ESSAY

MALPRACTICE MOBS: MEDICAL DISPUTE RESOLUTION IN CHINA

*Benjamin L. Liebman**

China has experienced a surge in medical disputes in recent years, on the streets and in the courts. Many disputes result in violence. Quantitative and qualitative empirical evidence of medical malpractice litigation and medical disputes in China reveals a dynamic in which the formal legal system operates in the shadow of protest and violence. The threat of violence leads hospitals to settle claims for more money than would be available in court and also influences how judges handle cases that do wind up in court. The detailed evidence regarding medical disputes presented in this Essay adds depth to existing understanding of institutional development in China, showing that increased innovation and competence are not providing greater authority for the courts. Despite thirty-four years of legal reforms and significant strengthening of legal institutions, the shadow of the law remains weak. Medical cases highlight largely unobserved trends in both law and governance in China, in particular state overresponsiveness to individual grievances. The findings presented here suggest limitations to contemporary understanding of both the functioning of the Chinese state and of the role of law in China, and add to existing literature on the nonconvergence of the Chinese system with existing models of legal and political development.

---

* Robert L. Lieff Professor of Law and Director, Center for Chinese Legal Studies, Columbia Law School. I am grateful to the outstanding team of research assistants who assisted on this project, and to the many people in China who shared their time and insights with me. I am also grateful to the numerous people who provided helpful comments on drafts of this paper and to participants in numerous workshops in which this paper was presented in China, the United States, and Europe.

The relevant portions of Chinese-language sources were translated into English by research assistants. These translations were then cite-checked by the staff of the *Columbia Law Review*. When a citation indicates that a Chinese-language source is on file with the *Columbia Law Review*, the relevant parts of both the original source and the translation are on file. Those sources without appropriate translations were substantively checked by a Chinese-reading staff member. Some Internet sources are no longer available online, so their weblinks have not been included in the citation. Due to the confidential nature of the interviews conducted in connection with this Essay, the *Columbia Law Review* does not have copies of the interview transcripts on file.

INTRODUCTION

Media accounts report a surge in medical disputes in China in recent years, on the streets and in the courts. Many disputes result in violence. In January 2011, family members of a deceased patient stabbed ten doctors in Shanghai, allegedly after a hospital denied treatment because

the family could not pay the cost.[1] In August 2011, newspaper accounts around the world described a brawl at Nanchang No. 1 Hospital in Jiangxi Province, in which thirty friends and relatives of a deceased patient clashed with scores of hospital staff, leaving fifteen injured.[2] The incident was notable because of the decision by hospital staff to fight back,[3] a sign of growing frustration about increasingly violent conflicts with patients and their families.

Available official data paint a grim picture. China's Ministry of Health reported 9,831 "grave incidents" of medical disputes in 2006, with 5,519 medical staff injured and property damage of 200 million yuan.[4] The total number of medical disputes doubled between 2006 and 2008, to more than one million per year, with each medical institution in China on average confronting forty disputes.[5] A report on an official media website[6] described medical disputes as "bloody conflicts concerning the accumulation of power in society" and stated that disputes increased

---

1. Li Mao, Shanghai Moves to Fix Medical Disputes, Global Times (Aug. 24, 2011), http://www.globaltimes.cn/NEWS/tabid/99/ID/672328/Shanghai-moves-to-fix-medical-disputes.aspx (on file with the *Columbia Law Review*); see also Shengkun Sun & Wei Wang, Violence Against Chinese Health-Care Workers, 377 Lancet 1747, 1747 (2011).

2. Barbara Demick, Hospital in China Fends Off Angry Mob, L.A. Times (Aug. 25, 2011), http://articles.latimes.com/2011/aug/25/world/la-fg-china-hospital-20110825 (on file with the *Columbia Law Review*); Zhao Wanlu, Nanchang Tongbao Diyi Yiyuan Yihuan Jiufen Dou'ou Shijian (南昌通报第一医院医患纠纷斗殴事件) [Nanchang Reports Hospital-Patient Dispute and Brawl at No. 1 Hospital], Dajiang Wang (大江网) [Dajiang Online] (Aug. 25, 2011), http://www.jxnews.com.cn/xxrb/system/2011/08/25/011755422.shtml (on file with the *Columbia Law Review*).

3. See infra Part III.A (describing violence in hospitals with hospital staff largely as victims).

4. At the time, roughly $26 million. Historical Rates for the Chinese Yuan Renminbi, Federal Reserve, http://www.federalreserve.gov/releases/h10/hist/dat00_ch.htm (on file with the *Columbia Law Review*) (last updated Oct. 29, 2012). One U.S. dollar equaled roughly 7.8 yuan in 2006. As this Essay goes to print, the exchange rate is roughly 6.2 yuan to one U.S. dollar. Id.

The volume of injuries and incidents was roughly double that reported four years earlier; the property damage figure represented a tripling from 2002. Zeng Liming, Zhongguo Qunian Fasheng Jin Wanqi Raoluan Yiliao Zhixu Shijian Shang Wuqian Ren (中国去年发生近万起扰乱医疗秩序事件伤五千人) [China Had Almost Ten Thousand Incidents Last Year Disturbing Orderly Medical Services and Leaving Five Thousand Injured], Zhongguo Xinwen She (中国新闻社) [China News Agency] (Apr. 18, 2007), available at http://news.hsw.cn/system/2007/04/18/005230555.shtml (on file with the *Columbia Law Review*). The Ministry does not appear to have made public similar data for subsequent years.

5. Zeng, supra note 4.

6. All major news websites in China are under the supervision of the Communist Party's Propaganda Department. See generally Benjamin L. Liebman, Watchdog or Demagogue? The Media in the Chinese Legal System, 105 Colum. L. Rev. 1, 17–23, 41–50 (2005) (discussing government control over media and content regulation).

by 70% at 350 surveyed hospitals over three years.[7] Violent protest has become common in both rural and urban hospitals.[8] In interviews, hospital officials, doctors, judges, health department officials, and lawyers all report that conflicts relating to medical care have become increasingly common and more difficult to resolve in the past decade.[9]

The volume of disputes has also increased in the courts. The Supreme People's Court (SPC)[10] reported that courts nationwide heard

7. Li Qiumeng, Zhengxie Weiyuan: Ying Jiada Daji Yinao Weihu Shehui Wending (政协委员: 应加大打击医闹维护社会稳定) [CPPCC Member: Hospital Protests Ought To Be Cracked Down On with Greater Force To Maintain Social Stability], Dongfang Wang (东方网) [Eastern Online] (Mar. 12, 2011), http://news.sohu.com/20110312/n279782428.shtml (on file with the *Columbia Law Review*). Local authorities likewise report a significant increase in the volume of medical disputes, including violent conflict, and in hospital payouts in recent years. Tang Lei & Liu Gang, Fujian Nanping Cheng Yinao Shifandi (福建南平成医闹示范地) [Nanping of Fujian Province Becomes Paradigm Case of Hospital Protests], Zhongguo Xinwen She (中国新闻社) [China News Agency] (July 7, 2009), http://www.chinanews.com.cn/jk/jk-hyxw/news/2009/07-07/1764262.shtml (on file with the *Columbia Law Review*). A series of studies of hospitals found that more than 70% of medical disputes resulted in disruptive behavior and that more than 40% of disputes involved violence. Xu Xin & Lu Rongrong, Baoli Yu Bu Xinren—Zhuanxing Zhongguo De Yiliao Baoli Yanjiu: 2002–2006 (暴力与不信任—转型中国的医疗暴力研究: 2002–2006) [Violence and Mistrust—A Study on Medical Violence in a Transforming China: 2002–2006], 2008 Fazhi Yu Shehui Fazhan (法制与社会发展) [Legal Sys. & Soc. Dev.] 1, 82 (2008), available at http://www.usc.cuhk.edu.hk/PaperCollection/Details.aspx?id=6776 (on file with the *Columbia Law Review*).

8. Wenzhi Cai et al., Antecedents of Medical Workplace Violence in South China, 26 J. Interpersonal Violence 312, 313 (2011) (describing several studies finding high levels of workplace violence in Chinese healthcare sector); Danghui Yu & Tiantian Li, Facing Up to the Threat in China, 376 Lancet 1823 (2010) (stating eroded trust has increased risk of violence against doctors in China); Wang Leyang, Renda Daibiao Cheng: Youde Yinao Dai Heishili Xingzhi (人大代表称:有的医闹带黑势力性质) [National People's Congress Member Claims: Some Hospital Protests Involve Criminal Syndicates], Nanjing Chenbao (南京晨报) [Nanjing Morning News] [hereinafter Wang, Criminal Syndicates], available at http://health.sohu.com/20070315/n248736421.shtml (on file with the *Columbia Law Review*) (last visited Nov. 16, 2011) (reporting study of over 100 Chinese hospitals finding high levels of violent incidents).

9. Interview 2009-102 (describing how settlements have become more difficult with people due to high demands by plaintiffs); see also Interview 2009-118 (describing judge's first-hand experience with increased volume of petitions and protests concerning medical disputes); infra notes 312–314 and accompanying text (collecting interviews that comment on increase in volume of medical dispute cases).

10. China has a four-tier court system: basic-level courts at the county (in rural areas) or district (in urban areas) level; intermediate courts at the municipal level; provincial high courts; and the Supreme People's Court at the national level. Most cases start in basic-level courts and are reviewed by intermediate courts. But more serious cases may begin in intermediate courts or provincial high courts (or, extremely rarely, in the Supreme People's Court itself). The Supreme People's Court, with hundreds of personnel classified as judges, plays an administrative and oversight role in addition to hearing and reviewing cases. See Stanley B. Lubman, Bird in a Cage: Legal Reform in China After Mao 252–53 (1999). See generally Benjamin L. Liebman, China's Courts: Restricted Reform, 21 Colum. J. Asian L. 1 (2007) [hereinafter Liebman, Restricted Reform] (describing recent court reform movements within China).

nearly 17,000 medical malpractice claims in 2010, an increase of 7.6% over 2009.[11] Statistics from prior years are not available, but judges and commentators have noted a surge in medical disputes in the courts over the past decade and have repeatedly cited medical disputes as troublesome for Chinese courts.[12]

This Essay presents empirical evidence of medical malpractice litigation and medical disputes in China in order to develop a broader understanding of trends in institutional development, dispute resolution, and governance. This Essay focuses in part on national trends and in part on one midsized municipality, which this Essay refers to as Municipality *A*, in central China.[13] This Essay is based on interviews with more than fifty doctors, hospital officials, health department officials, judges, and lawyers in Shanghai, Beijing, Wuhan, and Municipality *A*, and a review of 152 decisions in lawsuits against hospitals or other medical providers in Municipality *A* from 2000 to 2009.[14] Medical malpractice law has generated extensive academic discussion in China, in particular in the run-up to the enactment of China's Tort Liability Law in 2009.[15] No prior litera-

11. Supreme People's Court Statistics (2011) (on file with author).

12. See, e.g., Interview 2009-114 (noting increase in number of medical disputes in courts). See generally infra Part III (discussing rise of hospital protests and their impact on Chinese court system).

13. A municipality is the primary subprovincial authority in China. Municipalities such as Municipality *A* generally have under their jurisdiction both a core urban center and a wide rural area, including in Municipality *A*'s case five counties, each with a county town. Municipality *A* had a population of nearly four million people as of 2009, with 350,000 in the urban center of the municipal seat. Municipality *A* is home to approximately 100 hospitals including two hospitals classified as "level three" hospitals (the highest quality ranking for hospitals in China), seventy-one township level hospitals, and five privately run hospitals. Interview 2010-16.

14. All of the decisions are public documents. As is frequently the case in China, however, the fact that decisions are public does not mean they are readily available. The decisions were collected by judges at the Municipality *A* intermediate court from their own court and from each lower court under their jurisdiction. The court shared these public decisions with the request that the court not be identified in this Essay. Likewise all interviews were conducted on the condition that interviewees would not be identified by name or institutional affiliation.

15. See, e.g., Chao Xi & Lixin Yang, Medical Liability Laws in China: The Tale of Two Regimes, 19 Tort L. Rev. 65, 66 (2011) (arguing China's Tort Liability Law had limited success in bridging divide between administrative and judicial medical liability regimes); Yang Lixin, "Qinquan Zeren Fa" Yiliao Sunhai Zeren Gaige De Chenggong Yu Buzu ("侵权责任法"改革医疗损害责任制度的成功与不足) [Success and Shortcomings of the Medical Malpractice Liability System Reform Through the "Tort Liability Law"], 4 Zhongguo Renmin Daxue Xuebao (中国人民大学学报) [J. Renmin U. China] 10 (2010) (examining Tort Liability Law successes and failures regarding medical damage liability); Wang Liming, Qinquan Zeren Fa De Hexin Shi Baozhang Siquan (侵权责任法的核心是保障私权) [The Core of the Tort Liability Law Is To Protect Private Rights], Guangming Wang (光明网) [Guangming Daily Online] (Nov. 12, 2009), http://www.gmw.cn/01gmrb/2009-11/12/content_1007147.htm (on file with the *Columbia Law Review*) (discussing Tort Liability Law provisions on doctor-patient disputes).

ture of which this author is aware, in English or Chinese, has engaged in detailed empirical study of medical litigation in China's courts or of hospital-patient conflicts in China more generally.[16] Comparative scholarship on medical malpractice law likewise largely focuses on doctrinal developments, not on empirical study of actual disputes or the institutional dynamics of dispute resolution.[17]

Qualitative and quantitative empirical evidence reveal a dynamic in which the formal legal system operates in the shadow of protest and violence. The threat of protest, often including violence, leads hospitals to settle claims for more money than would be available in court;[18] the threat also influences courts' handling of claims that are brought to court.[19] Court decisions do not provide a framework that influences negotiations outside the court. Instead, stability concerns shape outcomes in court.

The findings in this Essay carry implications for three interrelated debates. First, the evidence presented here adds depth to the existing understanding of institutional development in China. Medical disputes highlight the growing institutional competence of the courts, but they also show that innovation in the courts does not equate to increased authority. The institutional development of China's courts challenges existing assumptions about the development trajectory of courts in authori-

---

16. Prior articles in English discussing medical malpractice law in China have focused almost entirely on the written law. See, e.g., Dean M. Harris & Chien-Chang Wu, Medical Malpractice in the People's Republic of China: The 2002 Regulation on the Handling of Medical Accidents, 33 J.L. Med. & Ethics 456, 456 (2005) (discussing recent legislation concerning medical malpractice); Zhu Wang & Ken Oliphant, Yangge Dance: The Rhythm of Liability for Medical Malpractice in the People's Republic of China, 87 Chi.-Kent L. Rev. 21, 21–22 (2012) (discussing advances in codification of malpractice law); Xi & Yang, supra note 15, at 72–75 (discussing statutory developments in medical liability law). One prior work in Chinese has examined the use of violence in medical disputes in China. Xu & Lu, supra note 7, at 83–85. Likewise, one prior English study examined violence against medical staff generally. Cai et al., supra note 8.

17. Rare exceptions include work on Japan and Taiwan. See, e.g., Eric A. Feldman, The Ritual of Rights in Japan: Law, Society, and Health Policy 110–40 (2000) (analyzing litigation as means of delineating medical rights); Eric A. Feldman, Law, Culture, and Conflict: Dispute Resolution in Postwar Japan, *in* Law in Japan: A Turning Point 50, 67–71 (Daniel H. Foote ed., 2007) (discussing Japanese dispute resolution case studies); Jou-juo Chu & Lin Donglong, Yiliao Gongdao Ruhe Tao? Taiwan Yiliao Jiufen Chuli Jizhi Bibing Zhi Tantao (醫療公道如何討? 台灣醫療糾紛處理機制弊病之探討) [How to Seek Medical Justice? A Discussion on the Problems of Taiwanese Medical Dispute Resolution Mechanisms], 11 Yishi Faxue (醫事法學) [J.L. & Med.] 3, 31 (2003) (describing both litigation and nonlitigation channels for dispute resolution in Taiwan); You Zongxian & Yang Xiuyi, Taiwan Yiliao Jiufen Zili Jiuji Zhi Shizheng Yanjiu—Jianbao Ziliao Fenxi (台灣醫療糾紛自力救濟之實證研究—剪報資料分析) [Case Studies on Self-Help in Medical Disputes in Taiwan—An Analysis Based on Newspaper Clippings], 14 Yishi Faxue (醫事法學) [J.L. & Med.] 1, 87 (2006) (analyzing use of news media in medical malpractice cases in Taiwan).

18. See infra text accompanying notes 188–189.

19. See infra text accompanying notes 293–298.

tarian systems. Medical cases show how new uses of the courts can serve the interests of both individuals and the state and may reinforce rather than subvert state authority. Second, medical disputes show that, despite thirty-three years of legal reforms and significant strengthening of legal institutions, the shadow of the law remains weak. Violence and protest are now part of the cycle of dispute resolution. Routine legal issues are frequently converted into political issues, and courts lack a privileged position in setting legal norms. Third, medical malpractice cases highlight state overresponsiveness to some individual grievances. Prior literature has examined the use of cycles of repression and concession as a governance tool in China. That literature has, however, largely overlooked how concessive and repressive policies interact with efforts to construct formal legality. The findings presented here suggest limitations to contemporary understanding both of the functioning of the Chinese state and of the role of law in China, and add to existing literature on the nonconvergence of the Chinese system with existing models of legal and political development.

Part I begins with a discussion of changes in China's healthcare system that legal and medical experts argue are to blame for the rise in disputes between patients and healthcare providers. The Essay then surveys the confused legal landscape concerning medical disputes and introduces some of the intermediaries influencing medical disputes. Part II analyzes 152 cases collected from Municipality *A*. Part III discusses the rise of medical protests and the impact of such conflicts on hospitals, officials, and the courts. Part IV discusses the implications of the above findings for understandings of institutional development, dispute resolution, and governance in China.

I. BACKGROUND

A. *China's Healthcare System*

The increase in medical disputes in China has occurred against the backdrop of dramatic changes in China's legal and healthcare systems.[20] Extensive literature has analyzed the complex and multidimensional changes in the healthcare system.[21] This Essay thus provides only an over-

20. For a discussion of changes to the legal system, see Liebman, Restricted Reform, supra note 10; Benjamin L. Liebman, A Return to Populist Legality? Historical Legacies and Legal Reform [hereinafter Liebman, A Return to Populist Legality], *in* Mao's Invisible Hand: The Political Foundations of Adaptive Governance in China 165, 176–88 (Sebastian Heilmann & Elizabeth J. Perry eds., 2011).

