for his own policies later proved uncontrollable. With their new freedom, the media also publicized the failings of the reformist program of development.⁴

The post-1978 economic reforms subsequently produced a commercial market for newsworthy events. As the system of centralized economic planning weakened and a market fringe developed throughout the economy, journalism became a money-making venture.⁵ The products of regional journalism found a market nationwide and even abroad.⁶ Editorial boards tested the constraints of government control if they thought that particular articles would sell copy.⁷ At the same time, newspapers and magazines became easier targets for libel and defamation suits since they now qualified as "deep pocket" defendants.

The growing independence of the media suffered a blow in the

3. See generally Martin King Whyte, *Prospects for Democratization in China*, PROBS. OF COMMUNISM, May-June 1992, at 58-59 (stating that factors important to democratization include modification of Communist Party's monopoly on power, ability of interest groups to organize and promote alternative policies, legal protection of individual rights, open elections, and autonomy of mass media). The author agrees with Professor Whyte that it is worthwhile to look for a trend toward democratization in China, even if the eventual outcome is not likely to be a Western-style democracy.

4. See Polumbaum, *supra* note 2, at 39-43.

5. See *id.* at 50-51.

6. For example, with respect to the three cases discussed later in this article, Yang Mo was a permanent resident of Beijing (living temporarily in Guangdong) but the offending article, *Yang Mo de Chulian* [*Yang Mo's First Love*], was published in Harbin; the story *Ershinian 'Feng Ni' Zhi Mi* [*The Twenty Year Old Riddle of the Mad Woman*] was originally published in Shanghai and later republished with a sequel in Liaoning; and Wang Meng's story *Jiaying de Xizhou* [*Hard Gruel*] was first published in China and later republished in Taiwan.

7. The pressure to obtain independent sources of revenue will only increase as the government withdraws subsidies from virtually all newspapers and journals. See *Ming Pao' Most Newspaper Subsidies to Be Abolished from 1994*, BBC Summary of World Broadcasts, Dec. 22, 1992, available in LEXIS, Nexis Library, BBCSWB File. Leading Chinese journalists see financial independence from the government as a necessary concomitant of editorial freedom. See Jin Zhong, *Qidai "Gua Shu Di Luo"*—*Fangwen Zhongguo Jizhe Dai Qing Xiaojie* [*Waiting for the Melon to Ripen and Fall from the Stem*]—*An Interview with Dai Qing*, KAIFANG [OPEN], Feb. 1993, at 42, 43 [hereinafter *Interview with Dai Qing*]; Zhenggu Baozhi Duli—*Shanghai Jizhe Zhang Weiguo Tan Xinwenye Minyinghua* [*The Struggle for Press Independence—An Interview with Shanghai Journalist Zhang Weiguo About Popular Management of Journalism*], KAIFANG, Feb. 1993, at 32.

aftermath of the Democracy Movement. Journalists who had supported the demonstrations and criticized the government were arrested or dismissed from their jobs and anti-establishment newspapers like the *World Economic Herald* in Shanghai were closed down.⁸ Even before the Democracy Movement, new constraints on the media had already emerged in the form of defamation suits (both civil and criminal defamation) against reporters and the newspapers or journals that employed them.⁹

Lower court decisions published within the last five years in *Zuigao Renmin Fayuan Gongbao* ("Gazette of the Supreme People's Court"), which carry quasi-precedential value in the law,¹⁰ nearly all hold against media defendants.¹¹ Shanghai has been a frequent venue for defamation suits because of the amount of investigative reporting done there.¹² While the suits brought in Shanghai have

8. See Polumbaum, *supra* note 2, at 66-68. At the time of this writing, the atmosphere is notably less repressive than it was three years ago, in terms of the sheer number of publications in circulation, the range of subject matter, and decreased surveillance of foreign reporters. See, e.g., Nicholas D. Kristof, *Political Jargon, China's Barometer, Shows Clear Skies for Art and Sex*, N.Y. TIMES, Feb. 24, 1993, at C13; Xu Xing, *Xinwen You le Shangye Ziyou [Journalism Has Commercial Freedom]*, KAIFANG, Feb. 1993, at 24. However, the government has continued to close down publications which directly call for greater political reform or feature material which is too sexually explicit. See, e.g., *Official Journal Closed for Publishing Pro-Democracy Articles*, BBC Summary of World Broadcasts, Jan. 8, 1993, available in LEXIS, Nexis Library, BBCSWB File; *Ruanxing Tiaozhan Dangxing [A Soft Challenge to the Party Spirit]*, KAIFANG, Feb. 1993, at 28.

9. See *Writers Need Protection from Plague of Lawsuits*, CHINA DAILY, Jan. 18, 1989, at 4.

10. See Liu Nanping, *An Ignored Source of Chinese Law: The Gazette of the Supreme People's Court*, 5 CONN. J. INT'L L. 271, 302 (1989).

11. See, e.g., the Shen Yafu and Mou Chunlin case discussed *infra* part IV.A; Judgment of Mar. 19, 1991, Chishui Renmin Fayuan [Chishui Basic People's Court], ZUIGAO RENMIN FAYUAN GONGBAO [GAZETTE OF THE SUPREME PEOPLE'S COURT], June 20, 1992, at 60 (civil defamation case brought by Hu Jichao et al. against Liu Shouzhong and the *Zunyi Evening News*); Judgment of Oct. 27, 1988, Jingan Qu Renmin Fayuan [Jingan District Basic People's Court], ZUIGAO RENMIN FAYUAN GONGBAO, Dec. 20, 1990, at 28 (civil defamation suit brought by Xu Liang against the *Shanghai Culture and Arts Journal* and its reporter Zhao Weichang); Judgment of Mar. 3, 1990, Xiamen Zhongji Renmin Fayuan [Xiamen Intermediate People's Court], ZUIGAO RENMIN FAYUAN GONGBAO, June 20, 1990, at 27 (criminal defamation suit brought against Tang Min); Judgment of June 21, 1989, Tianjin Shi Zhongji Renmin Fayuan [Tianjin Intermediate People's Court], ZUIGAO RENMIN FAYUAN GONGBAO, June 20, 1990, at 30 (1990) (civil defamation case brought by Chen Xiuqin against the *Evening Daily* and Wei Xilin); Judgment of June 5, 1989, Hebei Sheng Gaoji Renmin Fayuan [Hebei High People's Court], ZUIGAO RENMIN FAYUAN GONGBAO, June 20, 1989, at 33 (civil defamation suit brought by Wang Faying against Liu Zhen and four magazines including *Woman's Literature*); Judgment of Oct. 8, 1987 (Shanghai Xinya Medical Rubber Factory v. Wujin Medical Facilities Factory), Qingan Qu Renmin Fayuan [Qingan District Basic People's Court], ZUIGAO RENMIN FAYUAN GONGBAO, Mar. 20, 1988, at 41 (involving action against a non-media defendant), discussed in Ye Lin, *The Tort System in China*, LAW & CONTEMP. PROBS., Summer 1989, at 143, 161-63 (product disparagement by a business competitor).

12. See *Guanyu Qin Hai Mingyuan Anjian You Guan Baokan She Ying Fou*

not succeeded in the majority of cases,¹³ libel litigation has markedly chilled investigative journalism.¹⁴ The growing power of the media, which surfaced in the 1980s, has been countered with new obstacles: reporters and editors now must be concerned not only with censorship,¹⁵ but also with the possibility of libel litigation. The media had gained a measure of financial and editorial independence from the government and the Party, but at the same time it came under attack from members of the general public who found themselves thrust involuntarily into the spotlight.

As with its economic reform policy generally, the Chinese government communicates a mixed message to the public. On the one hand, it placates the lower classes by allowing "yellow" journalism to flourish.¹⁶ This stance is consistent with the government's tolerance (even encouragement) of consumerism, which is intended to serve as a substitute for greater political participation. On the other hand, the government tries to maintain a high moral tone and ideological purity, at least in official publications such as *Renmin Ribao* ("People's Daily"). In this manner, as in other sectors of the economy, the government permits a "market fringe" to expand around a core of activity that remains under state control.¹⁷ It allows a pluralistic system of journalistic activity to operate, but in the future will only provide financial support for orthodox and politically respectable media players.

Although a developing country, China faces the same problems of "information control" as developed countries like the United

Liewei Beigao Ruhe Shiyong Guanxia Wenti de Pifu [Letter of Reply by the Supreme People's Court On Whether Publishers May Be Joined as Defendants in Defamation Suits and Where Jurisdiction Is Proper in Such Cases], ZUIGAO RENMIN FAYUAN GONGBAO, Mar. 20, 1988, at 32.

13. According to researchers at the Institute of Journalism, Chinese Academy of Social Sciences, only about one-third of plaintiffs suing newspapers or journals in the Huangpu District of Shanghai in 1987-88 (mainly defamation cases) were successful. Interview with researchers at the Institute of Journalism, Chinese Academy of Social Sciences, in Beijing, P.R.C. (July 15, 1992).

14. The same phenomenon may be observed in the United States, where the costs of merely defending against libel litigation, even if the plaintiffs are ultimately unsuccessful, are believed to have a chilling effect on the media. See ANTHONY LEWIS, *MAKE NO LAW* 226 (1991); RODNEY A. SMOLLA, *SUING THE PRESS* 5-6, 73-79 (1986).

15. Censorship by the Party and self-censorship by the media are described in the articles by Faison and Polumbaum, *supra* note 2; see also *infra* Appendix A.

16. In a surprise to some, the government has not banned the works of popular fiction writer Wang Shuo, who focuses mainly on lower-class urban society. Wang writes about the lives of salesmen, prostitutes, vagrants, workers, and alienated youth. See Sheryl WuDunn, *The Word From China's Kerouac: The Communists are Uncool*, N.Y. TIMES, Jan. 10, 1993, § 7 (Magazine), at 3.

The noted journalist Dai Qing has observed that popular literature with heavy sexual content should not be accepted as a substitute for frank political reportage. See *Interview with Dai Qing*, *supra* note 7, at 45.

17. HILARY K. JOSEPHS, *LABOR LAW IN CHINA: CHOICE AND RESPONSIBILITY* 7-8 (1990).

States. In the electronic age, the means of acquiring and disseminating information are diverse and widely available.¹⁸ The Chinese government is increasingly unable to monitor the flow of information through administrative checks and advance censorship.¹⁹ Rather than attempting to impose systematic censorship to hold the media in check, it may be more realistic for the government to resort to sporadic (and unpredictable) suppressions and to rely on the threat of litigation.

II. RECENT LEGAL DEVELOPMENTS, ESPECIALLY IN THE LAW OF PERSONALITY INTERESTS

The resurrection of the Chinese legal system in the 1980s ushered in a new emphasis on the dignity and autonomy of the individual and her right to retain the fruits of her labor. Official recognition of property (including intellectual property) and privacy rights were central to the economic reform movement, designed to spur entrepreneurial initiative and profit-seeking activities.²⁰ This vision of a society in which individual decision-making plays such a significant role differs strikingly from earlier social models, including both pre-modern China and China since 1949.²¹ Before and after 1949 China very much fitted the profile of an activist state, in which the state manages all activities and uses the law to implement its goals.²²

While the impact of this new social vision may be hard to measure,²³ there is no question that it has been cast in legal bronze. This development is particularly evident in the General Principles of Civil Law ("Civil Code"), which was adopted by the National

18. See Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CAL. L. REV. 1133, 1167 (1992).

19. This phenomenon may have been at issue in the Yang Mo case, discussed *infra* part IV.B. The changes in information technology brought on by the computer, the photocopier, and the fax machine should be contrasted to the situation of the 1970s. At that time, publishers of "underground" newspapers and periodicals were severely hampered by shortages of printing equipment and supplies. Further, the equipment that was available, such as mimeograph machines, was slow and cumbersome to use. See NATHAN, *supra* note 2, at 15.

20. In this respect, the development of the Chinese legal system resembles that of the United States, where privacy interests were also originally associated with private property interests. See Bezanson, *supra* note 18, at 1142 (in their landmark 1890 article on the right to privacy, Warren and Brandeis drew an analogy to private property).

21. See William Jones, *Sources of Chinese Obligation Law*, LAW & CONTEMP. PROBS., Summer 1989, at 69-70; Anthony Dicks, *The Chinese Legal System: Reforms in the Balance*, 119 CHINA Q. 540 (1989).

22. See MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 71-96 (1986) (discussing prototypes of the "activist" state and the "reactive" state).

23. As William Jones wryly remarks, "[i]t is quite possible that the promulgation of the new Civil Code will prove to have been, in practical effect, a non-event." See Jones, *supra* note 21, at 70-71.

People's Congress and became effective on January 1, 1987.²⁴ Although an individual's right to be free from "insult, libel, false charge or frame-up" had already been stated in Article 38 of the 1982 Constitution, under Chinese law the Constitution does not confer directly justiciable rights.²⁵ The right to sue for defamation essentially had to await the enactment of the Civil Code. Before that time, suits for defamation were rare.²⁶

The Civil Code recognized the citizen's rights to her name, likeness, and reputation,²⁷ and the right to definite remedies where a privacy violation is established.²⁸ In an extensive interpretive opinion issued by the Supreme People's Court in 1988,²⁹ the right to sue for defamation, invasion of privacy, or commercial appropriation received further support.³⁰

Another important legal development is the Administrative Litigation Law ("ALL"), which authorizes citizens to sue the government for deprivations of rights.³¹ In an important recent case filed before the Beijing Intermediate People's Court, a publishing house obtained the reversal of an order by the State Press and Publications Administration to close down operations.³² However, the

24. All references are to *General Principles of Civil Law of the People's Republic of China* (Whitmore Gray & Henry Ruiheng Zheng, trans.), LAW & CONTEMP. PROBS., Spring 1989, at 27 [hereinafter Civil Code].

25. See *Zuigao Renmin Fayuan Guanyu Zai Xingshi Panjuezhong Bu Yi Yuanyin Xianfa Zuo Lun Zui Kexing de Yiju de Fu Han* [Letter of Reply by the Supreme People's Court Regarding the Inappropriateness of Quoting the Constitution as the Basis for Deciding a Criminal Case and Imposing Penalty], in ZHONGHUA RENMIN GONGHEGUO FALÜ QUANSHU [COLLECTED LAWS OF THE PEOPLE'S REPUBLIC OF CHINA] 120 (Jilin People's Press 1989).

26. Anonymous interview at High People's Court, in Beijing, P.R.C. (July 9, 1992). The legal basis of these early suits is unclear.

27. See Civil Code, *supra* note 24, arts. 99-101. Article 101 further provides that "it is forbidden for anyone to damage the reputation of a citizen or a legal person by the use of slander, libel, or similar means."

28. See Civil Code, *supra* note 24, art. 120. Remedies include the right to obtain an injunction against continued infringement, to demand an apology, and to demand compensation for loss.

29. All references are to *Opinion (For Trial Use) of the Supreme People's Court on Questions Concerning the Implementation of the General Principles of Civil Law of the People's Republic of China* (Whitmore Gray & Henry Ruiheng Zheng, trans.), LAW & CONTEMP. PROBS., Spring 1989, at 59 [hereinafter *Opinion*].

30. See *id.* paras. 139-41.

31. See generally Susan Finder, *Like Throwing an Egg Against a Stone? Administrative Litigation in the People's Republic of China*, 3 J. CHINESE L. 1 (1989); Pitman B. Potter, *The Administrative Litigation Law of the P.R.C.*, 24 CHINESE L. & GOV'T 22 (Fall 1991) (English translation of the ALL at 22-34).

32. See *Press and Publications; First Major Press Legal Case Wound Up 'Satisfactorily'*, BBC Summary of World Broadcasts, Jan. 13, 1993, available in LEXIS, Nexis Library, BBCSWB File. Under Article 11(i) of the ALL, a citizen, legal person, or other organization may protest a license revocation or an order to suspend business activity. In this case, the authorities decided to close the publishing house because, among other things, it was publishing books with "problematic contents."

ALL does not offer complete protection. Suits against the Party are not authorized, nor can individuals seek judicial review of "rules of general application" (as opposed to "orders with specific application to individuals").³³ Of course, legal concern for individual privacy and reputation continues to coexist with highly invasive surveillance mechanisms; the power of the state over individual life has diminished but not disappeared.³⁴ China still lacks a Freedom of Information Act or privacy statutes, which enhance the individual's control of personal information.

Nonetheless, Chinese citizens increasingly resort to formal legal channels to vindicate harm to reputation or invasion of privacy. Some of the reasons for this phenomenon are probably quite similar to factors behind privacy litigation in the United States. One such factor is judicial receptiveness to libel litigation as a means of protecting the public against fraud and deception by the media.³⁵ Another contributing element in the rise of libel litigation is the individual's sense of powerlessness in modern mass society.³⁶ Contemporary media can appropriate matters of inside information or local gossip and broadcast them to a wide audience. Once information is revealed in this manner, aggrieved individuals must express outrage or seek vindication through equally public means.

Defamation and invasion of privacy cases account for a minor portion of the total civil docket, but have increased steadily since 1987.³⁷ Although pleadings filed in actual litigation tend to confuse the various causes of action, scholarly literature traces clearly defined categories which generally correspond to those in U.S. law.³⁸

33. See generally Pitman B. Potter, *Administrative Litigation and Political Rights in China*, HUM. RTS. TRIB., Summer 1992, at 4; Richard Dicker, *A Law for Change—with Loopholes*, HUM. RTS. TRIB., Summer 1992, at 7. By contrast, under U.S. law, administrative rules are subject to judicial review even prior to enforcement, unless review is clearly precluded by legislative intent. See PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 216-17 (1989).

34. See, e.g., U.S. DEP'T OF STATE, 102D CONG., 2D SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991, at 817 (Comm. Print 1992).

35. See SMOLLA, *supra* note 14, at 39-40. As the market fringe of the Chinese economy has expanded, and quality control enforced through the command economy has weakened, the legal system increasingly has become a protector of consumer interests. See generally Frederick R. Burke, *The Administrative Law of Standardization in the P.R.C.*, 1 J. CHINESE L. 271 (1987); Edward J. Epstein, *Tortious Liability for Defective Products in the People's Republic of China*, 2 J. CHINESE L. 285 (1988). In the Shen Yafu and Mou Chunlin case, translated *infra* Appendix A, the court appears disturbed not only by the injury to individual reputation but also by the deception practiced upon the public.

36. See SMOLLA, *supra* note 14, at 13.

37. For example, in Beijing municipality in 1991, only 40 privacy cases were tried in the court of first instance out of a total civil and criminal docket of more than 65,000 cases. Interview, *supra* note 26; see also *Supreme Court Work Report Recommends Judges with Chinese Characteristics*, BBC Summary of World Broadcasts, Apr. 17, 1992, available in LEXIS, Nexis Library, BBCSWB File.

38. For example, a distinction is recognized between defamation (the publication of

There are three types of commonly litigated cases, namely, product disparagement, quasi-biographical literary works ("faction"), and disputes between relatives or neighbors alleging invasion of privacy or misrepresentation.³⁹ The increased incidence of personal disputes litigated under either the law of personality interests or the ALL suggests that traditional forms of social control, such as neighborhood or workplace mediation, are no longer adequate to cope with "mundane" social conflicts. Another possible explanation is that grievants actively shop for optimal forums, and new forums have supplemented but not completely displaced traditional means of dispute resolution.⁴⁰

Although ordinary civil and criminal courts are separate in China, both criminal and civil liability may be imposed for defamation or invasion of privacy.⁴¹ If a complainant files a criminal case,⁴² the criminal court can also conduct the finding of fault and calculation of damages in the supplementary civil action.⁴³ In determining whether to direct a privacy complaint through the criminal process, the civil process, or both contemporaneously,⁴⁴ the

untruths) and invasion of privacy (revelation of true but embarrassing information). See Zhang Xinbao, *Yinsiquan Yanjiu* [*The Right to Privacy*], FAXUE YANJIU [LEGAL RESEARCH], June 23, 1990, at 56, 65-66.

39. The last category is the most common of the three in Beijing. Interview, *supra* note 26. One representative case described to the author arose when a woman repeatedly made harassing telephone calls to another woman she suspected as responsible for the breakup of her marriage. In fact, the victim of the harassment was not the former husband's paramour. The trial court awarded the plaintiff 1500 yuan (approximately U.S. \$300) for emotional distress, and also ordered the defendant to make an apology.