21. See, e.g., CPC Cent. Comm. & State Council, Dang Zhongyang Guowuyuan Guanyu Shenhua Yiyao Weisheng Tizhi Gaige De Yijian (党中央国务院关于深化医药卫生体制改革的意见) [Opinion of the Central Committee of the Communist Party and the State Council on Deepening Reform of the Medical Health System], Xinhua Wang (新华网) [Xinhua Online] (Apr. 6, 2009) [hereinafter Opinion of the CPC Central Committee and State Council], http://www.gov.cn/test/2009-04/08/content_1280069.htm (on file

view of those elements most relevant to disputes between patients and healthcare providers.

Over the past thirty years, healthcare, like much of the Chinese economy, has undergone dramatic marketization. At the beginning of the reform era, most individuals in China had access to free or heavily subsidized healthcare. By 2001 the public's out-of-pocket share of spending on health had increased to 60%, up from 20% in 1978.[22] As the state retreated from funding healthcare in the 1980s, hospitals came under pressure to maximize revenue, in particular by selling medicines and charging for tests.[23] Excessive testing, procedures, and the prescribing of unnecessary medication are widespread,[24] as is low-quality care.[25] Although most urban residents have healthcare through their work, migrant workers and rural residents do not.[26] As a result, rural residents

---

with the *Columbia Law Review*) (presenting goals and guidelines for reform of Chinese healthcare service system); Karen Eggleston et al., Health Service Delivery in China: A Literature Review, 17 Health Econ. 149, 151–62 (2008) [hereinafter Eggleston et al., Health Service Delivery] (analyzing successes and failures of healthcare reform); Christina S. Ho, Health Reform and De Facto Federalism in China, 8 China: Int'l J. 33, 37–38 (2010) [hereinafter Ho, Health Reform and De Facto Federalism] (discussing China's evolution to fee-for-services healthcare model); Yanzhong Huang, The Sick Man of Asia: China's Health Crisis, 90 Foreign Aff. 119, 121 (2011) [hereinafter Huang, Sick Man of Asia] ("The introduction of market-oriented reforms in the 1980s further hurt an already debilitated health-care system: by 2003, more than 70 percent of China's population had no health insurance at all."); Yuanli Liu et al., Health System Reform in China 7: China's Health System Performance, 372 Lancet 1914, 1921–22 (2008) [hereinafter Liu et al., Health System Performance] (surveying aspects of Chinese health system requiring improvement); Qun Meng et al., Trends in Access to Health Services and Financial Protection in China Between 2003 and 2011: A Cross-Sectional Study, 379 Lancet 805, 805 (2012) (assessing "trends in health-care access and financial protection between 2003 and 2011" across China); Karen Eggleston et al., Comparing Public and Private Hospitals in China: Evidence from Guangdong, 10 BMC Health Services Res., art. 76, at 8–10 (2010) [hereinafter Eggleston et al., Public and Private Hospitals], available at http://www.ncbi.nlm.nih.gov/pmc/articles/pmc2858143 (on file with the *Columbia Law Review*) (using survey data to compare privately-owned and government-owned hospitals in Guangdong Province); Richard Herd et al., Improving China's Health Care System 23–24 (OECD Econ. Dept., Working Paper No. 751, 2010), available at http://www.oecd-ilibrary.org/economics/improving-china-s-health-care-system_5kmlh4v2fv31-en (on file with the *Columbia Law Review*) (discussing 2009 healthcare reform).

22. Ho, Health Reform and De Facto Federalism, supra note 21, at 39.

23. Id. at 37–38.

24. See Interview 2010-31 (describing problem of excessive treatment and inspection); Interview 2010-32 (describing use of excessive treatment and expensive medicine).

25. See Interview 2009-102 (describing lower quality of care in countryside); see also Huifeng Wang, A Dilemma of Chinese Healthcare Reform: How To Re-define Government Roles?, 20 China Econ. Rev. 598, 601–02 (2009) (arguing that combination of continued state management of healthcare with marketization has caused distortions affecting quality of care).

26. See Ho, Health Reform and De Facto Federalism, supra note 21, at 39 (describing inequity of healthcare availability); see also Wangchuan Lin et al., Urban Resident Basic Medical Insurance: A Landmark Reform Toward Universal Coverage in China, 18

have generally had to pay out of pocket up front for healthcare—a phenomenon referred to as "pay or die."[27] Even urban residents with health coverage are at times required to pay significant amounts up front.[28] The cost of medical care, in particular for major illnesses or injuries, has become a significant financial risk and burden, with healthcare unaffordable for many.[29] Reforms initiated in 2009 have sought to address the lack of health coverage for rural residents. Initial evidence suggests that such reforms have succeeded in extending coverage to more than 90% of the population.[30] Nevertheless, low coverage rates, in particular for catastrophic injury or illness, mean that the financial risks remain high even for those covered by the new healthcare plans.[31]

Observers of and participants in China's healthcare system have argued that marketization of the healthcare system has shifted patient expectations and doctor-patient relationships in ways that increase conflicts. Four trends stand out. First, the fact that patients are paying out of pocket means that patients and their families expect positive outcomes. This makes patients more likely to complain and protest about the care they receive.[32] Doctors and officials also argue that patients, especially the

---

Health Econ. S83, S83 (2009) (describing background challenges of Chinese healthcare). State spending on healthcare also shifted dramatically toward urban residents during the reform era, with more than three-quarters of all spending on healthcare going to urban areas and institutions. Huang, Sick Man of Asia, supra note 21, at 123.

27. See generally Jonathan Watts, Protests in China over Suspicions of a Pay-or-Die Policy, 369 Lancet 93 (2007).

28. See Ho, Health Reform and De Facto Federalism, supra note 21, at 37–39.

29. See id. at 38–39 (noting number of urban patients that avoid seeking outpatient services due to cost increased dramatically from 1993 to 2003). Despite these problems, the health of the Chinese population has improved during the reform era. See Martin King Whyte & Zhongxin Sun, The Impact of China's Market Reforms on the Health of Chinese Citizens: Examining Two Puzzles, 8 China: Int'l J. 1, 4–6, 29 & n.51 (2010) (noting that Chinese population in post-reform era enjoys longer average lifespan and lower rates of infant and maternal mortality). But see Huang, Sick Man of Asia, supra note 21, at 119 (arguing increases in life expectancy in China have been low when viewed in comparative context). For a discussion of these two different accounts of trends in healthcare, see Lincoln Chen & Dong Xu, Trends in China's Reforms: The Rashomon Effect, 379 Lancet 782 (2012).

30. Meng et al., supra note 21, at 812; Winnie Chi-Man Yip et al., Early Appraisal of China's Huge and Complex Health-Care Reforms, 379 Lancet 833, 833 (2012).

31. See Yip et al., supra note 30, at 838 (noting most studies have found "no measurable effect on reduction of financial risk"). As of 2010, out-of-pocket expenses for patients still exceeded 50%. Id. at 836; see also Meng et al., supra note 21, at 812 (noting continued high financial burden of healthcare).

32. See Liu Yi & Tian Feng, Qian Xi Yiliao Jiufen De Chengyin Yu Fangfan (浅析医疗纠纷的成因与防范) [Brief Analysis of the Causes and Prevention of Medical Disputes], 1 Zhonghua Xiandai Yiyuan Guanli Zazhi (中华现代医院管理杂志) [Chinese J. Current Hosp. Admin.], no. 1, 2003, available at http://journal.9med.net/html/qikan/yyglyyfyxwsx/zhxdyyglzz/2003911/ysfg/20080903014220702_15972.html (on file with the *Columbia Law Review*) (contending combination of high expectations and high costs leads to disputes).

poor, often delay treatment until serious illnesses are at an advanced stage, making disputes more likely.[33] Doctors complain that they are blamed when a patient has a history of illness that contributes to an adverse outcome.[34] Yet they also acknowledge that failure to explain medical procedures contributes to patients' high expectations.[35]

Second, the quality of care provided remains inconsistent.[36] Observers have pointed to inequalities in standards of care between major urban hospitals and those in rural areas and have argued that quality care is increasingly out of reach for China's poor.[37] The vast majority of hospitals, and virtually all major hospitals, are public.[38] Numerous smaller private clinics and hospitals have emerged in recent years, often offering care at lower cost than that offered in the public system.[39] Many doctors, in particular those outside of major cities, remain poorly trained.[40]

Financial incentives may lead to low-quality care even in major (and highly regarded) urban hospitals. Doctors argue that many problems result from the excessive use of surgery.[41] Lawyers complain that doctors

---

33. Interview 2010-17 (explaining that patients wait to visit doctors because of high cost and then complain about bad results).

34. See Interview 2009-108 (describing problem of multiple causes and burden of proof).

35. See Interview 2009-116 (explaining that high work volume prevents doctors from explaining medical issues to patients).

36. See, e.g., Zhao Zhongwei, Income Inequality, Unequal Health Care Access, and Mortality in China, 32 Population & Dev. Rev. 461, 474 (2006) ("[T]he contrasts in quality and accessibility between medical services in China's large cities and its less developed rural areas have become much greater than they were two decades ago.").

37. See Eggleston et al., Health Service Delivery, supra note 21, at 153 ("[R]apidly rising health-care costs and limited insurance coverage have made healthcare increasingly unaffordable for China's poor families."); Ho, Health Reform and De Facto Federalism, supra note 21, at 39 (emphasizing that rural residents constitute two-thirds of population but only 22.5% of nation's health expenditures); Liu et al., Health System Performance, supra note 21, at 6–8 (discussing increased inequality in healthcare system and growing unaffordability for many).

38. Ministry of Health of P.R. China, 2011 Nian 4 Yue Quanguo Yiliao Fuwu Qingkuang (2011年4月全国医疗服务情况) [Report on Nationwide Health Services in April 2011] (May 9, 2011), available at http://www.moh.gov.cn/publicfiles/business/htmlfiles/mohwsbwstjxxzx/s7967/201106/52031.htm (reporting that only 7,361 out of total of 941,190 registered hospitals and medical clinics in China are private). The number of new private hospitals is growing, while the total number of public state hospitals has declined modestly in recent years. Id.

39. Some allege that private hospitals often offer lower-quality care. One study, however, found that the type of ownership was not a significant factor in determining the level or quality of care offered. See Eggleston et al., Public and Private Hospitals, supra note 21 (finding no statistically significant difference between "mortality rates for government and non-government non-profit [hospitals]").

40. Id. (noting half of hospitals in study are lowest level of accreditation and low levels of accreditation are more common outside cities).

41. Interview 2009-113.

are incentivized to prescribe expensive medicines and treatment and consequently often fail to treat the underlying condition.[42] Regardless of the quality of care provided, the perception of inequality also undermines trust in medical institutions.

Many hospitals are overwhelmed with patients. Because patients pay out of pocket, it is common to seek treatment in major urban hospitals, even for relatively minor ailments, and even though urban hospitals charge more than those in rural areas.[43] Many rural residents who seek care in the cities travel accompanied by a number of family members, adding to the large number of people at major hospitals on any given day.[44] The volume of patients, lack of primary care facilities, and profit incentives combine to mean that doctor-patient interactions are extremely brief.[45] Follow-up is rare.[46]

Third, distrust in the healthcare system is widespread, in part because of corruption and questionable practices.[47] Patients believe doctors are out to make money and thus are skeptical of treatment decisions (in particular those that entail significant cost). Most observers interviewed for this project noted a lack of trust in the healthcare system as a source of medical disputes.[48] Lawyers complain that it is common for doctors to falsify medical records and to fail to disclose information to patients.[49] The fact that most hospitals are public contributes to distrust.[50] Hospitals are arms of the state, and thus when patients die, family members blame the hospital—and protest—believing the state will step in to provide compensation.[51] Further, estimates state that more than half of doctor income comes from side payments from patients, kickbacks from drug companies, and moonlighting.[52] Doctors often demand side payments, or

42. Interview 2010-6 (explaining that doctors make half their money on medicine and have incentive to prescribe most expensive medication).

43. Interview 2009-102; see also Interview 2010-16. Recently announced reforms are designed to encourage patients to seek treatment in rural areas first, and thus may alter this trend over time. Id.

44. Hospital officials also describe a culture in which the average patient is accompanied by two to three family members—and many come with eight to ten or more family members and neighbors. Interview 2009-116; see also Interview 2010-17 (noting example of mass congregation of family members at hospital).

45. Interview 2009-116 (stating that high patient volume prevents doctors from discussing medical issues with patients).

46. Id.; Interview 2009-102 (noting need for community-based healthcare).

47. Ho, Health Reform and De Facto Federalism, supra note 21, at 38 (noting hospitals have become "fee-for-service" providers that "survive[] mainly on the basis of maximising revenue from private households").

48. E.g., Interview 2010-4; Interview 2010-5; Interview 2009-114.

49. Interview 2010-6.

50. Id.

51. Id.

52. Id.

"red envelopes."[53] The practice exacerbates patient-doctor distrust both by increasing expectations among those who make such payments and by fueling suspicion by those who do not (or cannot) make such payments. In addition, although virtually all doctors are registered with hospitals,[54] many also work on the side either at second-tier hospitals or in other cities to supplement their income.[55]

Fourth, hospital officials and doctors blame widespread media coverage of medical disputes for encouraging patient protests.[56] Doctors (not surprisingly) argue that media reports are often biased toward patients and create unrealistic expectations regarding potential settlement amounts for disputes.[57] In 2009, for example, extensive media coverage described claims by parents of a five-month-old infant who died at a children's hospital in Nanjing.[58] The parents alleged that the doctor on duty was playing video games and refused to come to the assistance of the child.[59] The case eventually settled for 510,000 yuan, well above the amount that would have been recoverable in court.[60] As a result, patients

53. Huang Chong, Zhendui Geren De Fanhuilu Cuoshi Bu Neng Genzhi Yisheng Chi Huikou (针对个人的反贿赂措施不能根治医生吃回扣) [Anti-Bribery Measures Targeting Individuals Cannot Eliminate the Root Cause of Doctors Taking Kickbacks], Zhong Qing Zai Xian (中青在线) [China Youth On Line] (Nov. 3, 2011), http://zqb.cyol.com/html/2011-11/03/nw.D110000zgqnb_20111103_3-07.htm (on file with the *Columbia Law Review*) (reporting doctors' acceptance of kickbacks at public hospitals); Sanjia Yiyuan Yuanzhang Nianshouru Shang Baiwan, Huise Shouru Chao Gongzi Shubei (三甲医院院长年收入上百万 灰色收入超工资数倍) [The Annual Income of a 3A Hospital's Director Is More Than 1 Million RMB, with the Gray Income Far Exceeding Salary], Pingxiang Pingdao (萍乡频道) [Pingxiang Channel] (Jan. 13, 2012, 9:54 PM), http://px.jxnews.com.cn/system/2012/01/13/011876743.shtml (on file with the *Columbia Law Review*) (highlighting additional sources of income for doctors); Yisheng Bu Shou Huikou Nan Zai Yiyuan Lizu (医生不收回扣难在医院立足) [Doctors Cannot Keep a Foothold in the Hospital If They Don't Accept Kickbacks], Xinhua Wang (新华网) [Xinhua Online], http://www.xinhuanet.com/comments/20101009jrht (on file with the *Columbia Law Review*) (last visited July 27, 2012) (discussing prevalence of doctors accepting kickbacks); see also Christina S. Ho, China's Health Care Reform: Background and Policies, *in* Implementing Health Care Reform Policies in China: Challenges and Opportunities 1, 5 (Charles W. Freeman III & Xiaoqing Lu Boynton eds., 2011) (stating elimination of red envelopes should be key goal of healthcare reform).

54. Interview 2009-101.

55. Interview 2009-116.

56. Interview 2009-102.

57. Interview 2009-116.

58. See generally Li Xiang, Yisheng Wan Youxi Zhi Yinger Si (医生玩游戏致婴儿死) [Infant Death Caused by Doctor Playing Computer Games], Sina.com (新浪网) (Nov. 16, 2009, 10:38 PM), http://news.sina.com.cn/c/sd/2009-11-16/223819059951.shtml (on file with the *Columbia Law Review*).

59. Id.

60. Id.

and families elsewhere refused to settle pending claims, arguing that the outcome in Nanjing showed that proposed settlements were far too low.[61]

Recent state efforts have begun to address some of the problems in the healthcare system. Official statements call for increased state funding and for restructuring the financial incentives facing healthcare providers.[62] Significant reforms are underway.[63] But reforms will be costly and will take years to implement.

B. *The Legal Landscape: The Two Tracks of Medical Malpractice Litigation*

The legal framework governing medical disputes is characterized by confusion and controversy. This section provides an overview of the relevant laws and regulations used in medical disputes, the debate over the appropriate legal standards that should govern medical claims, and the often inconsistent application of such rules in China's courts.

1. *The Medical Accident Regulations and Medical Review Boards.* — Medical malpractice litigation in China is primarily governed by the 2002 Regulations on Handling Medical Accidents (the "Regulations") issued by the State Council.[64] In order to obtain compensation it must be shown that the defendant was responsible for a "medical accident," defined as an error causing personal injury to a patient that results from medical personnel negligently violating relevant laws, administrative regulations, rules, standards governing medical care, or ordinary practice.[65] The

---

61. Interview 2009-101 (noting amount of money available through courts is not as high as is available via settlement).

62. For discussion of proposed reforms, see Opinion of the CPC Central Committee and State Council, supra note 21 (suggesting concrete solutions to improve urban and rural healthcare systems); Ho, Health Reform and De Facto Federalism, supra note 21, at 40–45 (tracking government attitude toward healthcare reform over time); Shanlian Hu et al., Reform of How Health Care Is Paid For in China: Challenges and Opportunities, 372 Lancet 1846, 1846–49 (2008) (noting current challenges to healthcare payment reform); Pitman B. Potter, Dilemmas of Access to Healthcare in China, 8 China: Int'l J. 164, 171 (2010) (indicating primacy of institutional factors in shaping healthcare reform); Qian Jiwei, Reforming Public Hospitals in China, 3 E. Asian Pol'y 75, 77 (2011) (discussing proposed reforms to urban hospitals); James A.C. Sinclair, China's Healthcare Reform, 36 China Bus. Rev. 32, 33–34 (2009) (describing China's five major goals for reform); Yip et al, supra note 30, at 833–40 (discussing current progress on same goals); Herd et al., supra note 21, at 23–24 (analyzing potential effects of reforms proposed in 2009 that aim to increase primary care and preventative medicine).