40. See Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869, 882 (1988). In the Yang Mo case, discussed *infra* part IV.B, the victim first sought redress through her Party connections before instituting a lawsuit. In the Wang Meng case, discussed *infra* part IV.C, Wang pursued a complaint both through Party channels and the courts.

41. See *Xingfa* [Criminal Code], art. 145, ZHONGHUA RENMIN GONGHEGUO FALÜ HUIBIAN 1979-1984, at 98, 124 (1984) (P.R.C.), translated in THE CRIMINAL LAW AND THE CRIMINAL PROCEDURE LAW OF CHINA 9, 51 (Jerome A. Cohen et al. trans., Foreign Languages Press 1984). In the United States as well, both civil and criminal liability may arise from defamation or invasion of privacy. See SMOLLA, *supra* note 14, at 37 (discussing criminal libel); SHELDON W. HALPERN, THE LAW OF DEFACTION, PRIVACY, PUBLICITY AND "MORAL RIGHTS": CASES AND MATERIALS ON PROTECTION OF PERSONALITY INTERESTS 401-02 (1988) (discussing New York Civil Rights Law).

42. A criminal defamation case is usually initiated after complaint by a private party. See Criminal Code, *supra* note 41, art. 145; *Xingshi Susongfa* [Criminal Procedure Code], arts. 53-54 (supplementary civil actions), ZHONGHUA RENMIN GONGHEGUO FALÜ HUIBIAN 1979-1984, at 133, 145 (1984) (P.R.C.), translated in THE CRIMINAL LAW AND THE CRIMINAL PROCEDURE LAW OF CHINA 115, 131 (Jerome A. Cohen et al. trans., Foreign Languages Press 1984).

43. See, e.g., discussion *infra* part IV.A.

44. Although this decision is partly made by the complainant, a court has discretion in determining the proper approach to a case. A judge sits at the reception desk of the courts to direct complainants to the appropriate forum. Interview, *supra* note 26.

courts generally rely on the following factors: the degree of fault or malice, the scope of the harm caused by the defendant's actions (*i.e.*, how widely broadcasted was the defamation),⁴⁵ and the seriousness of the harm caused by defendant.⁴⁶ Complainants may recover actual damages, such as medical expenses and lost income, as well as damages for emotional distress. Normally, damages for emotional distress are separately unavailable under Chinese tort law.⁴⁷ Defamation actions are unusual since they allow a plaintiff to bring a separate claim for emotional harm. Although criminal penalties, including imprisonment or deprivation of rights, are authorized by law, they are rarely imposed.⁴⁸

III. A GENERAL COMPARISON BETWEEN CHINESE AND U.S. DEFAMATION LAWS

In both the United States and China, the development of the mass media and an explosion of sensational journalism appear to mark a historical divide. In each nation there is a transition from a society where family and community are the most important structures to a society that is more fragmented, divided, impersonal, and egalitarian.⁴⁹ To the privileged classes, defamation and invasion of privacy suits become instruments of defense against the "snooping" of the mass media, which seek to feed the appetite of the lower classes for scandal-mongering.⁵⁰

Defamation cases in China and the United States challenge the courts to balance constitutionally protected freedom of speech rights and individual privacy or reputation interests. In both societies, libel litigation may have cathartic value in airing controversies which were once fought outside of the public eye.⁵¹ In both coun-

45. The geographic scope of the defamation was a factor in the Shen Yafu and Mou Chunlin case discussed *infra* part IV.A.

46. In one case described to the author, criminal sanctions were prescribed against a defendant who posted numerous defamatory leaflets about a former girlfriend in public places. The woman's reputation was ruined and she lost her job. Interview, *supra* note 26.

47. See Ye Lin, *supra* note 11, at 159; WILLIAM C. JONES, BASIC PRINCIPLES OF CIVIL LAW IN CHINA 178 (1989).

48. In the Tang Min case, Judgment of Mar. 3, 1990, Xiamen Intermediate People's Court, ZUIGAO RENMIN FAYUAN GONGBAO, June 20, 1990, at 28, the defendant journalist was sentenced to one year of imprisonment and ordered to pay damages of 2000 yuan (approximately U.S. \$400). In the Shen Yafu and Mou Chunlin case discussed *infra* part IV.A, the defendant journalists were sentenced to deprivation of political rights and ordered to pay damages. In Beijing Municipality in 1991 there were only eleven cases of criminal defamation; in only two cases were the defendants sentenced to imprisonment. Interview, *supra* note 26.

49. On the U.S. experience, see Bezanson, *supra* note 18, at 1137-43.

50. See *id.* at 1139. In China this phenomenon is particularly evident in the "faction" cases, discussed *infra* part IV.B.

51. See discussion of the Wang Meng case, *infra* part IV.C. Cf. SMOLLA, *supra* note 14, at 200, 231.

tries privacy plaintiffs may be awarded remedies of apology and damages, unlike certain European countries where only apology is available.⁵²

However, the "constitutionalization" of U.S. defamation law since the Supreme Court decided *New York Times Co. v. Sullivan*⁵³ in 1964 has made it hard to collect damages in invasion of privacy and defamation actions.⁵⁴ For example, it is exceedingly difficult for "public figure" plaintiffs to recover.⁵⁵ Furthermore, statements of "opinion" (as opposed to "fact") are not actionable.⁵⁶ In addition, a reporter has no duty to check a source of factual information that appears to be reliable.⁵⁷ Various absolute or limited common law immunities exist for certain classes of individuals (e.g., government officials) or for particular situations (e.g., legislative or judicial proceedings).⁵⁸ The constitutionalization of U.S. defamation law developed from and reinforced the common law privilege of fair comment.⁵⁹

Partly because it is in an earlier stage of development more like that of the United States a century ago, the Chinese legal system favors individual reputation interests over free speech rights. Much like their American counterparts of a century ago, Chinese courts serve as standard bearers for moral values at a time when communitarian beliefs are in decline. The balance struck by Chinese defamation law is consistent with the country's present Constitution, which strongly reflects communitarian values and explicitly limits the exercise of individual rights and liberties.⁶⁰

Chinese law provides a privilege of fair comment⁶¹ but makes

52. See LEWIS, *supra* note 14, at 229. For discussion of damages under U.S. law, see SMOLLA, *supra* note 14, at 108 (special, general, and punitive damages). For discussion of damages under Chinese law, see Ye Lin, *supra* note 11, at 161-63.

53. 376 U.S. 254 (1964).

54. This is true notwithstanding the fact that the incidence of suits and the expense of defending against them have increased considerably since 1964. See SMOLLA, *supra* note 14, at 73-79. The trend of U.S. Supreme Court decisions in recent years has tilted towards protection of individual reputation and privacy. *Id.* at 255.

55. On the public figure/private figure distinction, see LEWIS, *supra* note 14, at 183-99; SMOLLA, *supra* note 14, at 57-60.

56. On the opinion/fact distinction, see SMOLLA, *supra* note 14, at 60-66, 96-97 (discussing the wide berth given the media in defamation cases even where "facts" are involved).

57. See *id.* at 67-68 (discussing *St. Amant v. Thompson*, 390 U.S. 727 (1968)). This point contrasts with the Chinese approach, discussed in connection with the Shen Yafu and Mou Chunlin case, *infra* part IV.A.

58. See HALPERN, *supra* note 41, at 157-225.

59. See *id.* at 70 (excerpt from *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc)).

60. See Josephs, *supra* note 1, at 312-13; see also discussion of the Shen Yafu and Mou Chunlin case *infra* part IV.C.

61. See discussion *infra* part IV.C.

no distinction between public and private figures.⁶² Therefore, in addition to the criminal penalties available to punish "counterrevolutionary incitement," government officials may invoke the law of defamation to keep false and humiliating "private" information out of the public eye even if such information arguably relates to their fitness to govern.⁶³

IV. THREE REPRESENTATIVE CASES

Each of the three cases selected for detailed discussion in this section illustrates a particular category of defamation or invasion of privacy litigation. The case against Shen Yafu and Mou Chunlin arose out of the aggressive investigative journalism of the 1980s, which tried to rectify the wrongs of the past. The case represents an essentially private domestic dispute which resisted resolution through informal means and eventually was tried in the formal justice system. The case of Yang Mo exemplifies suits by celebrities against the publication of unauthorized biographies. The case of Wang Meng demonstrates the innovative use of litigation as a weapon in political controversies. Wang Meng, a political outsider, used the media and the courts to challenge the Party leadership and fully profited from the shield provided by public opinion.

A. THE CRIMINAL DEFAMATION CASE AGAINST SHEN YAFU AND MOU CHUNLIN⁶⁴

This landmark case marks the first criminal defamation judgment against reporters (and indirectly against their publisher, who paid the damages) since the founding of the People's Republic of China.⁶⁵ The forum for the offending article, *Minzhu yu Fazhi* ("Democracy and the Legal System"), is a popular Shanghai magazine addressing legal, social, and political issues.⁶⁶ The magazine apparently fought the lawsuit vigorously; for example it published articles by legal and medical experts vindicating its original decision

62. See Zhang, *supra* note 38, at 64.

63. Generally, in the past public officials in China have not "stooped" to bringing defamation suits. Interview, *supra* note 26 (discussing "National Enquirer-type" exposés of Prime Minister Li Peng's private life). However, this was once true of public officials in the U.S. as well, and the situation in America has now changed. See SMOLLA, *supra* note 14, at 16-17.

64. Judgment of June 29, 1987, Changning Qu Renmin Fayuan [Changning District Basic People's Court], ZUIGAO RENMIN FAYUAN GONGBAO, June 20, 1988, at 42; translated *infra* Appendix A. Suit was brought in the court of first instance in January 1985. After the court's attempts at mediation proved unavailing, the court rendered its decision.

65. See Zhu Huarong & Yang Cheng, *Ruci Xianli Zhide Yi Lun*, [A Precedent Worthy of Discussion], MINZHU YU FAZHI, Aug. 12, 1988, at 36.