63. See Eggleston et al., Health Service Delivery, supra note 21, at 156–58 (describing attempts to address fee-for-service and red envelope problems and documenting increase in private ownership); Ho, Health Reform and De Facto Federalism, supra note 21, at 42–53 (analyzing current round of health system reform); Herd et al., supra note 21, at 17–21 (discussing challenges and successes of recent reform schemes).

64. Yiliao Shigu Chuli Tiaoli (医疗事故处理条例) [Regulations on Handling of Medical Accidents] (promulgated by the St. Council, Feb. 20, 2002, effective Sept. 1, 2002) St. Council Gaz., Apr. 4, 2002, at 2 [hereinafter Regulations].

65. Id. art. 2.

Regulations contemplate four categories of medical accident, ranging from medical accidents resulting in death or serious disability (level one) to those resulting in "obvious personal injury" but no disability (level four).[66] Cases involving a "medical accident" are governed by the Regulations; cases against medical providers that do not involve "medical accidents" are not covered by the Regulations.[67]

The Regulations were designed in part to make it easier for plaintiffs to receive compensation and to channel disputes into the formal legal system.[68] The Regulations place the burden of proof in medical cases on defendants. In practice, however, many observers of and participants in the legal system contend that the regulations are favorable for defendants, for two reasons.

First, damages available in malpractice cases brought pursuant to the Regulations are low—significantly lower than in other tort cases. The Regulations, while providing for a range of categories of damages, do not list payment of compensation for death as a category for compensation.[69] In contrast, damage awards in other tort cases are governed by the SPC's 2003 interpretation on damages in personal injury cases (the "Interpretation") and by the General Principles of the Civil Law ("General Principles").[70] The Interpretation explicitly provides for a death

66. Id. art. 4. In theory patients can also seek redress through local health bureaus, but this route appears to be rarely used. Although health bureaus have the ability to sanction doctors and hospitals and can mediate disputes, they cannot order hospitals to compensate patients. Interview 2009-108.

67. Regulations, supra note 64, art. 1.

68. Prior to 2002 medical disputes were governed by the 1987 Methods on the Handling of Medical Accidents. The Methods permitted only a narrow scope of claims and stipulated that determinations regarding liability should be made by local health bureaus, which also oversee the operation of hospitals. See generally Guowuyuan Guanyu Fabu Yiliao Shigu Chuli Banfa De Tongzhi (国务院关于发布医疗事故处理办法的通知) [Notice of the State Council Regarding the Issuance of the Methods on the Handling of Medical Accidents] (promulgated by the St. Council, June 29, 1987, effective June 29, 1987) St. Council Gaz., no. 63, 1987, at 614, 617. The Regulations were designed to increase trust in the system by expanding the range of injuries for which compensation could be received and shifting determinations of fault away from health bureaus. Harris & Wu, supra note 16, at 456–57; see also Yiwu Renyuan Ruhe Yingdui Xin De "Yiliao Shigu Chuli Tiaoli" (医务人员如何应对新的《医疗事故处理条例》) [How Medical Professionals Should Deal with the New "Regulations on the Handling of Medical Accidents"], Zhonggu Falü Wang (中顾法律网) [Zhonggu Law Online], http://news.9ask.cn/yljf/201101/1039324.shtml (on file with the *Columbia Law Review*) (last updated Jan. 10, 2011) (stating Regulations were designed to encourage use of formal legal system). In practice, however, it seems clear that the Regulations were also designed to ensure the continued economic development of China's hospitals.

69. Regulations, supra note 64, art. 50. The provision specifically provides for compensation for medical expenses, missed work, disability, funeral-related expenses, and emotional distress.

70. Zuigao Renmin Fayuan Guanyu Shenli Renshen Sunhai Peichang Anjian Shiyong Falü Ruogan Wenti De Jieshi (最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释) [Supreme People's Court Interpretation of Some Issues Concerning the

compensation payment of twenty times average local income in cases in which negligent actions lead to death.[71] Thus in a case tried according to the Regulations, a plaintiff seeking compensation for a medical accident that results in death will generally receive significantly less—often hundreds of thousands of yuan less—than a plaintiff seeking compensation for death in an ordinary negligence action.

Second, under the Regulations, determinations regarding whether or not a "medical error" has occurred are made by medical review boards established by local medical associations.[72] Courts must defer to the review boards' determinations.[73] Academics, lawyers, and judges have pointed out a number of problems with the use of medical review boards. Review boards consist entirely of local doctors and are thus likely to protect local doctors and hospitals.[74] Local medical associations are overseen

---

Application of Law in the Trial of Cases on Compensation for Personal Injury] (promulgated by the Sup. People's Ct., Dec. 26, 2003, effective May 1, 2004) 2004 Sup. People's Ct. Gaz. 2, at 3 [hereinafter Interpretation]; Minfa Tongze (民法通则) [General Principles of the Civil Law] (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987) 1986 Standing Comm. Nat'l People's Cong. Gaz. 371, at 3 [hereinafter General Principles].

71. Interpretation, supra note 70, art. 29. Other differences also exist between the Regulations and the SPC's Interpretation, including the calculation of disability payments (where the Regulations provide modestly higher damages). Such differences are relatively minor compared to the difference in death compensation payments.

72. Regulations, supra note 64, art. 21.

73. Zuigao Renmin Fayuan Guanyu Canzhao "Yiliao Shigu Chuli Tiaoli" Shenli Yiliao Jiufen Minshi Anjian De Tongzhi (最高人民法院关于参照《医疗事故处理条例》审理医疗纠纷民事案件的通知) [Notice of the Supreme People's Court Concerning the Trial of Civil Medical Dispute Cases According to "Regulations on the Handling of Medical Accidents"] (promulgated by the Sup. People's Ct., Jan. 6, 2003) Fa (法) [SPC Publication], art. 2 [hereinafter Notice of the SPC], available at http://www.law-lib.com/law/law_view.asp? id=78300 (on file with the *Columbia Law Review*); Interview 2010-21. Medical review boards exist at the municipal, provincial, and national levels. Decisions of municipal review boards can be appealed to the provincial-level review board, which may be less subject to local bias, but doing so is costly and thus rare. In some provinces parties may also request an inspection by a medical association in a different municipality. Interview 2009-108; see also Yiliao Shigu Jianding Ruhe Pinqing Waidi De Zhuanjia (医疗事故鉴定如何聘请外地的专家) [How To Hire an Expert from Another Location for Review of Medical Accidents], Beijing Shi Jindong Lüshi Shiwu Suo Wangzhan (北京市金栋律师事务所网站) [Beijing Jindong Law Firm Website] (May. 24, 2011), http://www.lvshi100.net/news.php?NewsID=45651 (on file with the *Columbia Law Review*) ("Therefore, many patients and families will request reviews by another medical association, or that the review board members are all doctors from a different area."). A very small number of cases are eventually appealed to the medical review board under the national medical association. Interview 2009-108.

74. See Wang Jinfan & Wang Haiyan, Yiliao Shigu Jishu Jianding Cunzai De Wenti He Gaijin Jianyi (医疗事故技术鉴定存在的问题和改进建议) [Problems in Technical Reviews of Medical Accidents and Suggestions for Improvement], 20 Weisheng Ruan Kexue (卫生软科学) [Soft Sci. Health], no. 6, 2006, available at http://so.med.wanfangdata.com.cn/ViewHTML/PeriodicalPaper_wsrkx200606024.aspx (on file with the *Columbia Law Review*) (noting medical associations work under governmental health administration agencies);

by local health departments—which also oversee hospitals and doctors.[75] Hearings are brief and decisions are often short and lack detailed reasoning.[76] Decisions are anonymous, with no dissents, and review board members never appear in court.[77] When review boards do find error, they often find minor error—thus protecting hospitals and doctors. The process can be expensive.[78]

Hospital and health department officials contest many such claims, arguing that review boards frequently find against defendants.[79] Rival claims regarding medical review boards are difficult to assess because review board determinations are not public. Empirical evidence is scarce. The one prior study that exists found that medical review boards found error in only twenty-five out of 110 cases over a three-year period following the enactment of the Regulations.[80] Yet actual outcomes may be less

---

Wo Zhongdong, Dui Woguo Yiliao Shigu Jishu Jianding Zhidu De Jidian Sikao (对我国医疗事故技术鉴定制度的几点思考) [Some Thoughts on Our Nation's Rules of Reviewing Medical Accidents], 4 Zhonghua Xiandai Yiyuan Guanli Zazhi (中华现代医院管理杂志) [Chinese J. Current Hosp. Admin.], No. 12, 2006, available at http://www.39kf.com/cooperate/qk/xdyygl/0612/2007-04-26-349428.shtml (on file with the *Columbia Law Review*) (contending review boards are made up of members of local medical agencies who protect their colleagues); Interview 2010-6 (noting conflict of interest between governmental medical association and doctors); Interview 2010-12 (observing interest of medical association in protecting doctors). The fact that adverse decisions by medical review boards can also result in administrative punishment for doctors and hospitals further decreases the likelihood that review boards will find serious error. Interview 2010-12.

75. Wo, supra note 74 (discussing China's rules for reviewing medical accidents).

76. See, e.g., Interview 2010-6 (observing lack of transparency and disclosure in process); Interview 2010-13 (noting lack of witnesses and other deficiencies in hearing process).

77. Yiliao Shigu Jianding Yu Yiliao Guocuo Jianding Qubie (医疗事故鉴定与医疗过错鉴定区别) [The Difference Between Medical Accident Inspection and Medical Negligence Inspection], Zhao Fa Wang (找法网) [Findlaw Online] (Nov. 5, 2002), http://china.findlaw.cn/yiliao/hot/guocuojianding/24950.html (on file with the *Columbia Law Review*) (outlining medical accident review procedure); Interview 2010-11 (noting that medical review board members never come to court and do not attach their names to decisions). This may be appealing to judges, who may find it easier to defer to the review boards than to engage in review of their determinations. Interview 2010-12 (suggesting that courts like to rely on medical review board decisions because of their anonymity and because the lack of discretion they give courts); Interview 2009-113 (observing rarity of court rejecting medical review board determination).

78. Hospitals will generally bear the cost if they request an inspection, a court orders an inspection, or the plaintiff prevails. Interview 2010-16.

79. Non-public reports by the Ministry of Health found that the medical review boards find error in approximately 60% of cases. Interview 2010-10.

80. Wang Ping, Yiliao Shigu Zhengyi 110 Li Jishu Jianding Fenxi (医疗事故争议110例技术鉴定分析) [Analysis of Technical Reviews in 110 Disputed Medical Accident Cases], 16 Hainan Yixue (海南医学) [Hainan Med. J.], no. 12, 2005, available at http://so.med.wanfangdata.com.cn/ViewHTML/PeriodicalPaper_hainanyx200512112.aspx (on file with the *Columbia Law Review*).

important than appearances: One doctor noted that the design of the review boards means it is virtually impossible to convince patients to trust review board decisions.[81]

2. *Avoiding the Regulations: Tort Principles and Judicial Inspections.* — Numerous plaintiffs have sought to avoid both damage limitations and medical review boards by bringing ordinary tort claims under the provisions of the General Principles of the Civil Law and the SPC's Interpretation. In such cases determinations regarding negligence are made by judicial inspection agencies, quasi-private entities retained by parties to the litigation.[82] Hospitals, doctors, and their lawyers have criticized this practice,[83] arguing that judicial inspection bodies lack subject matter expertise,[84] are poorly regulated, and are driven by profit (and thus are likely to decide in favor of the party retaining them).[85] Judicial

81. Interview 2009-101.

82. Originally established under the courts, judicial inspection offices became independent of the courts in 2005. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Sifa Jianding Guanli Wenti De Jueding (全国人民代表大会常务委员会关于司法鉴定管理问题的决定) [Decision of the Standing Committee of the National People's Congress on Issues Regarding Management of Judicial Inspections] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 2005, effective Oct. 1, 2005) 2005 Standing Comm. Nat'l People's Cong. Gaz. 2, Mar. 31, 2005, at 119, available at http://law.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=chl&Gid=57068 (on file with the *Columbia Law Review*). Judicial inspection bodies are registered with the Ministry of Justice and most often are used to make determinations regarding the severity of injury in civil cases. Many judicial inspection agencies are linked to universities or other state entities. But the range of judicial inspections offices is broad. In Beijing, for example, there are twenty-nine different judicial inspection entities.

83. Interview 2010-4 (expressing firm disapproval on part of hospitals).

84. Interview 2010-12 (describing problems caused by proliferation of judicial inspection agencies); Interview 2010-17 (observing process as drawn out and troubling).

85. Interview 2010-3 (stating some judicial inspection bodies decide cases for financial gain); Interview 2010-9 (noting judicial inspection bureaus profit from decisions and are not well regulated); Interview 2010-12 (describing bias in favor of patients); Interview 2010-31 (claiming these bodies make decisions according to politics rather than law); see also Lu Yuhua, Jianding Jielun Yu Sifa Jianding Tizhi Gaige (鉴定结论与司法鉴定体制改革) [Inspection Conclusions and Reform of the Judicial Inspection System], Hunan Xiangjian Lüshi Shiwusuo (湖南湘剑律师事务所) [Hunan Xiangjian Law Firm], http://www.xj148.com/xjlw/lunwen_luyh01.htm (on file with the *Columbia Law Review*) (last visited Sept. 21, 2012) (offering suggestions to improve regulation over judicial inspection bodies). In contrast to medical review board procedures, judicial inspection employees do sometimes testify in court; the names of the persons making the decisions are attached to the decision; and in some cases (albeit rarely) dissenting opinions may be attached. Butong Jianding Yijian De Chuli Guize (不同鉴定意见的处理规则) [Rules for Handling Different Inspection Opinions], Zhonggu Falü Wang (中顾法律网) [Zhonggu Law Online] (July 24, 2009), http://news.9ask.cn/xsss/sfjd/sfjdcx/200907/206999.html (on file with the *Columbia Law Review*); see also Interview 2010-14 (detailing experiences of employee of judicial inspection organization).

inspection officials describe their work as a necessary response to the unfairness of the medical review boards.[86]

The "two tracks" of medical cases have generated extensive debate in China. Hospital officials and their lawyers argue that the Regulations should govern all claims involving allegations of injury resulting from medical care. They contend that the existence of the two tracks of litigation permits courts to reach any decision they desire, particularly in cases involving sympathetic plaintiffs.[87] In contrast, many lawyers, judges, and academics have argued that the Regulations govern only serious cases of medical error and that more routine and minor malpractice claims can be brought according to ordinary tort principles. In practice, some lawyers have sought to bring cases involving major claims of medical error under ordinary tort principles in order to avoid the medical review boards and to obtain higher damages.[88]

The SPC has indirectly endorsed the more permissive view;[89] in a 2003 notice, the SPC ordered courts to handle medical disputes "with reference" to the Regulations.[90] The notice did little to clarify what cases fit within the Regulations, stating instead that "cases not arising as a result of medical accident" could proceed according to the provisions of the General Principles.[91] In a 2004 press conference, an SPC official

---

86. Interview 2010-13 (describing lack of neutrality in some medical review board cases). In most cases plaintiffs select judicial inspections. But in some cases courts may order a judicial inspection because of doubts about the outcome in a medical review board. Interview 2010-11 (explaining that if judges dislike one decision, they will seek another inspection); see also Liu Taijin et al., Jiangxi Shouli Sifa Jianding Kangbian Yiliao Jianding An Luomu (江西首例司法鉴定抗辩医疗鉴定案落幕) [Jiangxi's First Case Involving Opposing Results from Judicial Inspection and Medical Inspection Ends], Dajiang Wang (大江网) [Dajiang Online] (May 21, 2009, 6:12 AM), http://jiangxi.jxnews.com.cn/system/2009/05/21/011118129.shtml [hereinafter Liu et al., Opposing Results] (on file with the *Columbia Law Review*) (describing judicial inspection prompted by questionable review board proceedings).

87. Interview 2010-4 (recounting case of larger payout when plaintiff had family to support).

88. Interview 2010-6 (noting "patients must sue for negligence or else they will not get sufficient compensation"); Interview 2009-126 (describing plaintiffs' desire to have medical malpractice cases tried in tort). In some cases lawyers may also sue in contract, again because damages may be greater. Interview 2010-7 (detailing advantages of suing in contract).

89. Zhu Jianjun & Wang Hong, Shi Tongguo Liang Ze Anli Jiedu Yiliao Shigu Jianding De Falü Xingzhi (试通过两则案例解读医疗事故鉴定的法律性质) [An Attempt to Interpret the Legal Nature of Medical Accident Reviews Through Two Cases], Zhongguo Minshang Falü Wang (中国民商法律网) [China Civil Commercial Law Online] (Oct. 8, 2003), http://www.civillaw.com.cn/article/default.asp?id=13055 (on file with the *Columbia Law Review*) (arguing SPC's Interpretation integrated other forms of material loss and had effect of significantly increasing total monetary compensation to plaintiffs).

90. Notice of the SPC, supra note 73.

91. Id.

stated that in "medical accident cases" the Regulations apply.[92] But, the official stated, plaintiffs may also sue under ordinary tort law for "medical injury," in which case the Interpretation and higher damage standards apply.[93] The official thus implied that plaintiffs may determine the path under which to bring their cases.[94]

3. *Court Practice.* — Provincial and local courts have taken a range of approaches, with some all but ignoring the Regulations and others refusing to accept cases not examined by medical review boards. In Beijing, for example, courts have generally permitted plaintiffs to choose between medical and judicial inspections.[95] Judges state that this is because medical review boards are unfair to plaintiffs.[96] One of the highest-profile cases in recent years involved a claim by the relatives of a professor and doctor at Peking University Hospital who died during surgery at the hospital, allegedly due to the negligence of trainee doctors.[97] The plaintiffs

---

92. Wang Lianyin, Zuigao Renmin Fayuan Min Yi Ting Fuzeren Jiu Shenli Yiliao Jiufen Anjian De Falü Shiyong Wenti Da Jizhe Wen (最高人民法院民一庭负责人就审理医疗纠纷案件的法律适用问题答记者问) [Head of Supreme People's Court Civil No. 1 Division Answers Reporter's Questions Regarding the Applicable Laws in the Trial of Medical Dispute Cases], Zuigao Renmin Fayuan Wangzhan (最高人民法院网站) [Supreme People's Court Website] (Apr. 12, 2004, 3:31 PM), http://www.law-lib.com/fzdt/newshtml/21/20050709153310.htm (on file with the *Columbia Law Review*) ("Therefore, when People's Courts deal with medical accidents, they should use the Regulations as the basis for decision.").