66. See Mark Sidel, *Recent and Noteworthy Legal Works Published in China*, 1 J. CHINESE L. 251 (1987).

to publish the article that led to the complaint.⁶⁷

A conference of criminal law experts flatly disagreed with the court's decision to impose upon the two reporters both the criminal penalty of deprivation of political rights⁶⁸ and civil liability for damages.⁶⁹ The experts concluded that the reporters certainly did not have criminal intent. The reporters had conducted a thorough factual investigation in writing the article, and produced ample evidence to support their implied conclusion. Furthermore, the story had originally been published with the approval of the Propaganda Department of the Shanghai Municipal Party Committee, and thus not, as the court asserts, in defiance of superior authority.⁷⁰

The case arose from an article entitled *Ershinian 'Feng Nü' Zhi Mi* ("The Twenty Year Old Riddle of the Mad Woman"), published in 1983.⁷¹ According to the article, Du Rong (named Tu Yong in the article) had wanted to change his official residence from Wuhan to Shanghai.⁷² In order to have a legitimate reason for the move, he coerced his wife Di Zhenzhi (named Tian Zhenzhu in the article) to feign mental illness, and had her hospitalized on two occasions. Du Rong succeeded in moving to Shanghai to care for his "sick" wife.

The article further alleged that about ten years later, after their marriage had deteriorated, Du Rong had Di committed to a mental hospital for the third time, for a period of three months. To clear her reputation, Di approached a number of publications over the years, including the citizens' complaint department of the *People's*

67. See Jia Yicheng, *Wo Dui 'Feng Nü' Anjian de Huiyi yu Tihui* [My Recollection and Understanding of the Case of the Mad Woman], MINZHU YU FAZHI, Sept. 12, 1988, at 22 (article by psychiatrist); *Shi Fou Goucheng Feibang Zui? (Quan Guo Zhuming Xingfa Xuejia Zai Beijing Daxue Zuo Tan 'Feng Nü' Yi An)* [Did the Defendants' Conduct Constitute Criminal Defamation? (report of a conference of legal experts)], MINZHU YU FAZHI, Sept. 12, 1988, at 25 [hereinafter *Did the Defendants' Conduct Constitute Criminal Defamation?*].

68. See Criminal Code, *supra* note 41, art. 29.

69. See *Did the Defendants' Conduct Constitute Criminal Defamation?*, *supra* note 67.

70. In the author's discussion of the case with one of the academic experts who participated in the conference, the expert noted that courts sometimes defer to the opinion of scholars and sometimes do not, even though China is a civil law jurisdiction where scholars have higher professional status than judges. Anonymous interview with legal scholar who participated in criminal law conference on the *Riddle of the Mad Woman* case, in Beijing, P.R.C. (July 15, 1992).

71. See *Ershinian 'Feng Nü' Zhi Mi* [The Twenty Year Old Riddle of the Madwoman], MINZHU YU FAZHI, Jan. 1983, at 28.

72. The physical mobility of individuals in China is severely restricted by the household registration system, which requires each person to maintain an official place of residence recorded with the local police. See MARTIN KING WHYTE & WILLIAM L. PARISH, *URBAN LIFE IN CONTEMPORARY CHINA* 17-19 (1984). It is extraordinarily difficult to obtain permission to move to one of the major metropolitan areas, such as Shanghai, even if one is already living in another large city. It is not uncommon for husbands and wives to be assigned to jobs in different cities.

Daily.⁷³ The *People's Daily* asked Di's employer to investigate her complaints. The employer produced a detailed report which did not confirm Di's allegations.

Shen Yafu and Mou Chunlin examined the employer's investigation and uncovered discrepancies that tended to bear out Di's claim that she had no history of mental illness prior to her first hospitalization. This evidence indicates that Di had never been mentally ill. For example, the record of disciplinary violations in her employment file was fabricated. According to other sources, Di had been disciplined as punishment for refusing the advances of a Communist Youth League member. Shen and Mou interviewed various people who had known Di well and who said that her behavior was in no way abnormal. On the contrary, these people supported Di's claims that her husband had physically abused her.⁷⁴

As indicated by the title, the story presents an enigma to be solved. The authors do not explicitly say that the wife's version of events is the correct version.⁷⁵ For the most part, the narration of past events is in Di's own words. At the time of her interview with Shen and Mou, Di was on long-term sick leave from her job, and was living apart from her husband out of fear of being murdered or driven to suicide. The reporters also interviewed Di's husband. He never stated unequivocally that Di was mentally ill, but rather claimed that she had persecuted him out of groundless suspicion of his infidelity. The story concludes as follows: "We truly hope that the appropriate authorities, in the spirit of the Twelfth Party Congress, review their own work and diligently sort out the facts of this long unresolved mystery! Let they who are deserving of punishment remain no longer outside the law!"⁷⁶

The article drew a strong response from the magazine's readers, who demanded that the husband be criminally prosecuted.⁷⁷ The magazine did not publish any letters supporting the husband, nor did it indicate that any such letters were received. Shen and Mou followed up with a story entitled *Reader Fascination with the 'Riddle of the Mad Woman.'* This story appeared in the December 1983 issue of another magazine in Liaoning Province, together with a reprint of the original article. The case report dwells on this point

73. Government and Party organs maintain "letter and visit" offices where ordinary citizens can submit complaints with a minimum of formality. Since the late 1970s, newspapers and magazines have played a particularly active role in investigating and publicizing injustices that were neglected by the administrative bureaucracy and the courts. See JOSEPHS, *supra* note 17, at 102-03, 112, 122 and sources cited therein.

74. See *Tian Zhenzhu Shi Feng Nü Ma? [Is Tian Zhenzhu a Madwoman?]*, MINZHU YU FAZHI, Feb. 1983, at 11.

75. See Zhu & Yang, *supra* note 65, at 36.

76. See *Is Tian Zhenzhu a Madwoman?*, *supra* note 74, at 13.

77. Letters to the editor were published in the February, March, and April 1983 issues of *Democracy and the Legal System*.

perhaps because control of the channels of information lies mainly with the local Party committees. When journalists publish in another area of the country, the ability of the local Party apparatus to monitor the media within its sphere of authority is undermined.⁷⁸

The popular appeal of the story is evident from readers' letters to the editor. To the readers Di was another victim of the Cultural Revolution (which had ended less than ten years before the article's publication), during which many people were murdered, imprisoned, or driven to suicide for political reasons. Wrongs were committed during the Cultural Revolution not only by prominent people such as the Gang of Four, who were eventually tried and imprisoned, but also by ordinary citizens, who often escaped with little or no punishment.⁷⁹

Further, Di was perceived as the victim of a cruel husband who abused her physically and psychologically. Given the primitive state of psychiatric care in China, confinement to a mental hospital is tantamount to imprisonment.⁸⁰ Laws promulgated to protect women in Di's circumstances⁸¹ are not adequately enforced. An employer, or "work unit,"⁸² is supposed to look after the welfare of its employees as though they were members of an extended family. In this case, the employer did nothing to prevent or rectify the harm to Di. Equally ineffective was the informal system of social controls, which are usually implemented through "mediation" by neighborhood organizations, the company trade union, the Communist Youth League, and the Women's Federation. Of course, Di did not have an opportunity for formal redress during the Cultural Revolution, because the courts were closed and the regular system of justice did not operate.

Shen and Mou and their readers also implicitly blamed the *People's Daily*, the major government newspaper, for not carrying out the Party's policy of rectifying the misdeeds of the Cultural Revolution. Di's case deserved more than peremptory investigation, particularly since she lacked privileged access to Party chan-

78. The growth of a national market has affected local systems of autarkic control (exerted by local government and Party institutions) in other respects. For example, the household registration system is increasingly unable to deal with illegal migration, particularly from the countryside to urban areas. See JOSEPHS, *supra* note 17, at 146-47.

79. See NIEN CHENG, *LIFE AND DEATH IN SHANGHAI* 522 (1986).

80. For a report on the deplorable state of psychiatric care in China, see Zhu Yuan, *You Ru Long Zhong de Yeshou [Like Animals in a Cage]*, KAIFANG, Sept. 18, 1992, at 33. According to one expert cited in the article, rapid social change in contemporary China has contributed to an increased incidence of mental illness and suicide.

81. See XIANFA [Constitution] art. 48 (stating the principle of gender equality) (P.R.C.); *id.* art. 49 (prohibiting mistreatment of women); Criminal Code, *supra* note 41, art. 182 (prohibiting abuse of family members).

82. For a discussion of the importance of the work unit in the lives of its members, see WHYTE & PARISH, *supra* note 72, at 25-26.

nels. Uncorrected mistakes or distorted information recorded in her employment file would haunt her throughout her life.⁸³ Di's experience illustrates that China has not escaped its feudal past—modern bureaucrats are as indifferent to the sufferings of the masses as were their historical predecessors.⁸⁴

Approximately two years after publication of the article, Du Rong brought a suit for defamation and won in the court of first instance. The trial court apparently did not consider it significant that the names of the protagonists in the original story were changed, especially since the complainant was otherwise readily identifiable from context.⁸⁵ Shen was sentenced to a year and six months of deprivation of political rights; Mou received a similar sentence of one year.⁸⁶ Both were assessed damages for injury to Du's career.

On appeal to the Shanghai Intermediate People's Court, Shen and Mou claimed that their story was well-substantiated, that they did not have criminal intent in publishing it, and that they were entitled to free speech protection. The appellate court found that the record, especially the report by a panel of physicians who examined Di's medical history, provided ample evidence that she suffered from clinical paranoia. Although the Constitution does not provide directly justiciable rights, the appeals court considered the defendants' constitutional argument and rejected their claim of reporters' privilege. The court held that reporters have no greater right to free speech than do ordinary citizens.⁸⁷ Moreover, the court emphasized the limits on the exercise of free speech set forth in Articles 51 and 38 of the Constitution.⁸⁸

83. See ANDREW G. WALDER, *COMMUNIST NEOTRADITIONALISM: WORK AND AUTHORITY IN CHINESE INDUSTRY* 91-92 (1986).

84. An archetypal plot in traditional Chinese drama and fiction depicts the (presumably rare) official who exhibits great sympathy for ordinary folk and goes to great lengths to rectify longstanding injustices. See PATRICK HANAN, *THE CHINESE VERNACULAR STORY* 39-44, 72-74 (1981).

85. The result under U.S. law would be the same. See J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 4.10[G], at 4-55 (1993).

86. Deprivation of political rights meant that they could not publish their written work for the period of their sentence. However, since both men were near retirement age, their punishment was less severe than would otherwise appear. Interview, *supra* note 70.

87. As under U.S. law, the P.R.C. Constitution provides for both freedom of speech and of the press (literally, publication). Yet in both countries the courts have refused to accord greater or different rights to the media than to the public generally. See MELVILLE B. NIMMER, *FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT* § 2.08 (1984).

88. In a recent case brought under the ALL by Guo Luoji, a professor at Nanjing University, the court avoided but did not explicitly reject a constitutional argument. See Potter, *supra* note 31, at 5. These decisions suggest that courts do not consider constitutional interpretation as beyond the scope of their authority, even absent an explicit delegation of interpretive power. See Josephs, *supra* note 1, at 322-25.

Evidently both the trial court and the appeals court decided that the reporters could not escape liability for defamation by presenting the two sides of the story. Instead, the reporters would have needed conclusive proof that Di Zhenzhi's husband drove her to feign mental illness.⁸⁹ Shen and Mou therefore wrongfully relied on the testimony of a woman whose veracity was questionable. Perhaps the court regarded Di Zhenzhi as a crank, making the rounds of various agencies and newspapers until she finally received a sympathetic hearing. Because so many people had suffered during the Cultural Revolution, it was necessary at some point to close the investigation of an individual case. Besides, Di had already received a fair hearing from the *People's Daily*. Once the courts were reopened, Di neither brought nor even contemplated bringing criminal charges against her husband. Therefore, the court may have viewed the article with hostility as Di's effort to try her case in the newspapers.⁹⁰

Shen and Mou's inability to find documentary evidence of Du Rong's application for transfer to Shanghai did not permit them to invite liberal conjecture that he conjured up a false excuse. It is possible that Du's employer, a major steel company, exerted pressure behind the scenes on his behalf because of the negative publicity generated by the article.⁹¹ In light of the close relationship between the work unit and its employees, an attack on Du constituted an assault against the company. Also, if Du had fabricated an excuse to transfer jobs, his employer was directly implicated in his wrongdoing.⁹²

On the other hand, in this case the "objective" truth may have been impossible to establish since the husband and wife essentially contradicted each other on key facts known only to them.⁹³ The medical report so heavily relied upon by the court was based on stale records; Di was not rediagnosed or interviewed by the medical

89. This standard is much stricter than under U.S. law, which simply imposes on the reporter a duty to be "neutral" and "objective," i.e., to present both sides of a controversy. See HALPERN, *supra* note 41, at 197-204 (discussing *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir. 1977), *cert. denied* 434 U.S. 1002 (1977)).

90. See Judgment of June 29, 1987, Changning District Basic People's Court, ZUI-GAO RENMIN FAYUAN GONGBAO, June 20, 1988, at 42, 43 (spelling out the proper procedure for reversing an official diagnosis of mental illness).

91. See *id.* at 44.

92. For example, the employer could incur criminal liability by engaging in bribery or falsifying of documents. See Criminal Code, *supra* note 41, arts. 167 (forgery), 185 (bribery). There is no way of knowing whether the Shanghai court in making its decision or the Supreme People's Court in reprinting it was trying to prevent future investigative exposés against high officials. The case report reveals nothing on this score, and the courts would not disclose their motives even if asked. Interview, *supra* note 70.

93. See SMOLLA, *supra* note 14, at 198-237 (discussing *Westmoreland v. CBS*, 596 F.Supp. 1170 (S.D.N.Y. 1984)).

experts at the time of trial.⁹⁴ Di may have been *compos mentis* at the time of her first hospitalization but subsequently deteriorated into genuine mental illness because of her husband's mistreatment, institutional confinement, and the social stigma of madness. Whatever her mental state, she did not deserve her husband's abuse, of which there was ample eyewitness testimony.⁹⁵ In any event, the decision in this case discourages publication of articles where reporters cannot muster clear and convincing proof of any allegations made.

B. THE CIVIL DEFAMATION CASE BROUGHT BY YANG MO AGAINST FICTION CIRCLE

The magazine *Democracy and the Legal System*, placed on the defensive in the Shen Yafu and Mou Chunlin case,⁹⁶ took the offensive against irresponsible journalism in the Yang Mo case.⁹⁷ Yang Mo's suit against a journal which published an unauthorized biography of her was perhaps the most notorious of a series of cases involving docu-fiction, or "faction" (in Chinese, *jishi wenxue*).⁹⁸ In U.S. free speech jurisprudence, faction and docu-drama present one of the most controversial issues: may the media dramatize real life people and events, even though the process inevitably involves manufacturing certain facts? Or is the media required to adhere strictly to historical record, even at the sacrifice of literary interest?⁹⁹

The issue is even more complicated from the Chinese point of

94. See Zhu & Yang, *supra* note 65, at 36.

95. See *Is Tian Zhenzhu a Madwoman?*, *supra* note 74, at 11, 13.

96. For another defamation case brought against *Democracy and the Legal System*, see materials commenting on the Li Baoshan case: Shi Shenyuan & Gu Ershi, *Yi Ge 'Wenge' Youling Zai Zheli Youdang [A 'Ghost' from the Cultural Revolution Still Wanders Here]*, MINZHU YU FAZHI, Oct. 1986, at 10; Shi & Gu, *Zai Tan 'Yi Ge Wenge Youling Zai Zheli Youdang' [A Sequel to 'A Ghost from the Cultural Revolution']*, MINZHU YU FAZHI, Dec. 1986, at 8; Guanyu 'Li Baoshan Yi An de Zhenxiang' de Zhenxiang [*The Truth about 'The Truth Behind the Li Baoshan Case'*], MINZHU YU FAZHI, Apr. 12, 1988, at 37; 'Youling' Yi Wen Liang Zuoze Shi Fou Goucheng Feibang Zui? [*Did the Authors of 'A Ghost from the Cultural Revolution' Commit Criminal Defamation?*], MINZHU YU FAZHI, Apr. 12, 1988, at 39. This series of articles depicted factionalism within a Chinese company and its effect on group morale and productivity.

97. See Xu Ran, 'Yang Mo de Chulian' Shijian Zhenxiang [*The Truth Behind the Cause Célèbre of 'Yang Mo's First Love'*], MINZHU YU FAZHI, Mar. 12, 1987, at 4; Yang Mo Tongzhi, *Falü Zhichi Nil* [*Letters to the Editor: Comrade Yang Mo, the Law Will Support You!*], MINZHU YU FAZHI, Apr. 12, 1987, at 8.

98. See cases cited *supra* note 11. A second lawsuit brought by Yang Mo against the author and publisher of another "factional" article is reported in *Yang Mo Mingyuan Shou Qinfan Susong Huo Yi Shen Shengsu [Yang Mo Prevails in the Court of First Instance on Her Claim for Defamation]*, QIAO BAO [OVERSEAS CHINESE J.], Nov. 12, 1992, at 2 [hereinafter *Yang Mo Prevails*]. In this most recent case, Yang Mo was awarded an official apology and damages for emotional harm of 2500 yuan (approximately U.S. \$500).

99. See SMOLLA, *supra* note 14, at 132-33.

view because faction in Chinese historiography has produced some of the country's supreme works of classical literature, such as Sima Qian's *Historical Records*.¹⁰⁰ Over the centuries, faction has also created popular literature appealing to the taste for prurient gossip.¹⁰¹ To induce the reader to suspend disbelief, writers in many cultures have often used an autobiographical setting or a layer of historical fact. Even in the United States today, where fiction is an established and respected literary form, writers such as Norman Mailer and Tom Wolfe have used the documentary novel format. However, as the Yang Mo case illustrates, the documentary fiction writer in contemporary China has less latitude for invention than her American counterpart.¹⁰²

Yang Mo, now in her seventies and serving as a representative in the National People's Congress, is the author of a well-known quasi-autobiographical novel, *Qing Chun Zhi Ge* ("Song of Youth"), about the early Communist movement. The novel, later made into a film, became a popular sensation when published in 1957. In 1987, the Harbin periodical *Fiction Circle* published a story entitled *Yang Mo de Chulian* ("Yang Mo's First Love"). The story was based on an actual love affair of Yang Mo during the 1930s, which she herself described in *Song of Youth*. However, it embellished historical fact. The story "misrepresented" an unhappy relationship, which ultimately foundered on political differences, as sexually charged and otherwise idyllic.¹⁰³ The author and publisher of *Yang Mo's First Love* did not obtain Yang Mo's consent to publication, and did not comply with her demand to withdraw the allegedly defamatory issue from circulation. The story also carried Yang Mo's signature and photograph without her consent.¹⁰⁴

Yang Mo's daughter, acting on behalf of her aged mother, sought assistance from the China Writers' Association and the Beijing Writers' Association. These organizations, in turn, intervened with the Propaganda Department of the Heilongjiang Province

100. *Translated in part in* 1 & 2 BURTON WATSON, RECORDS OF THE GRAND HISTORIAN OF CHINA (1962). *See also* Denis Twitchett, *Problems of Chinese Biography*, in CONFUCIAN PERSONALITIES 24-39 (Arthur F. Wright & Denis Twitchett eds., 1962).

101. *See* HANAN, *supra* note 84, at 115-16 (story about Song dynasty poet and libertine Liu Yong).

102. *See* MCCARTHY, *supra* note 85, § 8.8[D][1], at 8-55, § 8.8[E][2], at 8-58 to -59.

103. According to a Chinese colleague, who has read *Song of Youth* and has seen the movie based on the book, the novel does not refer to nor explicitly describe the couple's sexual relations. The only racy feature of the novel is that the heroine lives with someone who is not her husband.

Under U.S. tort law, the wrong allegedly committed in this case would probably be characterized as false light invasion of privacy. *See* MCCARTHY, *supra* note 85, § 5.12, at 5-126. *Compare* Civil Code, *supra* note 24, art. 101 (right to reputation).

104. *See* Civil Code, *supra* note 24, arts. 99 (right to name), 100 (right to likeness); *see also* *Opinion*, *supra* note 29, paras. 139-41.