93. Id.

94. In addition, in a 2007 speech directed at civil court judges, the chief of the SPC's first civil division—which is responsible for medical cases—noted the paradox created by the conflict between the Regulations and the Interpretation: The most serious cases will be tried as medical accident cases and will receive lower compensation than minor cases that proceed according to the General Principles. The judge called for courts to proceed "according to actual practice" and to avoid creating situations in which there was an imbalance between the two types of cases. He also called on courts to make sure that "interests are balanced" in medical cases. Although the judge stopped short of explicitly stating that courts could use the Interpretation in calculating damages in medical cases, the statement suggested that the court would endorse expanded damage awards in some medical cases. Ji Min, President, First Civil Trial Court of Supreme People's Court, Zai Quanguo Minshi Shenpan Gongzuo Zuotan Hui Shang De Zongjie Jianghua (在全国民事审判工作座谈会上的总结讲话) [Concluding Remarks at the National Civil Trial Work Forum] (Apr. 10, 2007), available at http://law.baidu.com/pages/chinalawinfo/11/4/fef1f4b3a7264f73d85e6a6e92ea04ad_0.html (on file with the *Columbia Law Review*).

95. Interview 2010-4 (noting Beijing courts will accept judicial inspections in medical cases).

96. Id. (stating judges believe medical review boards "are unfair").

97. Wang Jianguo, Guan Huiying Su Beijing Daxue Diyi Yiyuan (王建国、管惠英诉北京大学第一医院) [Wang Jianguo & Guan Huiying v. Peking Univ. No. 1 Hosp.], 2009 Gao Min Zhong Zi (高民终字) [Beijing High People's Ct. Civ. Final Decision] (Beijing High People's Ct. 2010), available at http://www.m-lawyers.net/Article_Show.asp?ArticleID=26384 (on file with the *Columbia Law Review*); Chen Hongwei et al., Beida Yiyuan Jiaoshou Si Yu Gongzhi Yiyuan Yin Feifa Xingyi Zhizheng (北大医院教授死于供职医院引非法行医之争) [Death of Professor at Peking University Hospital Where She Worked Causes

relied on a judicial inspection. On appeal following a large award for plaintiffs, the intermediate court allowed both a judicial inspection and one by a medical review board.[98] In some cases courts have relied on judicial inspection results that directly contradict findings of medical review panels.[99] In other decisions courts have increased damage awards in accordance with the personal injury regulations, arguing that to do otherwise would be unfair.[100]

Other jurisdictions have taken a stricter approach, either banning cases brought according to general tort principles or severely limiting damage awards in such cases. Shanghai courts generally follow the Regulations; as a result, as of late 2009 the maximum payout in medical cases was 120,000 to 130,000 yuan—significantly below the amount available in medical cases in other jurisdictions.[101] The Shanghai High People's Court also reportedly issued a nonpublic notice stating that compensation in medical cases not brought according to the Regulations cannot exceed 20,000 yuan—making clear that such cases should be restricted to those alleging only minor harm or no allegation of medical error.[102]

Dispute over Illegal Medical Practice], Tai Hai Wang (台海网) [Tai Hai Online] (June 12, 2010, 11:54 AM), http://www.taihainet.com/news/cnnews/2010-06-12/542043.html (on file with the *Columbia Law Review*).

98. Interview 2010-4 (describing posture of Peking University case and use of multiple inspections). Regulations in Guangdong likewise permit the plaintiff to choose to pursue a case as a medical fault case or as a medical injury case—with the former being subjected to judicial inspection and the later to inspection by a medical review board. Guanyu Shenli Yiliao Sunhai Peichang Jiufen Anjian Ruogan Wenti De Zhidao Yijian (关于审理医疗损害赔偿纠纷案件若干问题的指导意见) [Guidance on a Number of Issues Regarding the Trial of Medical Dispute Cases Involving Damages for Injury] (promulgated by Guangdong Province High People's Ct., Dec. 19, 2007) Yue Gao Fa Fa (粤高法发) [Guangdong High People's Ct. Publication], Apr. 8, 2008, available at http://www.peichang.cn/1875w.html (on file with the *Columbia Law Review*).

99. Liu et al., Opposing Results, supra note 86 (describing court's decision to calculate damages based on judicial inspection after three medical reviews found no malpractice).

100. Guo Hongyu, Falü Jie Jiao Hao, Yiliao Jie Jiao Qu (法律界叫好, 医疗界叫屈) [The Legal Profession Applauds While the Medical Professional Cries Out], Xinhua Wang (新华网) [Xinhua Online] (June 10, 2009, 11:41 AM), http://www.gs.xinhuanet.com/bianji/2009-06/10/content_16769217.htm (on file with the *Columbia Law Review*).

101. Interview 2009-108. Plaintiffs may receive additional compensation if courts award emotional damages or support for family members. Id.; see also Interview 2009-114 (noting courts will find ways to expand liability).

102. Interview 2009-108. Examples of such cases in Shanghai include slip and fall claims against hospitals, claims by family members of patients who commit suicide while in a hospital, or claims for failure to inform patients of the risks of treatment decisions. Interview 2009-112.

China's new Tort Liability Law,[103] effective as of July 1, 2010, makes significant changes to medical disputes, most notably shifting the burden of proof from defendants to plaintiffs.[104] All of the cases examined in this Essay preceded the new law. Some have argued that the new law means that the Regulations are no longer valid and that the two-track system for medical cases will be merged into one.[105] Others, however, have contended that the Regulations remain in effect.[106] In the autumn of 2011, the Supreme People's Court circulated for comment a draft interpretation on the handling of medical disputes.[107] The draft interpretation

---

103. Zhonghua Renmin Gonghe Guo Qinquan Zeren Fa (中华人民共和国侵权责任法) [Tort Law of P.R. China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) 2010 Standing Comm. Nat'l People's Cong. Gaz. 4, available at http://www.gov.cn/flfg/2009-12/26/content_1497435.htm (on file with the *Columbia Law Review*).

104. See Hu Bo, Qinquan Zeren Fa Fuyu Renmin Fayuan Zhijie Rending Tuiding Yiliao Jigou Guocuo De Quanli (侵权责任法赋予人民法院直接认定推定医疗机构过错的权力) [Tort Liability Law Gives People's Courts Power Directly to Find or Infer Fault by Medical Institutions], Dongfang Fayan (东方法眼) [Eastern Legal Watch] (June 21, 2011, 2:07 PM), http://www.dffy.com/faxuejieti/ms/201106/23754.html (on file with the *Columbia Law Review*) (arguing that prior to Tort Liability Law plaintiffs faced a lower burden of proof than after enactment of law); Huang Yingshuai et al., Fayuan Gongbu Qinquan Anli: Nühai Diexia Dangang Shuai Shang Huopei 11 Wan (法院公布侵权案例:女孩跌下单杠摔伤获赔11万) [Court Publishes Tort Case: Girl Receives 110,000 RMB in Damages for Injuries from Falling Off Horizontal Bar], Bandao Wang (半岛网) [Peninsula Net] (July 7, 2011, 5:29 AM), http://news.bandao.cn/news_html/201107/20110707/news_20110707_1425918.shtml (on file with the *Columbia Law Review*) (describing evidentiary burden new law has placed on patients). The shift came after extensive lobbying by hospitals. Interview 2010-29. For a general discussion of the impact of the Tort Liability Law on medical malpractice law, see Wang & Oliphant, supra note 16, at 40–49; Xi & Yang, supra note 15, at 72–75.

105. See, e.g., Qianyi Qinquan Zeren Fa Zai Yiliao Sunhai Jiufen Zhong De Shiyong (浅议侵权责任法在医疗损害纠纷中的适用) [Brief Views on the Applicability of the Tort Law in Medical Damage Disputes], Falü Kuaiche (法律快车) [Law Express] (June 18, 2011), http://www.lawtime.cn/info/sunhai/shpclw/20110618102603.html (on file with the *Columbia Law Review*) (pointing out contradictions between Regulations and Tort Liability Law and concluding new law will supersede old law); Qinquan Zeren Fa Shishi Yihou, Naxie Falü Fagui Hui Shoudao Yingxiang? (侵权责任法实施以后, 哪些法律法规会受到影响?) [Which Laws and Regulations Will Be Affected by the Implementation of the Tort Liability Law?], Guanxi Yishi Wang (广西医师网) [The Guangxi Physician] (June 10, 2011), http://www.gxmda.com/zilvweiquan/falvfagui/2011-06-10/77.html (on file with the *Columbia Law Review*) (suggesting that, as higher-level law, Tort Liability Law will replace Regulations where the two conflict).

106. Jiao Hongyan, Yiliao Shigu Chuli Tiaoli Miandui Cun Wang Jueze (医疗事故处理条例面对存亡抉择) ["Regulations on the Handling of Medical Accidents" to Face Life and Death Choices], Fazhi Zhoumo (法治周末) [Rule of Law Weekend], available at http://www.legaldaily.com.cn/zmbm/content/2010-07/01/content_2182865.htm?node=7573 (on file with the *Columbia Law Review*) (last visited Oct. 29, 2011).

107. Zuigao Renmin Fayuan Guanyu Shenli Yiliao Sunhai Zeren Jiufen Anjian Shiyong Falü Ruogan Wenti De Jieshi (Zhengqiu Yijian Gao) (最高人民法院关于审理医疗损害责任纠纷案件适用法律若干问题的解释(征求意见稿)) [Supreme People's Court Interpretation of Some Issues Concerning the Application of Law for the Trial of Medical

would make clear that inspections in medical cases may be conducted by either medical inspection agencies under local medical associations or by judicial inspection organizations.[108] The draft interpretation would impose specific requirements on the content of inspection reports,[109] would require that court personnel be allowed to attend inspection hearings and ask questions,[110] and would require that at least one person who participated in the inspection attend court proceedings and answer questions from the parties to the litigation.[111] Compensation in medical disputes would be in accordance with the provisions of the new Tort Liability Law, suggesting that plaintiffs in medical disputes would be entitled to the same damages as ordinary tort claimants, including compensation for death.[112]

Although the draft interpretation has engendered some online commentary,[113] the interpretation has yet to be formally adopted and its prospects thus remain unclear. In practice it appears that little has changed since the new law came into effect, with some jurisdictions con-

---

Malpractice Liability Dispute Cases (Draft for Comment)] (promulgated by the Sup. People's Ct., Nov. 22, 2011) [hereinafter Draft Interpretation], available at http://www.yiliaosunhai.com/medicaltreatment/yiliaoxinwendianping/yiliaoxinwendianping3130.html (on file with the *Columbia Law Review*). In 2010, the SPC also issued a brief notice on the eve of the effective date of the Tort Liability Law that explicitly authorized the use of judicial inspections in medical cases. The notice did not, however, rule out the use of medical review boards or set forth procedures for determining what type of inspection should be used. Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Qinquan Zeren Fa Ruogan Wenti De Tongzhi (最高人民法院关于适用中华人民共和国侵权责任法若干问题的通知) [Supreme People's Court's Notice Regarding Some Issues Concerning the Application of the PRC Tort Liability Law] (promulgated by the Sup. People's Ct., June 30, 2010, effective July 1, 2010) Fa Fa (法发) [Court Publication], available at http://www.law-lib.com/law/law_view.asp?id=316994 (on file with the *Columbia Law Review*).

108. Draft Interpretation, supra note 107, art. 14.

109. Id. art. 15.

110. Id. art. 19.

111. Id. art. 20. If experts from the inspection organization cannot attend, they may, with prior approval of the court, instead respond to written questions from the parties. If inspection organizations refuse to respond, courts are instructed to disregard the inspection report. Id. The draft interpretation also makes clear that courts will make the final determination of whether liability should be imposed. Id. art. 25.

112. Id. art. 24.

113. See, e.g., Dui Zuigao Renmin Fayuan Guanyu Shenli Yiliao Sunhai Zeren Jiufen Anjian Shiyong Falü Ruogan Wenti De Jieshi Zhengqiu Yijian Gao De Jidian Jianyi (对最高人民法院关于审理医疗损害责任纠纷案件适用法律若干问题的解释(征求意见稿)的几点建议) [A Few Suggestions for the Supreme People's Court's Interpretation of Some Issues Concerning the Application of Law for the Trial of Medical Malpractice Liability Dispute Cases (Draft for Comment)], Yiliao Sunhai Qinquan Zeren Wang (医疗损害侵权责任网) [Medical Malpractice Tort Liability Web] (Jan. 11, 2012), http://www.yiliaosunhai.com/medicaltreatment/yuanchuangwenzhan/yuanchuangwenzhan3138.html (on file with the *Columbia Law Review*) (suggesting further regulation of medical inspections be added to Tort Liability Law).

tinuing to follow the Regulations and others willing to handle cases according to the Interpretation.[114] More significant changes, if any, will likely come only after the SPC formally adopts a judicial interpretation on medical disputes.[115]

C. *Lawyers, Intermediaries, and Insurers*

A range of intermediaries help patients and their families resolve disputes and navigate the healthcare system. These include lawyers, professional protesters, appointment touts, and "medical introducers." All either influence the evolution of disputes or reflect problems in the healthcare system that give rise to disputes. In addition, insurers influence disputes largely through their absence from the process.

1. *Lawyers.* — Lawyers specializing in medical cases have emerged in recent years, particularly in major cities such as Beijing and Shanghai. Most lawyers who specialize in medical cases are former doctors (the Chinese bar is open to anyone with a university degree).[116] Yet in less developed legal markets, it is also common to find lawyers who specialize in medical cases, most often representing defendants.[117] Many plaintiffs pursue cases without legal representation, particularly in rural areas.[118]

---

114. See Chen Gang, Beijing Shi Gaoji Renmin Fayuan Guanyu Shenli Yiliao Sunhai Peichang Jiufen Anjian Ruogan Wenti De Zhidao Yijian (Shixing) De Lijie Yu Shiyong (北京市高级人民法院关于审理医疗损害赔偿纠纷案件若干问题的指导意见(试行)的理解与适用) [Understanding and Applying Beijing High People's Court's Guidance on Some Issues Concerning the Trial of Medical Injury Dispute Cases (For Trial Implementation)], Zhao Fa Wang (找法网) [FindLaw Online] (Aug. 16, 2010), http://china.findlaw.cn/lawyers/article/d34931.html (on file with the *Columbia Law Review*) (noting existence of "two track" system).

115. See Xin Hong, "Yiliao Shigu Chuli Tiaoli" Tiaowen Yu "Qinquan Zeren Fa" Chongtu, Zuigao Yuan Jiang Zhiding Xiangguan Sifa Jieshi (《医疗事故处理条例》条文与《侵权责任法》冲突 最高院将制定相关司法解释) [Provisions of "Regulations on the Handling of Medical Accidents" Conflict with "Tort Liability Law"; Supreme People's Court to Develop Relevant Judicial Interpretation], Fazhi Ribao (法制日报) [Legal Daily] (Dec. 30, 2009), available at http://www.yixuefalv.com/onews.asp?id=2462 (on file with the *Columbia Law Review*) (highlighting need for judicial clarification as to which laws apply to medical disputes).

116. In Shanghai, for example, lawyers estimated in 2009 that there were approximately twenty lawyers, all with medical training, who specialized in medical cases. Interview 2009-108. The group is divided into two subgroups. Most represent hospitals; only a very small number have developed a specialized practice that focuses on representing patients and their families.

117. See Interview 2010-6 (discussing financial advantages of representing defendant hospitals); Interview 2010-17 (observing that hospital lawyers are specialists while plaintiff lawyers are not); Interview 2010-23 (suggesting that if lawyers are involved in dispute they will generally represent larger hospitals).

118. See Interview 2010-4 (detailing judge's perception of parties' aversion to hiring lawyers); Interview 2010-23 (stating that plaintiff families will rarely hire lawyers); Interview 2010-25 (discussing professional lawyer's frustrations with plaintiffs resorting to less expensive basic legal workers).

Lawyers say that patients generally do not retain lawyers until after negotiations have failed to resolve a case.[119]

Contingent-fee arrangements are common in medical cases,[120] but actual practice varies based both on location and on individual lawyers and cases. Many plaintiffs' lawyers will charge a set fee up front and then collect an additional percentage if they prevail in the case.[121] Lawyers in Municipality *A* say they sometimes use contingent fees but more often collect a fixed percentage of the amount in controversy.[122] Some local jurisdictions have banned the use of contingent fees in medical cases, reflecting a broader crackdown by the Ministry of Justice on the use of such fees in cases that potentially influence social stability.[123] The bans, however, appear to have had little effect in practice.[124]

2. *Professional Protesters.* — Professional protesters, *zhiye yinaozhe* (literally "medical chaos professionals"), operate outside many major hospitals, soliciting patients and family members who appear to be in distress with offers to obtain a favorable settlement from the hospital in exchange for a percentage of the settlement or a flat fee.[125] Professional

---

119. See Interview 2010-17 (detailing last-resort nature of litigation in medical disputes); Interview 2009-108 (same). This is not necessarily an advantage for the hospitals: The absence of lawyers can make negotiating with patients and their families difficult. Interview 2009-101 (noting hospital preference for discussing disputes with those with legal training).

120. Interview 2010-15 (noting frequency of contingency fee arrangements).

121. Interview 2010-5 (describing practice of accepting fee up front in addition to percentage of outcome); Interview 2009-105 (observing that contingency fees are used but noting preference to charge up front); Interview 2009-109 (describing policy of accepting money up front then collecting 10% of outcome).