Party Committee. In response to an official Party inquiry, the magazine supplied false information that the story was based on factual material revealed to the author by Yang Mo and that Yang Mo had consented to publication. In fact, the author of the story had been part of a group that interviewed Yang Mo, but only about her early political activities. The author apparently also interviewed Yang Mo's former lover. *Fiction Circle* reneged on its promise to Yang Mo that it would publish an apology and stated falsely that Yang Mo had agreed to forego any legal action. The magazine also went back on assurances to prevent dissemination and sale of the offending issue. Therefore, because of the magazine's duplicitous behavior both before and after publication of the story, Yang Mo failed to obtain redress through her Party connections. Ultimately, Yang Mo sued the magazine for defamation and won.¹⁰⁵

Fiction Circle's initial interest in publishing *Yang Mo's First Love* and the lengths to which it went to avoid withdrawing the story from circulation say a great deal about the story's popular appeal. Yang Mo was only one of several early revolutionaries who explored the limits of sexual freedom. Mao Zedong himself was notorious for his relationships with women, including Jiang Qing, whom he eventually married.¹⁰⁶ However, once elevated to the pantheon of revolutionary saints, such individuals are not supposed to be made the butt of jokes or gossip.¹⁰⁷

Nonetheless, women currently appear to be the favorite subjects of sensational journalism. One possible reason is that women

105. According to Chinese sources, the opinion of the Heilongjiang court was not published, and therefore is not publicly available to either domestic or foreign researchers. Interview, *supra* note 26. One analysis of this case gently chides Yang Mo for not acting more quickly to assert her legal rights. If she had done so, a court might have issued an injunction to prevent dissemination of the offending story. See Zhang Peilin, *Yao Shanyu Xuan Yong Falü Wuqi Qu Zhansheng Weifa Xingwei* [One Should Be Adept at Using Legal Weapons to Achieve Victory over Illegal Conduct], MINZHU YU FAZHI, Apr. 12, 1987, at 9. Yang Mo has apparently overcome her initial reluctance to seek judicial remedies; see *Yang Mo Prevails*, *supra* note 98.

One suspects that since the story had originally slipped past the local Party censor, the Heilongjiang Party Committee was less than enthusiastic about investigating Yang Mo's complaint. It may be that the Party Committee preferred to shift the onus of resolving the matter to the courts.

106. Before her relationship with Mao, Jiang Qing, then a minor actress in Shanghai, is reputed to have had numerous love affairs. See, e.g., 'Gang of Four' Testimony Takes Up Love Letters; Sent by Mao's Widow, N.Y. TIMES, Dec. 2, 1980, at A9.

107. In the 1970s, a factory worker who told a joke about "a fair lady in the Forbidden City" was investigated by the police for having started a "counterrevolutionary" rumor against Jiang Qing. See WALDER, *supra* note 83, at 94; see also NATHAN, *supra* note 2, at 175-76.

Note that under U.S. law even the personal lives of public officials are considered relevant to their fitness to hold office. The sexual peccadilloes of elder statesmen, such as the late Congressman Wilbur Mills, have been fair game for media reports. U.S. courts are not so solicitous of public figures, who after all have volunteered for the spotlight and can use the media to rebut unflattering publicity.

constitute the primary audience for such material, and are eager for documentary fiction that portrays women as liberated from social convention. Another possible explanation is that women in the Party elite wield less power than their male counterparts (Jiang Qing having been something of an exception) and therefore make safer targets for journalistic exposés. Generally, Chinese society in recent years has been marked by a resurgence of sexual freedom, as part of a new emphasis on individual self-fulfillment.¹⁰⁸

One cannot know whether the Heilongjiang court considered the possibility that Yang Mo had waived her right of privacy by using her own life as raw material for her art. After all, the heroine of *Song of Youth* is depicted as having engaged in an extramarital relationship, largely based on Yang Mo's own experience. Whether a celebrity who lives her private life very publicly has waived her legal right to sue for invasion of privacy is an issue which has arisen under U.S. law but has not been definitively analyzed.¹⁰⁹

C. THE CIVIL DEFAMATION CASE BROUGHT BY WANG MENG AGAINST *WEN YI BAO* ("JOURNAL OF LITERATURE AND ART")

This case does not resemble any of the most frequently litigated categories of defamation suits brought in China.¹¹⁰ It is best characterized as a libel suit used as a forum for political debate.¹¹¹ In that sense, it is analogous to cases brought in the United States by victims of the McCarthy witch hunt.¹¹² Where factional struggles within the government or the Party once took place out of public view,¹¹³ today's protagonists, especially those who are out of favor with the current regime, unabashedly use the media and legal process to advance their political interests. Unlike Yang Mo, Wang Meng seems to revel in his opportunity to make a public spectacle

108. An American expert on the First Amendment has noted a correlation between a general trend towards personal narcissism, sexual explicitness in art, and the rise of defamation suits. See SMOLLA, *supra* note 14, at 20.

109. See *id.* at 131-34 (discussing lawsuit brought by the actress Elizabeth Taylor which was settled out of court).

110. See discussion *supra* notes 38-39 and accompanying text.

111. For general background on the Wang Meng case, see Nicholas D. Kristof, *Writer, Scolded, Plays His Ace With a Lawsuit*, N.Y. TIMES, Nov. 20, 1991, at A4; *Wang Meng Shangsü Beijing Zhongyuan [Wang Meng Files Suit in Beijing Intermediate Court]*, QIAO BAO, Nov. 4, 1991, at 20. On the subject of "political" libel cases in the United States, see SMOLLA, *supra* note 14, at 80-99 (discussing *Sharon v. Time, Inc.*, 599 F.Supp. 538 (S.D.N.Y. 1984)).

112. See SMOLLA, *supra* note 14, at 108; see also HALPERN, *supra* note 41, at 140-49 (Faulk v. Aware, 231 N.Y.S.2d 270, *modified*, 19 A.D.2d 464, 244 N.Y.S.2d 259 (1963), *aff'd*, 14 N.Y.2d 899 (1964), *cert. denied*, 380 U.S. 916 (1965)).

113. See NATHAN, *supra* note 2, at 175-77.

of the case.¹¹⁴ Publicity-seeking plaintiffs like Wang invariably lose in the courts. Nevertheless, they succeed in making the incumbent leadership look foolish.¹¹⁵ Even though his lawsuit did not succeed, Wang Meng is said to have prevailed in the court of public opinion, at least among writers and intellectuals.¹¹⁶

Wang Meng, like most leading Chinese intellectuals, has had a checkered career. Purged in 1957, he spent most of the next two decades in forced labor and internal exile. Politically rehabilitated in 1978, he was appointed Minister of Culture in 1986 and served in that post until he was dismissed after the June 4th suppression. However, Wang retained his seat on the Party Central Committee until October 1992.

Wang's defamation suit was occasioned by a letter to the editor published in the *Journal of Literature and Art*, a newspaper controlled by "hardliners."¹¹⁷ The letter found fault with a short story published by Wang Meng entitled *Jianying de Xizhou* ("Hard Gruel") for its being critical of Deng Xiaoping.¹¹⁸ It is unclear whether the letter indirectly attacks the policies of Deng Xiaoping or attempts to discredit a supposed supporter of Deng as disloyal. Wang's successor as Minister of Culture, the "hardliner" He Jingzhi, reportedly orchestrated the letter's publication.¹¹⁹

Wang Meng protested the letter through Party channels, and also filed a complaint against the *Journal of Literature and Art* and the anonymous author of the letter in the Beijing Intermediate People's Court.¹²⁰ In the suit he sought an official apology and dam-

114. The same is true of suits brought under the Administrative Litigation Law by well-known dissidents. See sources cited *supra* note 33.

115. One is reminded of the placards and wall posters of the Democracy Movement demonstrations, which used insulting language to caricature or revile the top leaders. See *CRIES FOR DEMOCRACY: WRITINGS AND SPEECHES FROM THE 1989 CHINESE DEMOCRACY MOVEMENT* 252, 292, 336 (Han Minzhu ed., 1990).

116. See sources cited *infra* note 119.

117. This group, which includes Prime Minister Li Peng, urged the use of force to suppress the Democracy Movement demonstrations and has advocated repressive policies since June 4th. See Nicholas D. Kristof, *Chinese Shake Up Top Party Group; Free Market Gains*, N.Y. TIMES, Oct. 20, 1992, at A1.

118. See *Duzhe Lai Xin* [Letter to the Editor], WEN YI BAO, Sept. 14, 1991, at 4. The story is reprinted in Wang Meng, *Jianying de Xizhou* [Hard Gruel], ZHONGGUO ZUOJIA [CHINESE AUTHORS], Feb. 1989, at 4-12.

119. See *Wang Meng Shijian yu He Jingzhi Xin Gongshi* [The Wang Meng Incident and He Jingzhi's New Offensive], ZHENGMING [CONTENTION], Dec. 1991, at 11; 'Cheng Ming' Claims He Jingzhi Behind Attack on Wang Meng's Story, BBC Summary of World Broadcasts, Dec. 10, 1991, available in LEXIS, Nexis Library, BBCSWB File [hereinafter *He Jingzhi Behind Attack*]. With another shift of the political winds in 1991-92, He Jingzhi himself has suffered a loss of power, although he nominally remains Minister of Culture. See Nicholas D. Kristof, *China Takes Jab at 'Leftists' and Nudges Economy*, N.Y. TIMES, Apr. 4, 1992, at A2.

120. For a copy of the "discussion draft" of the complaint, see *Minshi Qisu Zhuang* (Zhengqiu Yijian Gao), in *JIANYING DE XIZHOU* [HARD GRUEL] 126-30 (Cosmos Books Ltd. 1992) (a collection of materials on the case); see also the decision of the

ages of 10,000 yuan (approximately U.S. \$2000).¹²¹ The court rejected the case on the grounds that the letter expressed a "normal difference of opinion,"¹²² was not defamatory, and hence was not within the court's jurisdiction.

In his appellate brief¹²³ and its supplement,¹²⁴ Wang Meng attacks the decision of the intermediate court as politically motivated. His brief cites facts alleging that the editor of the *Journal of Literature and Art* used political influence to have the case rejected and knew what the decision would be before the court officially announced it.¹²⁵ Wang Meng also criticizes the intermediate court for its peremptory decision-making and failure to offer detailed justification for denying him his day in court. Nonetheless, the Beijing High People's Court affirmed the lower court's decision.¹²⁶

The story that provided fodder for this political controversy is actually fairly non-partisan in tone. Entitled *Hard Gruel*, it is a charming satire about a contemporary Chinese family's attempts to adjust to the winds of change. The story's narrator lives in an extended family household, a living situation that is quite exceptional nowadays, at least in urban areas. The oldest member of the house-

court, Judgment of Oct. 22, 1991, Beijing Intermediate People's Court, *in id.* at 131-32. In the lawsuit Wang Meng sought an official apology and damages of 10,000 yuan (approximately U.S. \$2000). The author has been informed that Wang Meng circulated copies of the "discussion draft" to gain publicity for his cause.

The author has reviewed a copy of the complaint that was actually filed with the court; it differs from the "discussion draft" in two significant respects. The tone of the "discussion draft" at times is more vehement and bombastic, as one would expect from a document intended as a kind of political manifesto. The use of a document generated as part of a legal proceeding to stage an ideological protest is certainly not unique to the Wang Meng case. For instance, the famous dissident Wei Jingsheng delivered his own defense at his trial for counterrevolutionary activities. See *Excerpts From Peking Trial Transcript*, N.Y. TIMES, Nov. 15, 1979, at A22; and Fox Butterfield, *China Dissident Likens Present to Repressive Past*, N.Y. TIMES, Nov. 15, 1979, at A22. The pleadings and appellate brief of Guo Luoji in his recent suit under the ALL also have this flavor. See ZHONGGUO RENQUAN XILIE BAOGAO [CHINA HUMAN RIGHTS REPORTS], XIANG RENMIN HUYU!: GUO LUOJI DE KONGGAO YU SHENSU [A CALL TO THE PEOPLE!: GUO LUOJI'S COMPLAINT AND APPEAL] (1992).

Another difference between the "discussion draft" and the actual complaint in the Wang Meng case is that the latter enumerates in greater detail the legal authority for the cause of the action, i.e., the Constitution, the Civil Code, and the Supreme Court Opinion. See discussion *supra* part II.

121. As compared with the other defamation cases discussed in this article, Wang Meng's claim for damages seems exorbitant, particularly since he did not present evidence of medical expenses incurred, lost book sales, or other consequential damages.

122. See *He Jingzhi Behind Attack*, *supra* note 119. For a discussion of the fair comment doctrine under U.S. law, see HALPERN, *supra* note 41, at 127-29.

123. Dated Oct. 29, 1991 (copy on file with the author).

124. Dated Nov. 1, 1991 (copy on file with the author).

125. Political manipulation of the judicial process is believed to be common in China. See Josephs, *supra* note 1, at 326 and source cited therein.

126. Civil Appeal No. 9 (1991) (copy on file with the author).

hold is the narrator's grandfather and the youngest is the narrator's teenage son.

At the story's beginning, the grandfather is the unquestioned head of the household, although he does not assert his power in a dictatorial manner. As far as the daily menu is concerned, real authority rests in the hands of the housekeeper, who has lived with the family for forty years and is treated as one of them. Every morning the entire family eats a traditional Chinese breakfast, which includes a kind of rice porridge. When the family patriarch decides that the family should adopt a more modern diet and more democratic methods of decision-making, the household is thrown into turmoil. The family tries Western-style breakfasts, with disastrous (though comic) health consequences, especially for the older members of the family. The housekeeper even has to be hospitalized.

The narrator, as a member of the "sandwich" generation whose lives were severely disrupted by the Cultural Revolution, says little during the course of this experiment but hopes for some reasonable compromise between tradition and modernization. At the end of the story, the negative consequences of the experiment have been attenuated by the break-up of the household. The old housekeeper dies, the teenage son grows up and moves out, and eventually the household is reduced to half its former size. An English friend who comes to stay with the family for a week has nothing but praise for the traditional Chinese breakfast: "Only in the ancient Far East would one find such a magical diet!"¹²⁷ The foreign observer, whose experience of China is brief and superficial, romanticizes Chinese culture as immutable and impervious to change.

The story satirizes both indiscriminate adoption of Western ways as well as mindless rejection of foreign influence, a longstanding dilemma in Chinese culture.¹²⁸ For this reason, both hardliners and reformers may find something to criticize in the story. The story also implies that the natural harmony that may have once existed within Chinese culture and the Party can no longer be maintained intact. Ironically, the family patriarch, who is portrayed in a sympathetic light, is the first member of the family to recognize the importance of adaptation and tolerance towards divergent points of view. One can easily view the family patriarch as a stand-in for Deng Xiaoping.¹²⁹

127. See *Hard Gruel*, *supra* note 118, at 12.

128. See generally ORVILLE SCHELL, *DISCOS AND DEMOCRACY* (1988).

129. It is important to note that *Hard Gruel* was published in early 1989, before Deng Xiaoping supported the use of force against the Democracy Movement demonstrations.

V. CONCLUSION

It would be simplistic to say that free speech flourished before Tiananmen and afterwards has gone into total eclipse.¹³⁰ Defamation suits both before and after June 1989 illustrate the risks inherent in investigative journalism and political dissent. Nonetheless, the Party's monopoly control over information and the ability of a dominant faction to suppress opposing views have been fatally undermined. The use of force against the Democracy Movement and acts of repression since that time have not changed this essential fact.

The defamation and invasion of privacy cases, including those discussed in this article, have been well publicized and therefore exert influence beyond their absolute numbers. Cases that are brought in major metropolitan areas like Beijing and Shanghai or that have some other connection to these cities, as in the case of Yang Mo, continue to attract media coverage. The frequent appearance of defamation and privacy decisions in the *Gazette of the Supreme People's Court* further highlight their importance.¹³¹

The Wang Meng case suggests an effort to move the stage for political dissent from the streets to the courts.¹³² Certainly the development of non-violent means of protest such as litigation in the courts, constitutes one hallmark of a democratic society and should be encouraged as part of the political transformation process. The refusal of the courts to hear these cases on the merits is regrettable, all the more so if the courts have been manipulated behind the scenes by the controlling Party faction. Nonetheless, it is understandable from an institutional perspective that the courts are reluctant to become embroiled in partisan political struggles by trying defamation and privacy cases.¹³³ At this point in its evolution, the

130. Polumbaum's discussion of the legislative history of the Demonstrations Law, which was passed in October 1989, explores the complex nuances behind the contemporary struggle for civil liberties in China. The proponents of free speech did have some tempering influence on the drafting of this highly repressive law. See Judy Polumbaum, *In the Name of Stability: Restrictions on the Right of Assembly in the People's Republic of China*, *AUS. J. OF CHINESE AFF.*, July 1991, at 43, 47-48, 52-53.

131. See discussion *supra* part I.

132. The Guo Luoji case provides further evidence of this phenomenon. See discussion *supra* part II.

133. In this context it is important to discuss a case recently brought under the ALL and reported in the *Gazette of the Supreme People's Court* that was won by the plaintiff on the merits. See Judgment of June 16, 1991, Lishui Xian Renmin Fayuan [Lishui County Basic People's Court], *ZUIGAO RENMIN FAYUAN GONGBAO*, June 20, 1992, at 62 (Chen Yingchun's refusal to accept the order of detention and investigation by the Lishui County Public Security Bureau).

Chen Yingchun, an 18 year-old typist, brought suit against the public security bureau of Lishui County, Shanxi for wrongful detention. Suspected of involvement in a criminal defamation case, she was lured into leaving her workplace by plainclothes police and forcibly detained for questioning for 24 days. After her release, she suffered a

Chinese judiciary may perceive a need to develop strength and independence in less controversial settings.

nervous breakdown and was hospitalized. The court of first instance determined that there were no substantive grounds for her detention, and that the security bureau had violated procedural requirements in apprehending Chen. She was awarded approximately 5000 yuan (U.S. \$960) in medical expenses and litigation costs. Chen's case afforded a more appropriate opportunity than the Wang Meng case for a court to exercise its institutional powers. First, the plaintiff was an ordinary citizen who had suffered abuse at the hands of the police and had no avenue of recourse outside the court system. Second, the plaintiff had demonstrated compensable injury. Third, the security bureau's seizure and holding of Chen violated State Council regulations that enumerated the situations where detention was permissible. Finally, the police had not followed proper procedure in taking Chen into custody.

APPENDIX A
CRIMINAL DEFAMATION CASE AGAINST
SHEN YAFU AND MOU CHUNLIN¹

Hilary K. Josephs

Complainant (and plaintiff in the civil action): Du Rong, male, 51 years old, cadre in the Marine Transport Department, Baoshan Steel Mill, Shanghai.

Attorneys for complainant: Zhang Guofei and Cheng Dawei, attorneys with the Shanghai No. 6 Legal Office.

Defendant: Shen Yafu, male, 61 years old, originally a reporter with *Democracy and the Legal System* publishing house.

Attorneys for defendant Shen: Ye Chuanhu, attorney with Shanghai United Law Firm, and Cao Hanyin, law intern² with the Shanghai United Law Firm.

Defendant: Mou Chunlin, male, 63 years old, originally a reporter with *Democracy and the Legal System* publishing house.

Attorneys for defendant Mou: Xue Ganhong and Pan Shouquan, law interns with the Shanghai United Law Firm.

On January 20, 1985, the complainant Du Rong brought suit in the People's Court of Changning District of Shanghai Municipality, charging that the defendants Shen Yafu and Mou Chunlin had defamed him with an article they had written. Complainant requested that criminal responsibility be imposed on them in accordance with law, and further that they compensate him for damages suffered due to their defamatory article.³ The People's Court of Changning District docketed the case, formed a collegial bench according to law, and held a public hearing. The court's factual findings are as follows.

Defendants Shen Yafu and Mou Chunlin jointly authored an

1. This Appendix is the author's translation of the opinion in the criminal defamation case against Shen Yafu and Mou Chunlin, in ZUIGAO RENMIN FAYUAN GONGBAO [GAZETTE OF THE SUPREME PEOPLE'S COURT], June 20, 1988, at 42.