122. Interview 2010-25; Interview 2009-105; Interview 2009-109.

123. See, e.g., Jiangsu Sheng "Lüshi Shiwu Shoufei Guanli Banfa" Shishi Xize (江苏省〈律师服务收费管理办法〉实施细则) [Implementing Provisions of the "Lawyer Services Fee Management Methods" of Jiangsu Province] (promulgated by the Jiangsu Price Bureau, Jan. 1, 2007), art. 8 (Jan. 1, 2007), available at http://www.law110.com/lawserve/serve-help/lawhelp2007001.html (on file with the *Columbia Law Review*) (banning contingent fees for personal injury suits arising from traffic or medical accidents in Jiangsu Province).

124. See Interview 2010-15 (highlighting continued use of contingent fees despite bans).

125. Cui Xia, Yinru Renmin Tiaojie Jizhi Chuli Yihuan Jiufen (引入人民调解机制处理医患纠纷) [Introducing People's Mediation Mechanism to Deal with Hospital-Patient Disputes], Shenzhen Shangbao (深圳商报) [Shenzhen Comm. Daily] (July 14, 2009), available at http://fzj.sz.gov.cn/work/462 (on file with the *Columbia Law Review*); see also Interview 2010-4 (noting plaintiffs are rewarded for causing "chaos"). One report from Shenzhen stated that protesters charge on average fifty yuan a day to protest outside hospitals. Luo Qiufang et al., Yituo Yaoshen Bian Yinao (医托摇身变医闹) [Medical Introducers Transform into Medical Protesters], Jing Bao (晶报) [Jing Daily] (Jan. 31, 2007), available at http://finance.ce.cn/law/home/wqxw/200701/31/t20070131_10267573.shtml (on file with the *Columbia Law Review*); see also Li Yang, 80 Ming Yinao Shougu Du Yiyuan, Gongan Juzhang Cheng Shi Tiaoxin Fazhi Shehui (80名医闹受雇堵医院, 公安局长称是挑衅法制社会) [80 Hospital Protesters Hired To Block Hospital, Police Chief Says Protest

protesters are most common in large cities; in smaller cities such as Municipality *A* and in county towns, it is harder for professionals to operate because local authorities quickly become acquainted with repeat protesters.[126] Nevertheless, hospital officials in Municipality *A* note that they also encounter professional protesters, although such protesters are often friends or family members who are hired by patients and their families.[127]

3. *Appointment Touts and Medical Introducers.* — Appointment touts, *haofanzi* (literally "numbers traffickers"), sell appointment slots with doctors. Obtaining appointments at top hospitals often requires waiting in line all night, and appointments with top specialists are booked long in advance. In Beijing and other major cities the high demand for appointments creates ample opportunities for touts, with appointment slots with top doctors costing as much as 1,000 yuan on the street.[128] The high price may nevertheless be worth paying for those who have travelled to major teaching hospitals in Beijing or Shanghai and who would otherwise have to wait weeks or months for an appointment.[129]

Yituo, or medical introducers, likewise congregate outside major hospitals and solicit patients on behalf of other hospitals—often second-tier hospitals—with promises of no delays and sometimes lower cost. Media reports detail periodic crackdowns on *yituo*. In 2006, for example, authorities detained 198 persons on suspicion of being *yituo*; seventeen hospitals were placed on a blacklist for relying on *yituo* to attract business.[130] The use of *yituo* may also result in disputes, in particular when

---

Was a Provocation for a Rule-of-Law Society], Xin Wenhua Bao (新文化报) [New Culture Daily] (Jan. 5, 2011, 9:13 AM) [hereinafter Li, Hospital Protesters], available at http://news.china.com/zh_cn/social/1007/20110105/16326633.html (noting protesters were paid fifty yuan per day and included elderly women) (on file with the *Columbia Law Review*); Zhang Zhihong, Fujian Wuyi Shan Yijia Yiyuan Bu Kan Yinao Ting Ye 7 Tian (福建武夷山一家医院不堪医闹停业7天) [Hospital at Wuyi Mountain in Fujian Closes for 7 Days Due to Medical Protests], Dongnan Kuai Bao (东南快报) [Southeast Express] (July 13, 2007), available at http://news.xinhuanet.com/health/2007-07/13/content_6369627.htm (on file with the *Columbia Law Review*) (describing hospital shut down by medical protester harassment).

126. See Interview 2010-23 (stating that professional protesters are uncommon in one small city because authorities quickly learn their identities).

127. Interview 2010-17 (describing concern over professional protesting and case where a village instructed every family to send a man to protest); Interview 2010-18 (noting case where nearly one-third of settlement went to professional protesters); Interview 2010-25 (contending that "most disputes [in one small city] rely on family members" to protest).

128. Interview 2010-4.

129. Interview 2010-7 (noting long wait for appointments).

130. Liu Mofei, 17 Jia Yiyuan Gu Yituo Bei Baoguang (17家医院雇医托被曝光) [17 Hospitals Exposed for Hiring Medical Introducers], Sohu (搜狐) (May 15, 2006, 12:00 AM), http://news.sohu.com/20060515/n243228194.shtml (on file with the *Columbia Law Review*).

patients are taken to hospitals that lack adequate facilities. Like professional protesters, *yituo* are most common in major cities, where competition is fierce and patients seeking care at major hospitals often face long delays.[131]

4. *Insurers.* — Insurers, in contrast, are most notable for their absence from medical disputes. Although national and provincial authorities have encouraged (and in some cases mandated) medical liability insurance for doctors and hospitals,[132] the insurance system remains largely ineffective. Insurance generally covers only disputes in which a medical review board has found error.[133] Hospital officials complain that insurers refuse to pay claims resolved outside the courts.[134] Premiums are high relative to the amount of coverage obtained;[135] in some cases insurance

131. See Interview 2010-18 (describing role of *yituo*).

132. In 2007, for example, the Ministry of Health issued a notice to promote the development of medical liability insurance nationwide. Weisheng Bu, Guojia Zhongyiyao Guanli Ju, Zhongguo Baojianhui Guanyu Tuidong Yiliao Zeren Baoxian Youguan Wenti De Tongzhi (卫生部、国家中医药管理局、中国保监会关于推动医疗责任保险有关问题的通知) [Notice Regarding Issues Concerning Promoting Medical Liability Insurance] (promulgated by the Health Ministry, St. Admin. Traditional Chinese Med., & China Ins. Regulatory Comm'n, June 21, 2007) Ministry of Health Publication No. 204, available at http://www.cicpa.org.cn/column/Information_regulations/Finance_insurance/200804/t20080429_10446.htm (on file with the *Columbia Law Review*). The notice called on some "experimental" locations to implement insurance first, while other jurisdictions could move more slowly. Id. In early 2011 the Ministry stated that improving medical liability insurance was one of its major goals for the year. Weisheng Bu Guanyu Yinfa 2011 Nian Weisheng Gongzuo Yaodian De Tongzhi (卫生部关于印发2011年卫生工作要点的通知) [Notice of the Ministry of Health on Key Objectives of Healthcare Industry Reform in 2011] (promulgated by the Health Ministry, Jan. 3, 2011), available at http://www.moh.gov.cn/publicfiles/business/htmlfiles/mohbgt/s7693/201101/50509.htm (on file with the *Columbia Law Review*). Some provincial and local authorities have explicitly required public hospitals in their jurisdictions to purchase insurance. See, e.g., Zhejiang Sheng Yiliao Jiufen Yufang Yu Chuli Banfa (浙江省医疗纠纷预防与处理办法) [Zhejiang Province Methods on Preventing and Handling Medical Disputes] (promulgated by the Forty-sixth Exec. Meeting People's Gov't Zhejiang Province, Jan. 19, 2010, effective Mar. 1, 2010), Zhejiang Province Government Order No. 269 (2010) [hereinafter Zhejiang Province Methods], available at http://www.zhejiang.gov.cn/gb/zjnew/node3/node22/node167/node359/node365/userobject9ai112682.html (on file with the *Columbia Law Review*) (stating commitment of local government to establishing insurance system).

133. Zheng Xiaoqian, Henan Yiliao Zeren Xian Zaodao Yiliao Jigou Ji Baoxian Gongsi De Lengyu (河南医疗责任险遭到医疗机构及保险公司的冷遇) [Henan Medical Liability Insurance Runs into Cold Reception from Medical Institutions and Insurance Companies], Henan Shang Bao (河南商报) [Henan Com. Daily] (Sept. 8, 2009), available at http://health.sohu.com/20090908/n266547802.shtml (on file with the *Columbia Law Review*).

134. Wang Jing, Dalian Yiliao Zeren Xian Weisha Bu Chixiang (大连医疗责任险为啥不吃香) [Why Medical Insurance Is Not Popular in Dalian], Dalian Wanbao (大连晚报) [Dalian Evening News] (Feb. 22, 2006) [hereinafter Wang, Medical Insurance in Dalian], available at http://dl.people.com.cn/GB/channel2/18/200602/22/40427.html (on file with the *Columbia Law Review*); Interview 2009-101 (asserting insurance companies will not pay if case settled).

135. Zheng, supra note 133.

costs exceed the amount of indemnification provided by the policy.[136] Insurance companies also often cap liabilities, excluding catastrophic cases from coverage.[137] Hospital officials say that they often must pay patients and their families in excess of the amounts covered by their policies.[138] Smaller or less successful hospitals may lack the ability to pay insurance premiums; big hospitals, in contrast, are not worried about the financial risks of litigation.[139] Insurance companies have generally not been enthusiastic about marketing medical liability insurance, viewing the area as one with low yields and high risks due to the lack of transparency in China's medical system.[140]

---

136. Zhongguo Yishi Xiehui (中国医师协会) [Chinese Med. Doctors Ass'n], Qian Tan Yiliao Zeren Baoxian (浅谈医疗责任保险) [Brief Discussion on Medical Liability Insurance] (Nov. 11, 2005), available at http://2009.cmda.gov.cn/yishiweiquan/weiquanzhishi/2008-12-10/2295.html (on file with the *Columbia Law Review*); Interview 2010-7 (contending percentage return from insurance policy is too small); Interview 2010-18 (stating that even though hospital bought insurance, insurance company refused to pay full value of policy to hospital).

137. In Xiamen, for example, insurers set the maximum reimbursement for medical disputes at 300,000 yuan. Chu Yan & Lin Ciwen, Jinhou Yiliao Shigu You Baoxian Gongsi Maidan, Danli Zuigao Ke Huopei 30 Wan Yuan (今后医疗事故由保险公司买单 单例最高可获赔30万元) [Future Medical Accident Bills Will Be Paid by Insurance Companies; Up to 300 Thousand Yuan Collectible for a Single Case], Xiamen Ribao (厦门日报) (Xiamen Daily) (June 4, 2011), available at http://biz.ifeng.com/city/xiamen/zaoanxiamen/xiamen_2011_06/04/37235_0.shtml (on file with the *Columbia Law Review*). Similarly, in Shanghai, where insurance is mandatory for most hospitals, the maximum payable under the policies as of late 2009 was generally limited to 200,000 yuan. Interview 2009-108. Such amounts may be insufficient to cover major cases.

138. Chinese Med. Doctors Ass'n, supra note 136.

139. Interview 2010-7 (claiming that while large malpractice suits can "be the end" for small hospitals, big hospitals are not financially vulnerable).

140. Hu Xiao, Chengbao Fengxian Gao Jichu Shuju Shao, Yiliao Zeren Xian Tuiguang Zai Lengyu (承保风险高基础数据少; 医疗责任险推广遭冷遇) [With High Risks on Insurers and Little Basic Data, Promotion of Medical Liability Insurance Meets with a Cold Reception], Guangzhou Ribao (广州日报) [Guangzhou Daily] (Feb. 26, 2010), available at http://finance.ce.cn/rolling/201002/26/t20100226_15544897.shtml (on file with the *Columbia Law Review*). Insurers complain that hospitals' preference for private settlement makes insurance more difficult to administer and market. Wang, Medical Insurance in Dalian, supra note 134. Insurance has developed particularly slowly away from major cities. In Municipality *A*, for example, one hospital official reported purchasing insurance in one year, 2004. The insurance company subsequently refused to pay out on the policy, arguing that the hospital was filing too many claims. The hospital bought insurance from a second provider the following year, but the insurer refused to cover any cases that had not gone through the medical review board. The hospital eventually sued the insurance carrier, and a local court mediated a settlement in which the bulk of the premium was returned to the hospital. As a result, the hospital no longer buys insurance. Interview 2010-18.

II. IN THE COURTS: FLEXIBILITY AND COMPROMISE

This project aimed to study every court judgment in which a hospital or medical provider was a defendant in a civil suit in one municipality, or *shi*, in a central province from 2000 to 2009. The jurisdiction, which this Essay refers to as Municipality *A*, is largely rural. This Essay examines a collection of 152 decisions, gathered for this Essay, fifty-nine from the intermediate (appellate) court and ninety-three from basic-level (first-instance) courts.[141] The cases include twenty-seven disputes in which it was possible to obtain both first-instance and appellate decisions.[142] Because the cases were collected by judges at the intermediate court, there is a high level of confidence that this represents most of the decisions issued by that court. It is, however, possible that some of the intermediate court cases were omitted, either intentionally or unintentionally. The intermediate court obtained lower court decisions by requesting that each first-instance court under its jurisdiction provide all medical cases decided during the same period. The total number of first-instance cases tried in the period was almost certainly larger than the ninety-three collected. All but two of the lower court decisions came from 2007 or earlier, suggesting that the intermediate court did not obtain most lower court cases from 2008 or 2009. In addition, only 29% of first-instance cases in the dataset were appealed;[143] this suggests that the total number of first-instance cases should be more than triple the number of appeals.[144] Nevertheless, the cases gathered for this Essay constitute the largest database of medical cases from a single jurisdiction collected to date. Table 1 provides a breakdown of cases collected by year.

---

141. To protect the identity of each court's location, cases are coded and citations are to the code number. "A" cases are intermediate court cases; "B" cases are basic-level (county) court cases. Cases were classified by year in accordance with the courts' classification systems, which generally classify cases by the year in which they were filed. For the most part, cases were decided in the same year that they were filed. In a few instances, cases classified as belonging to a particular year were actually decided early the following year.

142. Four disputes resulted in three separate court decisions each; one dispute resulted in four.

143. Twenty-seven of the ninety-three first-instance cases were appealed. Because all of the basic-level decisions came from 2008 or earlier, it is likely that most appeals would have been decided by the end of 2009.

144. Data on civil appeals rates in Municipality *A* are not in the author's possession. But a 30% rate is high compared to general trends in civil litigation. It is possible lower courts did not want to make all of their cases available to the intermediate court; it is also likely that the lower courts did not collect cases diligently. Court record systems are often imperfect, particularly in rural areas, and collecting medical cases might require a judge to read a large volume of cases in a file room one by one.

TABLE 1 — CASES COLLECTED BY YEAR

Year of Decision	Court		Total Cases
	Basic Level	Intermediate Level	
2000	2	3	5
2001	8	1	9
2002	16	1	17
2003	13	5	18
2004	10	12	22
2005	13	6	19
2006	13	11	24
2007	16	3	19
2008	2	11	13
2009	0	6	6
Total	93	59	152

Court decisions in medical cases are often longer and more detailed than in other tort cases. The cases reviewed generally ranged from four to eight pages in length; a small number of cases with complex facts were longer. Cases follow a standardized format that includes each party's arguments, the evidence submitted, and the court's brief legal analysis. Court opinions in the dataset became more detailed over time.[145] Yet much is also missing from the opinions—most notably behind-the-scenes discussions and considerations that may influence outcomes. Nevertheless, the decisions provide insight into the types and disposition of medi-

145. Examples of early decisions with minimal analysis include A1 (Son of Deceased Patient v. Doctor and Public Health Clinic) (2000) (adopting findings of medical review board with no analysis) and B10 (Child Who Suffered Nerve Injury During Injection v. District Children's Hospital) (2001) (concluding, without analysis, that plaintiff failed to show causation). Examples of later cases with more detailed analysis include A47 (Family of Woman Who Died During Childbirth v. Traditional Chinese Medicine Hospital) (2008) (providing detailed discussion of applicable law) and B93 (Plaintiff Treated for Fractures After Car Accident v. County Hospital) (2007) (conducting detailed analysis of burden of proof and causal relationship of injury and defendant's action).

cal disputes that wind up in courts in rural China and the interaction among courts, medical review boards, and judicial inspection agencies.

Four insights emerge from analysis of the cases. First, the decisions reveal a high degree of flexibility, both in interpreting written law and in balancing the interests of plaintiffs and defendants. Compromise decisions are common. Courts are developing competence, but this competence does not necessarily lead to strict application of legal rules. Second, courts overwhelmingly award some damages to plaintiffs. There is some evidence that compensation is tied as much to the severity of injury to the plaintiff as to the degree of wrongdoing of the defendant. This supports arguments that courts are evolving into institutions with roles that extend well beyond application of legal standards: Courts seek to mollify parties, and perhaps to provide low-level compensation in routine cases. Third, the cases suggest that the reality of day-to-day court decisions is more complex than it is often perceived to be. Many interviewed for this Essay argued that courts rarely find for plaintiffs or that the system is so biased as to render litigation useless. Yet courts are deciding many cases. Legal representation is surprisingly common compared to other types of civil cases in China's courts, and appellate courts appear to be playing a far more active role in medical cases than in other civil disputes. Fourth, the cases provide insight into problems in the healthcare system, problems that lead not only to litigation but also to unrest.

The remainder of this Part discusses the cases from Municipality *A* in detail, focusing on six aspects of the cases: outcomes, the legal standards used, the use of medical review board inspections or judicial inspections, court efforts to achieve equity and compromise, settlements and appeals, and damages. This Part concludes with a discussion of insights into problems in rural healthcare that the cases provide and the role of lawyers and other legal representatives in malpractice litigation.

A. *Outcomes*

The most striking aspect of the cases is that plaintiffs received some compensation in 117, or 77%, of 152 reported cases.[146] This does not mean that all those plaintiffs won: Most damage awards were modest, in particular when compared to plaintiff demands. Some 103 decisions included information on plaintiffs' demands; plaintiffs received 50% or more of the amount sought in just twenty-one cases. Courts ordered plaintiffs to pay court fees or to share court fees with defendants in nearly two-thirds of the first-instance cases and just under half of appellate cases, suggesting that courts believed that plaintiffs' claims were at

146. Plaintiffs obtained compensation in 80% of first-instance decisions and 74% of appellate decisions. The combined figure of 77% includes thirty-four settled cases and five withdrawn cases.

least partially without merit.[147] Plaintiff dissatisfaction with first-instance outcomes was also evident from the fact that more than half of the appeals of first-instance decisions awarding damages to plaintiffs were brought by plaintiffs. Nevertheless, the finding that plaintiffs do recover damages in a significant percentage of cases contrasts with claims by critics of the medical malpractice system that plaintiffs have little chance of recovery through the formal legal system.[148]

Courts in Municipality *A* were most likely to impose liability in three broad categories of cases: first, in cases in which defendants violated medical practices or standards, such as giving overdoses of medication or using drugs despite the existence of contraindications; second, in cases involving outrageous or extreme outcomes resulting from common procedures, such as incomplete removal of a placenta; and third, in cases where misdiagnosis was clear, such as failure to diagnose cancer despite cancer cells revealed in a biopsy.

County-level (in rural areas) or district-level (in urban areas) hospitals were the most common defendants and were named as defendants in fifty-five of the first-instance cases and thirty-two of the intermediate court cases. This is not surprising: These hospitals are by far the largest providers of inpatient care in Municipality *A*. Municipal-level hospitals, generally the best hospitals in Municipality *A*, were defendants in seven first-instance and ten intermediate court cases. Township health offices, which generally provide lower-standard facilities than county or municipal hospitals, were named as defendants in seventeen first-instance cases and ten intermediate court cases. Private clinics were named as defendants in five first-instance cases and two appellate cases; individual doctors were named in only nine first-instance cases and six appellate cases. In suits against hospitals, the names of doctors who treated the patient are rarely mentioned.[149] This reflects the fact that most doctors are employees of state-run hospitals and are not subject to personal liability.

B. *Use of Regulations or SPC Interpretation*

Courts in Municipality *A* were flexible in their application of the Regulations and rarely relied exclusively on the Regulations in resolving cases. Just twelve decisions were handled solely in accordance with the

147. Regulations on court filing fees provide that the losing party to a civil law suit is responsible for paying court fees. Susong Feiyong Jiaona Banfa (诉讼费用交纳办法) [Methods on Paying Litigation Fees] (promulgated by the St. Council, Dec. 8, 2006, effective Apr. 1, 2007), St. Council Gaz., Dec. 19, 2006, at 4 (on file with the *Columbia Law Review*). Court decisions generally state which party shall pay the court filing fees and thus provide a rough sense of which party the court viewed as prevailing. In many cases courts order the parties to split the fees.

148. See supra Part I.B.1 (discussing criticism of medical review boards).

149. In some cases brought prior to the Regulations, doctors were named as defendants alongside their employers. E.g., A1.

Regulations. Forty-two of the cases relied only on the General Principles and the SPC's Interpretation, while twenty-one cited to both the General Principles and to the Regulations in making liability determinations.[150]

The frequency with which the courts relied on the General Principles is notable given that there were also signs that the intermediate court was encouraging lower courts to follow the Regulations. In three cases, the intermediate court either rejected lower court decisions that had awarded death compensation payments or explicitly rebuked arguments from plaintiffs that such compensation should have been awarded.[151] For example, in a 2008 case, a lower court awarded death compensation to the family of a patient who died of a pulmonary embolism following surgery to remove a tumor.[152] The medical review board had found minor responsibility on the part of the hospital, determining that the defendant had failed to inform the patient of certain risks and to take necessary preventative measures. The trial court found that the total harm suffered included death compensation of 68,380 yuan, funeral expenses of 7,586 yuan, and emotional damages of 8,196 yuan. The court, however, assigned only partial blame to the hospital, and thus awarded plaintiffs 15,793 yuan. On appeal, the intermediate court rejected the award of death compensation, awarding only funeral expenses and emotional harm. Yet, the court roughly doubled the emotional damages, apparently seeking partially to counterbalance the elimination of death compensation damages, and awarded the same total amount of damages to the plaintiffs.[153]

In another case from 2008, the intermediate court rejected a plaintiff's argument on appeal that an award of roughly 50,000 yuan for the death of a family member was too low because it failed to include compensation for death.[154] The medical review board had found that defendant hospital's failure to diagnose a twisted small intestine was the major cause of death, and the trial court imposed 90% responsibility on the defendant. The intermediate court stated that the case fell squarely within the Regulations, and thus plaintiffs were not entitled to compensation for death.[155]

---

150. Seventy-two of the decisions provided no citation to either the Regulations or the General Principles, three relied on contract law, and one based its decision on product liability law.

151. A45 (Family of Patient Who Died After Treatment for Abdominal Pain v. Hospital) (2008); A47 (Family of Woman Who Died During Childbirth v. Traditional Chinese Medical Hospital) (2008); A61 (Family of Patient Who Died After Treatment for Tumor v. County Hospital) (2008).

152. A61.

153. Id.

154. A45.

155. Id. In a third case, also from 2008, the intermediate court explicitly rejected a claim for death compensation by the family of a woman who died following a postpartum hemorrhage. The court stated that the Regulations, not the General Principles, should be

In other cases, however, the intermediate court permitted plaintiffs to recover compensation for death. In a 2009 case, the intermediate court affirmed an award of death compensation to the wife and six children of a patient who died when a doctor apparently failed to recognize signs of a myocardial infarction. Yet the award in the case of 52,819 yuan for death compensation, living expenses, and funeral expenses was relatively modest, in line with other cases in which death compensation was not paid, and a reduction from the 88,032 yuan the trial court had awarded.[156]

Courts in Municipality *A* appeared most likely to ignore the Regulations in cases in which defendants had failed to produce evidence or where a defendant's conduct was particularly egregious. In two cases, courts explicitly stated that they were allowing the case to proceed according to general tort principles (and thus were willing to assign higher damages) because the defendant had not produced evidence, had employed unlicensed staff, or had failed to obtain consent for surgery. In one of the largest awards in the dataset,[157] the Municipality *A* intermediate court awarded 227,507 yuan in compensation for economic loss (including death compensation) and emotional damages to the family of a patient who died following complications from surgery for esophageal cancer. The court largely affirmed a county court finding that the hospital had failed to perform necessary tests prior to the surgery; the hospital contended that such tests had been rejected by the patient's family. The court noted that the case had been referred to the local medical review board—which had found a Class One error (the most serious)—and both sides had appealed to the provincial medical review board. The provincial medical review board never issued an opinion; it terminated the case because the hospital failed to submit key evidence, including a video swallow study and the autopsy report. The trial court found that the defendant should bear responsibility for failing to provide the evidence and stated that the case would therefore proceed according to the General Principles, not the Regulations. On appeal, the intermediate court did not comment on the applicability of the Regulations or on the award of death compensation, instead affirming the judgment with a 30% reduction in damages based on a finding that the complications that arose might also have occurred absent negligence.[158]

---

used to determine damages. A47. The outcome may have been influenced by the fact that the plaintiffs had already received substantial compensation through a settlement agreement.

156. A51 (Family Members of Patient Who Died of Myocardial Infarction v. Village Hospital) (2009).

157. A52 (Wife and Parents of Patient Who Died of Distal Esophageal Carcinoma v. Two Hospitals) (2008).

158. Similarly, in another case, a trial court awarded death compensation to the family members of a woman who died of cancer despite the fact that the medical review board found no negligence. A54 (Husband, Children, and Parents of Deceased Patient v. County

C. *Medical Review Boards*

Decisions likewise suggested that courts take a flexible approach to the use of medical review boards or judicial inspection agencies. Forty-eight of the cases reported findings of medical review boards—eighteen appellate decisions and thirty trial court decisions. Sixty-eight percent of the medical review board decisions—fifteen in the appellate cases and eighteen in the trial court cases—found some error. In a significant portion of the cases, however, the review boards found only minor error.[159] Data from court decisions are obviously incomplete; medical review board decisions are not public, and thus the number of cases that were dropped by plaintiffs after adverse decisions by the review boards is unknown.[160]

Use of judicial inspection institutions was also widespread. Twenty cases reported liability determinations by judicial inspection entities—in tension with the Regulations. This suggests that despite the widespread debate about whether judicial inspections are permissible, in practice the use of judicial inspections continued throughout the 2000s. Patients received compensation in nineteen of the twenty cases, somewhat more frequently than they did from medical review boards (thirty-nine out of forty-five cases).

Hospital) (2008). The court said that, because the review board found no error, the Regulations did not apply. The family had argued that the hospital erred in failing to take adequate steps after the decedent sought treatment for a lump. The medical review board found no malpractice because the cancer was already at a late stage and the patient disregarded instructions from the hospital to obtain follow-up treatment. But the board noted certain errors on the part of the hospital, including failure to obtain a tissue sample for pathological examination; the fact that the doctor treating the patient was "qualified but unlicensed"; and failure to keep adequate notes. The trial court calculated damages to the plaintiffs for such errors according to the SPC's Interpretation, including death compensation in the damages. The court then allocated 40% of the fault to defendants. On appeal, the intermediate court reduced the damages slightly because it found the lower court had miscalculated living expense allowances for the survivors—but it did not challenge the lower court's inclusion of death compensation for the harm suffered.

159. Only eighteen of the decisions reported the level of error found by the medical review board. Of these, five were Class One, the most severe; three were Class Two; eight were Class Three; and two were Class Four, the least severe. For a description of the categories of error, see Yiliao Shigu Fenji Biaozhun (Shixing) (医疗事故分级标准(试行)) [Grading Standards for Medical Accidents (For Trial Implementation)] (promulgated by the Health Ministry, July 31, 2002, effective Sept. 1, 2002), available at http://www.gov.cn/banshi/2005-08/02/content_19182.htm (on file with the *Columbia Law Review*); Liu Hui, Yiliao Shigu Fenji Zhidu Yu Shangcan Dengji De Guanxi (医疗事故分级制度与伤残等级的关系) [The Relationship Between the Grading Standards for Medical Accidents and the Grading of Disabilities], Falü Boke (法律博客) [Law Blog] (May 21, 2008, 12:36 PM), http://www.bloglegal.com/blog/cgi/shownews.jsp?id=1700012907 (on file with the *Columbia Law Review*).

160. In contrast, a health bureau official in Municipality *A* reported 111 cases referred to the local medical review board in 2009, with error being found in fifty-three cases. Interview 2010-16.

In fifteen cases parties directly challenged the findings of medical review boards (eleven) or judicial inspection offices (four), generally unsuccessfully. Thus, for example, in a case involving the death of a patient during childbirth, the defendant health clinic argued that the trial court's award in favor of plaintiffs was invalid because an inspection had been made by a judicial inspection office, not a medical review board. The intermediate court rejected the argument, noting that the inspection had nevertheless been done by "medical experts."[161] Courts accepted challenges to review board or inspection decisions in just two cases.[162]

As with application of death compensation, courts appeared particularly willing to rely on inspections by judicial inspection organizations in cases in which defendants were found to have failed to obtain consent to procedures or in cases of egregious harm. In a 2002 first-instance case, for example, the court adopted a finding of a judicial inspection bureau that the defendant hospital should pay 25% of the damages to the plaintiffs because the defendant had failed to inform the decedent of the risks involved in an operation to remove a portion of the decedent's spleen.[163] In a 2004 intermediate court case, the plaintiff developed complications from surgery to remove his gallbladder.[164] During subsequent surgery to correct severe abdominal adhesion the plaintiff suffered massive blood loss and entered into shock. After the surgery, plaintiff and defendant reached a settlement agreement. Six months later, however, the plaintiff's condition deteriorated, and plaintiff lost sight and mental function. The plaintiff then sued. Two inspection reports were obtained. An inspection by the provincial medical review board found no error. But a judicial inspection—presumably obtained by the plaintiff—found that the original decision to operate was in error given the plaintiff's underlying condition. Although the trial court sided with the defendant, finding that the settlement agreement was enforceable, the intermediate court rejected both the trial court decision and the medical review board's

161. A20 (Family of Patient Who Died During Childbirth v. Health Clinic and Municipal Hospital) (2004); see also A21 (Husband of Deceased Patient v. Municipal Tuberculosis Control Center) (2005) (rejecting defendant's argument that trial court decision was invalid because it relied on findings of judicial inspection, not medical review board).

162. See A36 (Patient Treated for Intestinal Obstruction v. District Hospital) (2004) (awarding compensation to plaintiffs on appeal after they challenged medical review board decision); B76 (Family Members of Patient Who Died of After Medical Misdiagnosis v. County Hospital and University Hospital) (2008) (accepting defendant's argument that review board decision was incomplete and thus should not be used but nevertheless finding for plaintiff).

163. B24 (Family Members of Deceased Patient v. County Hospital) (2002).

164. A36.

findings and awarded 106,766 yuan in damages, finding that the defendants had violated the relevant medical guidelines.[165]

D. *Equity and Compromise*

Court decisions reflected strong concerns about equity, with courts awarding compensation in numerous cases absent findings of medical error. For example, courts awarded damages in three cases that involved patients who had apparently attempted to commit or had committed suicide.[166] In one of the cases, the family of a patient who jumped from a hospital window alleged that the hospital was negligent for failing to secure the patient after giving her a dose of atropine.[167] The patient had originally been hospitalized for "mistakenly" ingesting pesticide, common in suicides in rural China.[168] The court found that hospital staff had untied the patient at the family's request but had instructed the family that four family members needed to be present at all times to secure the patient. While being watched by her sister overnight, the patient jumped out the window, using the pretext of needing to go to the bathroom to distract her sister. The court found that the patient, who survived but suffered injuries, was primarily responsible for her own injuries, but nevertheless awarded 5,000 yuan in damages, plaintiffs, finding that the hospital ignored the potential side effects of the drug when its staff agreed to untie the patient.[169] In a second case involving a patient who jumped to her death from a hospital window, the court likewise found that the hospital failed to show that it had taken sufficient steps to assist the family in

165. The court ordered the defendants to pay 75% of plaintiff's damages; the reduction from 100% was based on a finding that the surgery performed was "objectively difficult." Id. Similarly, in case A37 the intermediate court affirmed a trial court verdict in favor of a plaintiff who sued two hospitals for failing to detect a stomach tumor. A37 (Cancer Patient v. Two Hospitals) (2005). In this case, a local hospital had noted two tumors on a radiology exam but had failed to detect a third, which was clearly shown on the exam. The patient then underwent surgery at a hospital in the provincial capital; the surgery successfully removed the two detected tumors but did not find and remove the third. A judicial inspection report adopted by the trial court found primary liability on the larger hospital for failure to detect the tumor during surgery. The hospital appealed, arguing that the case should have been referred to a medical review board. Yet the intermediate court found that the judicial inspection was consistent with "the spirit of" the SPC's notice on handling medical disputes in accordance with the Regulations.

166. A34 (Family of Patient Who Committed Suicide v. County Hospital) (2006) (involving woman who jumped from third floor of hospital); A40 (Patient Treated for Poison v. County Hospital) (2006) (involving patient who jumped out of hospital window while under influence of medicine); A7 (Patient Who Drank Pesticide v. Traditional Chinese Medicine Hospital) (2003) (involving woman who drank pesticide).

167. A40.

168. Jianlin Ji et al., Suicide in Contemporary China: A Review of China's Distinctive Suicide Demographics in Their Sociocultural Context, Harv. Rev. Psychiatry, Jan.–Feb. 2001, at 1, 3–4.

169. The case was affirmed on appeal. A40.

obtaining nursing or chaperone services once aware of the decedent's mental condition.[170] The hospital argued that the decedent was being treated for an unrelated problem and that the hospital should not be liable for the suicide.[171]

Courts also imposed damages absent a finding of medical error in cases in which they found the defendants' conduct to be particularly egregious. Courts thus appeared to be seeking both to punish medical providers who had behaved badly—regardless of the actual impact of such conduct—and perhaps to deter such conduct in the future. One court imposed liability on a hospital for delaying treatment, despite the absence of a link between the care given or the delay and the patient's death, because the hospital had hired a medical introducer to entice patients away from a neighboring hospital.[172] In another case the intermediate court imposed 35,000 yuan in damages even though the trial court had found no error. The intermediate court acknowledged that the care had met the required standard, but nevertheless imposed damages on the hospital because it found that the medical record was unclear and the hospital had employed an anesthesiologist whose professional qualifications were "unclear."[173] Similarly, a court awarded damages to a plaintiff who sued after his wife died of cervical cancer.[174] Both the municipal and provincial medical review boards found that the hospital had erred in failing to perform a biopsy. Yet both boards also found no causation between the error and the death because the patient already had late-term cancer. The court nevertheless awarded damages of nearly 10,000 yuan, finding that "improper surgical procedure" resulted in misdiagnosis and thus economic harm to the plaintiff. Courts likewise imposed liability in cases in which defendants failed to keep adequate records or altered records.[175]

In other cases involving catastrophic injuries, courts awarded compensation despite the lack of a medical review board's finding of error. For example, the intermediate court awarded a patient's family 25,154 yuan in damages for "incomplete diagnosis and treatment" in a case that arose after the defendant hospital had removed a bone fragment from

---

170. A34.

171. Id. The hospital contended that the patient had sought treatment for gallbladder disease, not mental illness, and thus it should not be responsible for the patient's death.

172. A31 (Parents of Deceased Patient v. Health Clinic & Municipal Hospital) (2004).

173. A12 (Family Members of Deceased Patient v. Traditional Chinese Medicine Hospital) (2004).

174. B14 (Husband of Patient Who Died of Cancer v. District Hospital) (2003).

175. See, e.g., A2 (Hepatitis C Patient v. Maternity and Children's Hospital and Blood Bank) (2001) (noting hospital did not keep record of blood transfusions and could not prove patient acquired hepatitis before transfusion).

the decedent's esophagus.[176] Six days after the procedure, the patient was readmitted and subsequently died from upper gastrointestinal tract bleeding.[177] In some cases the court simply split damages equally between plaintiffs and defendants. In a 2003 case the intermediate court allocated economic damages of 28,339 yuan equally between the plaintiff and the defendant hospital.[178] The court found that the plaintiff might have suffered disability regardless of whether the hospital erred, but nevertheless imposed damages because the defendant had failed to discover a fracture. In other cases courts showed flexibility regarding procedures to permit claims to proceed. For example, in one case the intermediate court stated that the statute of limitations had not expired on the claims of six plaintiffs who sued after they contracted hepatitis C following blood transfusions, despite a five- to eight-year delay from the time they learned that they had contracted the disease to the time they sued.[179] The courts hearing the cases found that although the plaintiffs had not filed suit, they had "continually sought settlement with the two defendants ever since they became aware of their infection"[180] and "had not stopped making claims for their rights."[181]

Courts were willing to overlook plaintiff conduct that may have resulted in harm in order to ensure survivors received compensation, thus appearing to be attempting to make up for the lack of a robust social welfare system. For example, the intermediate court affirmed an award of 39,301 yuan to the family of a patient who died of acute drug-induced hepatitis.[182] The defendant disease control center treated the decedent for tuberculosis but neglected to test her liver function. The decedent herself was 50% responsible because she purchased drugs from a third party, apparently without a prescription, in order to avoid the high cost of medicine sold by the defendant. In another case involving a claim by survivors, the court awarded more than 80,000 yuan in damages to the family of a woman who died during childbirth.[183] The plaintiff had originally sought treatment from an unlicensed doctor; she was subsequently transferred to a township health center when complications developed.