2. A law intern is a person who has graduated university with a degree in law and is engaged in practical training with a law firm before taking the national bar examination. See Timothy A. Gelatt, *Lawyers in China: The Past Decade and Beyond*, 23 N.Y.U. J. INT'L L. & POL. 751, 759-60 (1991).

3. See *Xingshi Susongfa* [Criminal Procedure Code], arts. 53-54 (supplementary civil actions), ZHONGHUA RENMIN GONGHEGUO FALU HUIBIAN 1979-1984, at 133, 145 (1984) (P.R.C.), translated in THE CRIMINAL LAW AND THE CRIMINAL PROCEDURE LAW OF CHINA 115, 131 (Jerome A. Cohen et al. trans., Foreign Languages Press 1984).

article entitled *The Twenty Year Old Riddle of the Mad Woman*, which was published in the January 1983 issue of *Democracy and the Legal System*. In the spirit of "exposing to the public the full details of their investigation," the article alleged that Du Rong (called Tu⁴ Yong in the article) had used various means, including physical beatings, in order to compel his wife Di Zhenzhi (called Tian Zhenzhu in the article) to feign mental illness. Du's ulterior motive was to establish reasons for justifying a work transfer from Wuhan to Shanghai so that he could care for his wife. In February 1961 and March 1962, Du had his wife committed to a mental hospital. The article further alleged that after he succeeded in transferring to Shanghai, Du and his wife quarreled over his infidelities. Afraid that Di Zhenzhi would publicly expose his misconduct, Du had her committed to a mental hospital for the third time in March 1973. And so for twenty years, she suffered the stigma of being labeled mentally ill. The article appealed for Di Zhenzhi to be liberated from the suffering caused by this unresolved mystery, and for those deserving of punishment no longer to remain outside the law.

The publication of this article had pernicious effects. Numerous readers from all over the country, unaware of the true facts, wrote to *Democracy and the Legal System*. The readers condemned Du Rong, and strongly encouraged that he be prosecuted.⁵ Subsequently Shen Yafu and Mou Chunlin wrote a sequel entitled *Reader Fascination with the 'Riddle of the Mad Woman,'* which was published in Liaoning Province in the December 1983 issue of *Woman* magazine, together with a copy of the original article. Thus, the two reporters continued their defamation of Du Rong, causing serious harm to his character and reputation, making him unable to work normally, and causing him to suffer definite economic loss. Du Rong's daughter too was unjustifiably accused of wrongdoing because of the publication of these articles.

The court's investigation further revealed that Di Zhenzhi was indeed mentally ill; that Du Rong's transfer from Wuhan to Shanghai was normal and proper; and that Du Rong led a moral and upright private life.

The above-mentioned facts were supported by the complainant's allegations, the testimony of witnesses, documentary and material evidence, and an official certification of Di Zhenzhi's mental illness. The facts are clear and the evidence conclusive.

During the court proceedings, attorneys for Shen Yafu and

4. A surname which literally means "butcher."

5. See *Xingfa* [Criminal Code], art. 134 (prohibiting intentional injury to the person of another), ZHONGHUA RENMIN GONGHEGUO FALÜ HUIBIAN 1979-1984, at 98, 123 (1984) (P.R.C.), translated in *THE CRIMINAL LAW AND THE CRIMINAL PROCEDURE LAW OF CHINA* 9, 47-48 (Jerome A. Cohen et al. trans., Foreign Languages Press 1984); see also *id.* art. 182 (prohibiting abuse of family members).

Mou Chunlin moved for mediation.⁶ The collegial bench approved the motion and worked with both sides on numerous occasions to achieve a settlement, but the attempt at mediation failed. Accordingly, the collegial bench decided to adjudicate the case.

The court confirmed that defendants Shen Yafu and Mou Chunlin ignored the facts of Di Zhenzhi's illness. They violated regulations which require that the reversal of a diagnosis of mental illness must be accomplished through forensic certification. They rejected the warnings and advice of doctors involved in the case, their colleagues, neighbors of the injured party, the complainant's unit, and the magazine's department-in-charge.⁷ They intentionally fabricated and disseminated false information which sufficed to cause injury to the complainant Du Rong's character and reputation. Because of the odious means, the gravity of the circumstances, and the severe repercussions, their actions constitute criminal defamation under Art. 145, para. 1 of the Criminal Code.⁸ Because the defendants' conduct caused the injured party to suffer definite economic loss, they shall also bear responsibility for such loss in accordance with the circumstances pursuant to Art. 31 of the Criminal Code.⁹

To safeguard citizens' personal rights against invasion, the Changning district court issued the following decision on June 29, 1987: "Defendant Shen Yafu is guilty of criminal defamation and shall be deprived of political rights¹⁰ for a period of one year and six months. Defendant Mou Chunlin is also guilty of criminal defama-

6. In criminal cases initiated by a private citizen's complaint rather than through prosecutorial indictment, the court is empowered to resolve the case through mediation. See Criminal Procedure Code, *supra* note 3, arts. 13 & 127.

7. The Propaganda Department of the Shanghai Municipal Party Committee controls personnel appointments to the staff of local newspapers and magazines and reviews major articles before publication. See JOHN P. BURNS, *THE CHINESE COMMUNIST PARTY'S NOMENKLATURA SYSTEM* at xxvii (1989); ANDREW J. NATHAN, *CHINESE DEMOCRACY* 153-54 (1985).

8. The Criminal Code provides in pertinent part:

Whoever, by violence or other methods including the use of "big character posters" and "small character posters," publicly insults another person or trumps up facts to defame another person, when the circumstances are serious, is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention or deprivation of political rights.

Criminal Code, *supra* note 5, art. 145, para. 1.

9. The Criminal Code provides in pertinent part:

Where the victim has suffered economic loss as a result of a criminal act, the defendant, in addition to receiving criminal sanction according to law, shall in accordance with the circumstances be sentenced to make compensation for the economic loss.

Id. art. 31.

10. The Criminal Code provides in pertinent part:

Deprivation of political rights is deprivation of the following rights: 1. the right to elect and be elected; 2. the rights provided for in Art. 45 of the Constitution [freedom of speech, assembly, etc.]; 3. the right to hold a

tion and shall be deprived of political rights for a period of one year." The court separately determined Shen and Mou's liability in the supplementary civil action for Du Rong's economic loss.

After the decision of the court of first instance, defendants Shen Yafu and Mou Chunlin appealed the verdict to the Shanghai Intermediate People's Court. Defendants maintained their innocence for the following reasons: since there were objective facts to support their assertion that Du Rong compelled his wife to feign mental illness, they did not have the necessary criminal intent for defamation; the circumstances were not particularly serious; and furthermore the court should protect the lawful rights and interests of reporters.

The Shanghai Intermediate People's Court formed a collegial bench according to law and held a hearing. The court's factual findings are as follows. According to the records of the Shanghai Mental Hospital, Di Zhenzhi made more than fifty visits to the hospital between February 1961 and August 1974, and was hospitalized on three occasions. She was clearly diagnosed as mentally ill. During the proceedings in the court of first instance, the Shanghai Psychiatric Forensic Certification Group arranged for nine physicians to make a detailed study of her clinical history, and all nine concluded that she was mentally ill. Moreover, on May 15, 1985 they made an official finding that Di Zhenzhi suffered from paranoia. All of this evidence shows that the article's "revelation" that Du Rong forced his wife to feign mental illness was completely contrary to objective fact.

Before the article was published, Du Rong furnished the publisher with documentary material which explained the true circumstances. The reporter who originally interviewed Di Zhenzhi, a Mr. Zhai, told Shen Yafu that Di Zhenzhi had been mentally ill, but now asserted that she had feigned mental illness. Since the question of her sanity was still unclear, it would be better not to write the article. Neighbors and co-workers of both the husband and wife who were familiar with the background events clearly told the two reporters that Di was mentally ill. After the article was written, the department-in-charge of the magazine clearly stated that there was not enough evidence to negate a finding that Di was mentally ill, and the article could not be published. However, Shen Yafu and Mou Chunlin stubbornly clung to their own point of view. After they published the original article, they went even further by sending a sequel for publication, together with the original article, to a magazine outside of Shanghai.

position in state organs; and 4. the right to hold a leading position in any enterprise, institution or people's organization.

Du Rong had often been cited by his unit as a "model worker," and had never demonstrated any immoral behavior in his private life. After the article was published, numerous readers, who were unaware of the true facts, sent letters to *Democracy and the Legal System*, reviling Du as a "tyrant," a "new kind of hooligan," and "no better than a criminal who abuses his wife with blows of the fist and cudgel." These letters called for Du Rong to be criminally prosecuted. The negative publicity reached the point where Du Rong's unit had to take his photograph off the company honor roll, and his chances for promotion were ruined.

The evidence proves that Shen Yafu and Mou Chunlin not only had criminal intent in writing the article but also committed defamatory actions with serious consequences.

With respect to defendants' plea that their rights and interests as reporters be protected, the Shanghai Intermediate People's Court noted that it was true that according to the Constitution, the State protects freedom of speech and publication. However, reporters have no greater rights than other citizens. In the exercise of rights protected by the Constitution and other laws, reporters must practice the duties imposed by the Constitution and other laws. In other words, they must "not injure the interests of the State, society, and the collective nor the lawful freedoms and rights of other citizens";¹¹ they are "prohibited from using any means to insult, defame, falsely accuse, or frame another person."¹²

The Shanghai Intermediate People's Court determined that defendants Shen Yafu and Mou Chunlin had ignored evidence of Di Zhenzhi's mental illness. They rejected the advice of Du Rong's unit, individual witnesses, their colleagues, and the magazine's department-in-charge. They intentionally fabricated and disseminated false information, causing serious injury to Du Rong's character and reputation. Hence, they are guilty of criminal defamation. Their grounds for appeal have no merit. The punishment imposed on them by the court of first instance, based on the facts of their crime and the degree of harm caused by their conduct, is entirely appropriate. Accordingly, pursuant to Art. 136, para. 1 of the Criminal Procedure Code, the Intermediate People's Court rejected their appeal on April 11, 1988 and affirmed the original judgment.

11. XIANFA [Constitution] art. 51 (P.R.C.).

12. *Id.* art. 38.