---

176. A18 (Family of Patient Who Died Due to Gastrointestinal Tract Bleeding v. County Hospital) (2004) (internal quotation marks omitted).

177. Id. The trial court had likewise awarded damages based on incomplete treatment but awarded only 8,384 yuan, or about 10% of the plaintiff's damages. Id.

178. A8 (Patient v. County Health Clinic) (2003).

179. A6 (Hepatitis C Patients v. Blood Bank) (2003), aff'g B1 (2001).

180. B1.

181. A6.

182. A24 (Family Members of Patient Who Died of Acute Drug-Induced Hepatitis v. Municipality Center for Disease Control) (2006).

183. B51 (Family Members of Woman Who Died During Childbirth v. Township Health Center) (2006). The court made no mention of a medical inspection being conducted.

The health center then sought to transfer her to a larger municipal hospital, but the ambulance transferring the patient developed a flat tire, delaying treatment. The court found that the decedent should share some fault because she sought care from an unlicensed doctor. The court imposed liability on the two defendants, finding that the doctor should be liable because he lacked a license and the township health center should be liable for failing to conduct surgery on the patient, resulting in a fatal delay in treatment. The health center had argued that the patient's family refused to sign a consent agreement for the surgery; the court found there was no evidence to support the argument.

In some cases courts imposed liability on defendants without stating a reason. In one case, for example, a local court stated that although the major cause of death was a traffic accident, it was nevertheless "appropriate" to make the defendant partially liable "because of the actual circumstances of the case."[184] Although the court did not say so explicitly, it appeared to be relying on Article 132 of the General Principles of the Civil Code, which permits courts to award damages based on equitable principles in cases where no negligence has been found.[185]

E. *Settlements and Appeals*

Thirty-four of the cases collected reported settlements. Twenty-four of these cases were first-instance decisions; ten settlements were reported on appeal. Most were for relatively modest amounts, ranging from 5,000 yuan to 20,000 yuan. Yet some were large—in some cases clearly larger than would have been awarded pursuant to the Regulations. Eight settlements were in excess of 45,000 yuan: One was a settlement for 185,000 yuan,[186] and another was for 206,000 yuan.[187] The 206,000 yuan settlement came in the case of a woman who died of a postpartum hemorrhage at the defendant hospital. The medical review board had found a Class One error, the most serious, and that the hospital should be liable for the bulk of the harm for failure to conduct adequate tests and for failure to diagnose the hemorrhage or treat the patient in a timely manner. The case came to court when surviving family members sued for injuries they said had not been covered in the settlement and for compensation for death pursuant to the General Principles. The trial court al-

184. B53 (Husband of Deceased Patient v. Private Hospital) (2007).

185. General Principles, supra note 70, art. 132 (stating that "[i]f none of the parties is at fault in causing damage, they may share civil liability according to the actual circumstances").

186. A23 (Child Patient v. Maternity and Children's Hospital) (2006). Yet the amount of the settlement was significantly below the first-instance award in the case of 283,698 yuan for negligence that resulted in permanent mental disability to a newborn. B5 (Child Patient v. Maternity and Children's Hospital) (2006).

187. A47 (Family of Woman Who Died During Childbirth v. Traditional Chinese Medicine Hospital) (2008).

lowed only a modest damage award of 4,000 yuan. The intermediate court affirmed, noting that the plaintiffs had already received a settlement far more than they would have received had they sued pursuant to the medical review board determination.[188] In another case,[189] the plaintiff sought to challenge a settlement after learning that the doctor lacked a license. A first-instance court rejected the plaintiff's attempt to challenge the settlement, noting that the settlement was voluntary and that the amount agreed to—160,000 yuan—was more than would have been awarded under the Regulations.

Concerns about balancing plaintiff and defendant interests were also manifest in relatively high rates of reversal or modification on appeal. Twenty-eight of the fifty-eight appeals to the intermediate court, or nearly half the cases, resulted in decisions being vacated or modified. An additional ten cases settled on appeal, meaning that roughly 70% of appealed cases resulted in modification or reversal. This rate appears to be much higher than is generally the case in civil litigation.[190] National data on medical disputes are not available, but the data suggest that intermediate courts are playing a much more active role in medical disputes than in other areas. In numerous cases the intermediate court affirmed a lower court decision in favor of a plaintiff but reduced damages modestly, suggesting perhaps an effort to appease the appellant.[191] Likewise,

---

188. Id.

189. B36 (Family Members of Patient Who Died Due to Adverse Reaction to Infusion v. Clinic Operators) (2008).

190. See, e.g., Liang Cong et al., Guangdong High People's Ct., Ershen Minshi Anjian Gaipan Biaozhun De Diaoyan Baogao (二审民事案件改判标准的调研报告) [Research Report on the Standards for Modifying Judgments of Civil Cases on Appeal], Guangdong Fayuan Wang (广东法院网) [Guangdong Courts Online] (Feb. 6, 2009), http://www.guwenlvshi.com/ShowArticle.shtml?ID=20099710505732365.htm (on file with the *Columbia Law Review*) (showing rate of modification in Guangdong Province decreased from 27.34% in 2000 to 19.68% in 2007); Yang Honghui et al., Shaoyang: Ershen Minshi Anjian Lianxu 3 Nian "San Sheng Er Jiang" (邵阳: 二审民事案件连续3年"三升二降") [Shaoyang Saw Three Measurements Go Up and Two Others Go Down Among Civil Cases on Appeal for Three Consecutive Years], Zhongguo Fayuan Wang (中国法院网) [China Courts Online] (July 8, 2011), http://www.mzyfz.com/cms/fayuanpingtai/anjianshenli/minshishenpan/html/1074/2011-07-08/content-98833.html (on file with the *Columbia Law Review*) (showing rate of modification at Shaoyang Intermediate People's Court of Hunan Province decreased over three years to 18.8% in 2010). The fact that the modification or reversal rate is factored into a trial judge's performance evaluation, and thus affects pay and promotion, at least in part discourages reversals or modification. See Qian Xianliang, Falü Zhuanjia Chen Guangzhong: Faguan Kaoping Jizhi Daozhi Ershen Gaipanlü Di (法律专家陈光中: 法官考评机制导致二审改判率低) [Legal Scholar Chen Guangzhong: Judges Evaluation System Causes Low Modification Rates in Cases on Appeal], Zhenyi Wang (正义网) [Justice Online] (July 12, 2008), http://www.jcrb.com/zhuanti/fzzt/ntyydlt/ntyydzxbd/200807/t20080712_36692.html (on file with the *Columbia Law Review*).

191. See, e.g., A51 (Family Members of Patient Who Died of Myocardial Infarction v. Village Hospital) (2010) (reducing defendant hospital's liability for failure to diagnose myocardial infarction from 100% to 60% because of acuteness of patient's illness); A54

in some cases in which plaintiffs appealed, the intermediate court increased damage awards.[192]

Plaintiffs and defendants brought roughly equal numbers of appeals: Twenty-five of the appeals were filed by plaintiffs and thirty-three by defendants. The parties also appeared to prevail at roughly comparable rates. Plaintiffs received additional awards in sixteen of the twenty-five appeals, while defendants succeeded in having awards reversed or modified in fourteen of thirty-three appeals. Certain categories of cases, including cases in which a patient died,[193] cases involving large damage awards,[194] and disputes among multiple defendants,[195] appeared particularly likely to result in appeals.

For example, in a 2006 case, the plaintiff sued after her uterus was removed following extensive bleeding in childbirth.[196] A judicial inspection center decision found that the defendant hospital had not erred and that the complications resulted from the plaintiff's failure to undergo prenatal checkups and her late arrival at the hospital. The trial court rejected the inspection decision, finding that the medical records the center had used to make its decision had been modified and that the hospital had failed to direct the patient to undergo comprehensive check-ups. The intermediate court affirmed the trial court decision but nevertheless reduced the defendant's liability, from 111,000 yuan to 92,000, on the grounds that recognizing the plaintiff's condition was "a gradual process."[197]

As is standard in China, cases that were vacated and remanded generally provided no explanation of the reasons for doing so.[198] Yet occasionally intermediate court decisions provided some insight into the types of problems that arose in the lower courts. In one 2003 case, the

---

(Husband, Children, and Parents of Deceased Patient v. County Hospital) (2008) (reducing damages slightly because lower court miscalculated living expense allowances for survivors); A59 (Patient v. County Hospital) (2008) (reducing award by 30,000 yuan because lower court miscalculated patient loss).

192. See, e.g., A56 (Patient Who Was Treated for Fracture v. County Hospital) (2009) (raising damages for lost income).

193. See, e.g., A1 (Son of Deceased Patient v. Doctor and Public Health Clinic) (2000) (affirming judgment in case of woman who died after administration of penicillin).

194. See, e.g., B1 (Hepatitis C Patients v. Blood Bank) (2001) (awarding six plaintiffs meal stipends, medical costs, and cost of lost labor).

195. E.g., A29 (Patient Who Suffered Excessive Bleeding During Childbirth v. Community Health Center and Municipal Hospital) (2006); A30 (Plaintiff v. Blood Supply Station and Hospital) (2006).

196. A26 (Patient Who Underwent Hysterectomy v. Municipal Hospital) (2006).

197. Id. The court reduced liability for medical costs by 10% and also reduced emotional harm payments from 20,000 yuan to 10,000 yuan.

198. See, e.g., A28 (Family of Rabies Patient v. Hospital Employee and Retired Doctor) (2006). Courts do sometimes send a nonpublic letter to the lower court indicating the issues with the lower court decision that resulted in the remand. See, e.g., id.

intermediate court vacated and remanded a decision, noting that the lower court had violated procedures by issuing a decision despite the fact that the defendant had requested a medical inspection and the medical review board had yet to issue its findings.[199]

Cases from Municipality *A* also show another characteristic of medical disputes: Parties often seek to reopen cases when new expenses are incurred. Such claims sometimes succeed. For example, in a case first brought in 2006, the trial and intermediate courts awarded damages to a child who developed cerebral palsy as a result of the umbilical cord becoming entwined around his neck prior to birth. The medical review board found minor error on the part of the defendant hospital for failure to conduct a caesarian section and for failure to provide adequate resuscitation after the birth. The trial court found the defendant responsible for 40% of the harm and awarded 118,895 yuan in economic damages plus 20,000 yuan in emotional harm. On appeal the intermediate court found that the trial court had overestimated the plaintiff's losses and reduced the award to 55,840 yuan, plus the additional 20,000 yuan for emotional damages.[200] Yet two years later the plaintiff returned to court seeking additional damages, arguing that the defendant should pay for the expenses arising from additional hospitalizations that the plaintiff underwent subsequent to the original decision. The lower court agreed, ordering the defendant to pay 40% of such expenses, or 19,967 yuan; the intermediate court affirmed.[201]

F. *Damages*

Median and mean awards varied significantly each year, reflecting both the small number of cases awarding damages and the influence of large awards. Many years included single large awards, often in cases resulting in permanent mental or physical disability at childbirth,[202] cases involving a patient's death,[203] cases in which plaintiffs contracted hepatitis C through a blood transfusion,[204] or cases of egregious malpractice.[205]

---

199. A4 (Plaintiffs v. Traditional Chinese Medicine Hospital) (2003).

200. A42 (Child Who Developed Cerebral Palsy at Birth v. Municipal Hospital) (2007).

201. A43 (Child Who Developed Cerebral Palsy at Birth v. Municipal Hospital) (2009).

202. See, e.g., B55 (Child Who Developed Cerebral Palsy at Birth v. City Hospital) (2007) (awarding 132,490 yuan for cerebral palsy at birth); B5 (Child Injured During Birth v. County Maternity and Children's Healthcare Center) (2006) (awarding 283,698 yuan damages for mental disability at birth).

203. A34 (Family of Patient Who Committed Suicide v. County Hospital) (2006) (awarding 119,550 yuan for patient death); B76 (Family Members of Patient Who Died After Medical Misdiagnosis v. County Hospital and University Hospital) (2008) (awarding 316,438 yuan, reduced on appeal to 227,507 yuan, for patient death, in A52 (Wife and Parents of Patient Who Died of Distal Esophageal Carcinoma v. Two Hospitals) (2008)).

204. See, e.g., B6 (Hepatitis C Patient v. District Hospital and Blood Station) (2006) (awarding 190,000 yuan); B4 (Hepatitis C Patient v. County Hospital) (2005) (awarding 155,851 yuan); B1 (Hepatitis C Patients v. Blood Bank) (2001) (awarding 130,524 yuan).

Nevertheless, examination of the largest known award for each year suggests modest expansion in damage awards. The largest awards came in 2007 and 2005. The largest award, for 316,438 yuan, was awarded in 2007; it was reduced on appeal to 227,507 yuan.[206] The second largest was 283,698 yuan, in 2005.[207] Table 2 shows the median and mean damage awards for cases in each year in the study.

TABLE 2—MEAN AND MEDIAN DAMAGE AWARDS*

Year	Total Cases	Mean	Median	Largest Award	Cases with No Damages Awarded
2000	5	9,602	4,000	39,349	2
2001	8	30,889	9,000	125,521	5
2002	16	8,505	8,192	25,886	5
2003	16	24,480	17,221	88,524	4
2004	19	46,473	34,339	109,458	3
2005	17	62,720	25,490	283,698	2
2006	20	48,039	35,402	185,000	6
2007	18	46,180	12,494	316,438	4
2008	13	52,826	15,793	227,506	4
2009	6	46,233	38,409	90,000	0

* All amounts in yuan

Overall: Count (including cases awarding no damages) = 138; Mean = 40,060 yuan; Median = 18,000 yuan

Courts awarded emotional damages or reported settlements that included compensation for emotional harm in thirty decisions, covering

205. For example, in B77 the trial court awarded 127,825 yuan in damages after the defendant hospital removed plaintiff's left oviduct without the patient's permission during treatment for an extrauterine pregnancy; because a prior surgery had removed the right oviduct, the procedure left the plaintiff infertile. The court concluded that the defendant did not properly evaluate the risks to the patient's ability to bear children. B77 (Plaintiff Who Had Left Oviduct Removed v. County Hospital) (2008). The intermediate court reduced the award to 97,228 yuan, still one of the larger awards in the dataset. A59 (Patient Who Had Left Oviduct Removed v. County Hospital) (2008).

206. A52, modifying B76.

207. B5.

twenty-seven separate cases.[208] Emotional damage awards ranged from a low of 2,000 yuan[209] to a high of 50,000 yuan,[210] although in some cases with large damage awards the courts did not specify the breakdown between pecuniary and nonpecuniary damages. Courts almost never provided explanation for awards of emotional damages.[211] Courts appeared to use emotional damages to compensate plaintiffs in serious cases. For example, the trial court recognized a total loss of 55,866 yuan to the family of a patient who died following misdiagnosis of an intestinal obstruction.[212] The court, noting that it was not permitted to recognize death compensation, stated that 44,382 yuan of the loss stemmed from emotional damages.[213]

G. *Sources for Grievances: China's Healthcare System*

Such cases provide insight into problems with China's healthcare system. Numerous cases reported that patients' medical conditions at least in part resulted from their ignoring instructions for further treatment or testing or from patients seeking medication from a third party at a reduced rate.[214] Such cases likely result at least in part from the cost of healthcare.[215] In a 2004 case, for example, the intermediate court re-

---

208. In three cases awarding emotional damages, the dataset includes both first-instance and appellate decisions.

209. A13 (Patient with Eye Injury v. District Hospital) (2004); B56 (Bone Fracture Patient v. City Hospital) (2007).

210. B6 (Hepatitis C Patient v. District Hospital and Blood Station) (2006).

211. In only one decision did the court explicitly state that the defendant had inflicted emotional harm on the plaintiff. A42 (Child Who Developed Cerebral Palsy at Birth v. Municipal Hospital) (2007). In another case, however, the court said it was *rejecting* emotional harm damages because the patient had suffered no permanent disability or organ failure. A9 (Patient Treated for Uterine Myoma v. Traditional Medicine Hospital) (2004).

212. A45 (Family of Patient Who Died After Treatment for Abdominal Pain v. Municipal Hospital) (2008).

213. Id.; see also B55 (Child Who Developed Cerebral Palsy at Birth v. City Hospital) (2007) (demonstrating court's willingness to compensate plaintiffs for emotional harm). In another case, however, the intermediate court reduced a damage award on appeal, noting that the plaintiffs had received death compensation and thus could not also receive damages for emotional harm. A20 (Family of Patient Who Died During Childbirth v. Health Clinic and Municipal Hospital) (2004).

214. It is likely that a significant portion of such secondary market medication is either fake or of low quality. Matthew Jukes, Fake Drugs, Real Problems, Xinhua Wang (新华网) [Xinhua Online] (Nov. 24, 2011, 1:32 PM), http://news.xinhuanet.com/english2010/china/2011-11/24/c_131267060.htm (on file with the *Columbia Law Review*); see also infra text accompanying notes 223–224 (describing deaths caused by administration of improper medication).

215. See, e.g., A54 (Husband, Children, and Parents of Deceased Patient v. County Hospital) (2008) (discussing patient's failure to revisit hospital for recommended tests); A58 (Parents of Deceased Patient v. Drugstore Owner) (2008) (demonstrating patients' propensity to have drugs administered at local drugstores rather than at hospitals); A16 (Patient with Amputated Arm v. Village Health Clinic and Three Hospitals) (2006) (ex-

duced a damage award against a local hospital by nearly half, to 14,967 yuan.[216] The hospital had been negligent in prescribing unapproved eye drops, but the plaintiff's failure to seek care in a timely manner was the primary source of the injury. In a 2006 case, the intermediate court found that a plaintiff should bear 60% of the loss resulting from the amputation of her arm following the discovery of a malignant lump.[217] The patient had failed to complete radiotherapy as instructed, again likely because of the cost of the procedure. Similarly, in a case from 2002, the court rejected claims for malpractice after the decedent died of a brain edema secondary to traumatic brain injury from a motor vehicle accident.[218] The court noted that doctors had twice suggested a CT scan but the family members had refused because they lacked sufficient funds.

Ten decisions covering nine disputes involved the unlicensed practice of medicine—sometimes by staff in state-run hospitals.[219] In a 2007 intermediate court case, the plaintiffs sued after their husband and father died of alcohol poisoning. The medical review board found that the defendant health center was liable because the decedent had been improperly treated by someone who lacked a license.[220] The trial court accepted the finding and awarded damages of 72,618 yuan according to the Regulations. The plaintiffs appealed, arguing that the court should have awarded damages pursuant to the General Principles. They argued that because care had been performed by an unlicensed person, the

---

plaining that plaintiff did not follow hospital's recommended treatment due to economic reasons); A24 (Husband and Six Children of Deceased Patient v. Municipal Disease Control and Prevention Station) (2006) (involving patient who forsook treatment for her various ailments due to her family's financial difficulties); A31 (Parents of Deceased Patient v. Health Clinic and Municipal Hospital) (2004) (involving patient who opted for traditional Chinese remedies rather than Western medicine); B51 (Family Members of Woman Who Died During Childbirth v. Township Health Center) (2006) (alluding to patient's inability to pay medical bills); B63 (Family of Patient Treated for Head Injuries v. County Hospital) (2002) (explaining that after patient was hospitalized, his family often failed to pay medical fees on time).

216. A13 (Patient with Eye Injury v. District Hospital) (2004).

217. Three separate clinics and hospitals that had treated the patient were also liable for failing to test the tumor or for failing to completely remove it during prior treatment. A16; see also A31 (stating that decedent should bear some responsibility for her death because she sought treatment at late stage).

218. B63.

219. A46 (Husband and Son of Wife Who Died During Childbirth v. Villager Who Delivered Child) (2008); A54 (reviewing B78 (Husband, Children, and Parents of Deceased Patient v. County Hospital) (2007)); A58; A41 (Wife and Five Children of Patient Who Died from Alcohol Poisoning v. Health Station and Insurance Company) (2007); A12 (Family of Deceased Patient v. Traditional Chinese Medicine Hospital) (2004); B36 (Family Members of Patient Who Died Due to Adverse Reaction to Infusion v. Clinic Operators) (2008); B51; B75 (Retrial of Husband, Daughter and Son of Decedent v. Family Planning Bureau and Doctor at Family Planning Bureau) (2005); B64 (Child Treated for Bone Injury v. Township Hospital) (2001).

220. A41.

court should not apply the Regulations. The appeals court rejected the argument, stating that this case was still one that should have been brought under the Regulations because the defendant health center was responsible for its employees who had provided substandard medical care.[221] In another case, from 2004, plaintiffs were the family members of a patient who died of shock during surgery for pneumothorax at a county traditional Chinese medicine hospital.[222] The trial court found no liability, because the care provided by the defendant hospital met the required standard. On appeal the intermediate court vacated the decision and awarded 34,339 yuan in damages. The court found that although the care met the required standards, the defendant hospital should nevertheless be liable because the medical record was unspecific and incomplete and because its anesthesiologist's professional qualifications were unclear.

Other cases involved doctors who moonlighted, encouraging patients to obtain treatment outside of major hospitals, or patients who sought medical assistance from a friend or neighbor. For example, a court found plaintiffs had sought assistance from a neighbor who was an employee (apparently not a doctor) of a local hospital after the plaintiffs' daughter was bitten by a dog.[223] The defendant administered the rabies vaccine but did not administer both serum and immunoglobulin. The family obtained the first three shots from the neighbor and a fourth shot from a retired doctor—all, it would appear, in an effort to avoid paying for the shots. Their daughter subsequently died of rabies. The court rejected the plaintiffs' claims. Although it found that the neighbor had broken the law by administering the vaccine without the monitoring and instruction of a disease control organization, the court nevertheless found that the neighbor had no duty to the plaintiffs because no causation had been shown and that the actions of the retired doctor did not cause the girl's death. Claims against two hospitals that subsequently treated the decedent failed because there was no misdiagnosis or incorrect treatment.

---

221. B36 likewise involved a claim of practice without a license. The plaintiffs' family member died from anaphylactic shock following the administration of intravenous antibiotics. The plaintiffs had sought to reopen a settled case after they learned that the defendant staff member of a local health office lacked a license; the court rejected the claim, finding that the amount agreed upon exceeded the amount payable under the Regulations.

222. A12. In another case, B75, against a family planning office, the court found the decedent's death was the result of an underlying liver condition and was not, as plaintiffs alleged, the result of herbal medicine given by a doctor at the family planning bureau. The court found damages of 75,390 yuan and ordered the defendant family planning services office to pay 30,156 yuan of those damages because it had provided services beyond those it was authorized to provide.

223. B32 (Parents of Rabies Patient v. Hospital Employee, Retired Doctor, Township Medical Center, and County Hospital) (2006).

Likewise, in an intermediate court case, plaintiffs took their daughter to the local county hospital for treatment of tonsillitis.[224] Following two days of treatment at the hospital, they then took their daughter to an unlicensed doctor to continue treatment. The unlicensed doctor apparently aimed to continue the infusion the girl had received in hospital, but administered two separate infusions at the same time, instead of on different days; the patient died from an adverse reaction following the administration of intravenous drugs. The family settled with the unlicensed doctor and a claim against the pharmacy that sold the infusion solution failed because no problems were found with the quality of the medication. The intermediate court determined that there was no causal relationship between the victim's death and the infusion solution sold.

H. *Lawyers and Other Representatives*

Most litigants in medical cases in Municipality *A* were represented in court, although not always by a lawyer. Plaintiffs in forty-nine of ninety-three first-instance cases were represented by a lawyer; an additional twenty-six were represented by a basic-level legal worker.[225] Five more were represented by individuals identified as cadres, justice department, or public security department officials.[226] Defendants were represented by lawyers at a higher rate: Seventy-eight cases reported that defendants were represented by lawyers.[227] These rates of representation appear high compared to other recent studies on civil cases, suggesting that litigants are more likely to retain lawyers in medical disputes than in more routine civil cases.[228]

---

224. A58.

225. Basic-level legal workers are paraprofessionals who operate largely in rural areas. They generally have some legal training and are licensed to provide representation in civil cases. See generally William P. Alford, "Second Lawyers, First Principles": Lawyers, Rice-Roots Legal Workers, and the Battle over Legal Professionalism in China, *in* Prospects for the Professions in China 48 (William P. Alford, Kenneth Winston & William C. Kirby eds., 2011).

226. In ten cases plaintiffs were represented by individuals, seven of whom were family members, whose employment status was not specified. Only three plaintiffs lacked representation. On appeal plaintiffs likewise largely had representation: Of the fifty-nine appellate cases, twenty-six reported plaintiffs being represented by lawyers, fifteen by basic-level legal workers, one each by a professor and by a cadre, and seven by unidentified individuals. Nine appellate cases stated that plaintiffs lacked legal representation.

227. In addition, two cases involved representation by a basic-level legal worker, two by a "legal consultant," one by an official, and nine by hospital management. On appeal, rates were similar, with hospitals being represented by a lawyer in forty-four of fifty-nine appeals.

228. See, e.g., Bacheng Beijingren Da Guansi Bu Qing Zhen Lüshi (八成北京人打官司不请真律师) [Eighty Percent of Beijing Residents Do Not Hire Real Lawyers for Litigation], Falü Zixun (法律咨询) [Legal Advice], available at http://www.110.com/ziliao/article-121216.html (on file with the *Columbia Law Review*) (last visited Oct. 20, 2012) (reporting that, according to Beijing Municipal Justice Bureau, in 2003 only 16% of

Taken together, the 152 decisions from Municipality *A* provide insight into the evolution of China's courts as they confront increasingly complex and contentious issues. Innovation and flexibility are common, but such innovation serves to pacify parties, not to break new legal ground or to assert court autonomy. Courts emphasize achieving equity in adjudication and largely reject winner-take-all outcomes. Data on enforcement rates were not available, but interviewees did not raise enforcement of judgments as a major issue in medical cases. Some cases are being resolved in the courts, with courts largely seeking to balance competing interests. Yet such decisions appear to do little to shape how disputes are resolved outside the courtroom.

III. ON THE STREETS: PROTEST AND SETTLEMENT

The cases from Municipality *A* provide insight into how courts resolve disputes once they reach the courtroom. Yet hospital and public health officials say they are far more concerned with how disputes are resolved outside the courtroom, particularly in the face of protests.[229] Violence and protest cast a strong shadow over medical disputes in Municipality *A* and elsewhere.

A. *Protest, Violence, and Responsiveness*

The rise in protests and in violence concerning medical disputes has been widely reported in the Chinese media over the past decade, with the term *yinao*, or "medical chaos," used to refer to incidents of violence or protest arising from medical disputes. Media reports and interviews portray protest as a common tool for patients and family members seeking compensation from hospitals.[230]

---

litigants in Beijing involved in civil or financial disputes hired lawyers); Wang Yaxin & Wang Ying, Nongcun Falü Fuwu Shizheng Yanjiu (农村法律服务实证研究) [An Empirical Study of Legal Services in Rural Areas], 2 Tsinghua L. Rev. 5, 59 (2008), available at http://d.wanfangdata.com.cn/periodical_qhfx200805005.aspx (on file with the *Columbia Law Review*) (finding that in two rural counties in Guizhou Province only 24.3% and 19.8% of civil case litigants had legal representation).

229. Only one case from Municipality *A* explicitly mentioned violence by a patient's family member. B68 (County Hospital v. Patient Who Refused to Pay Bill) (2003). A patient refused to pay medical expenses, alleging negligence and substandard care by the hospital. Family members also physically vandalized the hospital. The hospital sued for the unpaid medical expenses and for damages caused by the vandalism. The family countersued for medical malpractice. The court ordered the family to pay 70% of the cost of treatment, but also ordered the hospital to pay 30% of the loss to the family resulting from the malpractice. The result was a judgment in the hospital's favor of roughly 17,000 yuan. The court stated that the claim for property damages should be brought in a separate case.

230. See Deng Xinjian, Yiliao Jiufen Yinfa Xing'an Zengduo, Xianxing Falü Buli Jiejue Maodun (医疗纠纷引发刑案增多 现行法律不利解决矛盾) [Medical Disputes Lead to Increase in Criminal Cases; Existing Laws Not Good for Conflict Resolution], Fazhi Ribao (法制日报) [Legal Daily] (July 24, 2007), available at http://news.xinhuanet.com/

Media accounts from across China describe protests by family members of injured or deceased patients. Following the death of a seventy-one-year-old man in Heyuan, Guangdong, seventy friends of relatives forcibly removed the body from the hospital morgue and placed it at the entrance of the hospital.[231] In Taizhou, Jiangsu, more than 100 villagers blocked hospital entrances and staged a protest following the death of a fellow villager, which was allegedly caused by the administration of incorrect medicine resulting in multiple organ failures.[232] In Fujian, protesters forced a maternity hospital to close for seven days in 2007 after the alleged mishandling of a stillbirth resulted in a woman becoming infertile; family members blocked the hospital entrance and placed the remains of the infant in a freezer in the hospital lobby.[233] In Zhangjiagang, Jiangsu, more than a thousand people protested after multiple deaths at a hospital.[234] A report from Sichuan described how a family left a newborn baby

---

politics/2007-07/24/content_6421115.htm (on file with the *Columbia Law Review*) (detailing physical altercations arising from medical disputes); see also Wang, Criminal Syndicates, supra note 8 (noting patients are often skeptical of disputes resolved by administrative government agencies, thus resorting to protest to receive compensation for damages). Reports note that most protests concentrate on level two hospitals, the middle tier of Chinese hospitals in terms of quality, because smaller hospitals have no resources to pay protest demands and larger hospitals tend to have closer ties with local authorities. See Shen Kui Zhuanjia: Tan 2008 Nian Guangdong Sheng Yinao Shijian De Tedian (沈奎专家: 谈2008年广东省医闹事件的特点) [Expert Shen Kui: Discussing the Characteristics of Hospital Protests in Guangdong Province in 2008], Nanguo Lüshi Shalong (南国律师沙龙) [South China Lawyer Salon] (Dec. 5, 2008), http://www.nglssl.com/article/articleshow.asp?articleid=6323 (on file with the *Columbia Law Review*) (stating Guangdong medical protesters specifically targeted level two hospitals in 2008); see also supra note 13 (discussing ranking of hospitals). But hospitals of all sizes appear to be targets, and officials at major public hospitals in Shanghai, Wuhan, and Municipality *A* all cited violence as common.

231. Huang Dan & Huang Guangming, Zhiyi Yiyuan Qiangjiu Budang Zhi Shangzhe Siwang, Jiashu Kangshi Gao Yinao (质疑医院抢救不当致伤者死亡 家属扛尸搞医闹) [Suspicion That Hospital's Improper Emergency Treatment Caused Injured Patient's Death Prompted Family To Engage in Medical Protest by Carrying the Body], Heyuan Wanbao (河源晚报) [Heyuan Evening News] (Mar. 25 2010), available at http://news.hyorg.com/2010/0325/29617.shtml (on file with the *Columbia Law Review*).

232. Feng Changhua, Taizhou Kaifa Qu Jingfang Chenggong Chuzhi Yiqi Raoluan Yiyuan Yiliao Zhixu Shijian (台州开发区警方成功处置一起扰乱医院医疗秩序事件) [Police of Taizhou Development Zone Successfully Handled an Incident Disturbing the Order of Medical Services at a Hospital], Zhongguo Taizhou Wang (中国台州网) [China Taizhou Online] (May 5, 2010, 10:31 PM), http://news.taizhou.com.cn/news/2010-05/05/content_247613.htm (on file with the *Columbia Law Review*).

233. Fujian Yi Jia Yiyuan Bu Kan Yinao Ting Ye 7 Tian (福建一家医院不堪医闹停业7天) [Unable To Deal with Hospital Protests, a Hospital in Fujian Closed for 7 Days], Feihua Jiankang Wang (飞华健康网) [Feihua Health Online] (Aug. 8, 2007, 2:17 PM), http://doctor.fh21.com.cn/zhuanti/ynzt/20070717/1508185.shtml (on file with the *Columbia Law Review*).

234. Jiangsu Zhangjiagang Shi Yin Yihuan Jiufen Yinfa Qianyu Minzhong Jiju Shijian (江苏张家港市因医患纠纷引发千余民众集聚事件) [More Than One Thousand People Gathered To Protest a Hospital-Patient Dispute in Zhangjianggang City of Jiangsu Prov-

at the hospital for two months and regularly organized dozens of protesters to demand compensation after the baby's mother died during childbirth.[235]

Violence is common. Officials in Guangdong reported in 2006 that on average there was one violent incident at a hospital in the province each day.[236] A report from Jiangsu said that that 90% of the approximately 100 "major medical dispute incidents" in Nanjing each year turned violent.[237] One posting to a Wuhan newspaper web site by a person self-identifying as a hospital employee described a protest in Shiyan, Hubei Province, in which fifty protesters attacked hospital staff, beating and pouring boiling water on them, pulling hair, spitting, and forcing the doctors to kiss the body of the deceased patient. The protesters demanded that the hospital establish a funeral shrine for the deceased in the hospital lobby and threatened to bury the doctors along with the deceased. Police initially called to the scene subsequently fled out of concern for their own safety.[238] In Guangdong, a hospital director had to be

---

ince], Boxun (博讯) [Boxun News] (Dec. 6, 2010), http://news.boxun.com/news/gb/china/2010/12/201012060643.shtml (on file with the *Columbia Law Review*); 11.28 Zhangjiagang Diyi Renmin Yiyuan Xiaohai Siwang Shijian (11.28张家港第一人民医院小孩死亡事件) [Nov. 28 Incident of a Child's Death at Zhangjianggang No. 1 People's Hospital], Boxun (博讯) [Boxun News] (Dec. 1, 2010, 10:30 PM), http://news.boxun.com/news/gb/china/2010/12/201012012301.shtml (on file with the *Columbia Law Review*); Zhangjiagang Diyi Renmin Yiyuan 12 Yue 5 Ri You Guangda Shimin Zizu De Xianhua Huodong (张家港第一人民医院12月5日由广大市民自组的献花活动) [A Group of the General Public Gathered on Their Own for a Ceremony to Present Flowers at Zhangjianggang No. 1 People's Hospital on Dec. 5], Sina Blog (新浪博客) (Dec. 5, 2010, 10:30 PM), http://blog.sina.com.cn/s/blog_6ec77c980100n2fu.html (on file with the *Columbia Law Review*).

235. Ma Limin, Zhengfu Zhudao Bumen Liandong Jian Duli Disan Fang Tiaojie He Baoxian Peifu Jizhi, Suining Pojie Yihuan Jiufen Tiaojie "Liang Da Zhangai" (政府主导部门联动建独立第三方调解和保险赔付机制, 遂宁破解医患纠纷调解"两大障碍") [Lead Government Agencies Jointly Create Independent Third-Party Mediation and Insurance Payment Mechanisms, Cracking Two Major Obstacles to Hospital-Patient Dispute Resolution in Suining], Fazhi Ribao (法制日报) [Legal Daily] (Jan. 6, 2011), available at http://finance.ifeng.com/roll/20110106/3161057.shtml (on file with the *Columbia Law Review*).

236. Liao Huailing et al., Heishili Jieru "Yinao" Geng Changkuang, Zuigao Suopei 1500 Wan (黑恶势力介入医闹更猖狂 最高索赔1500万) [Criminal Syndicates Get Involved in "Medical Chaos," Making Incidents More Rampant and Pushing Compensation to a New High of 15 Million Yuan], Yang Cheng Wanbao (羊城晚报) [Yang Cheng Evening News] (Oct. 6, 2008), available at http://www.chinanews.com/jk/kong/news/2008/10-06/1401884.shtml (on file with the *Columbia Law Review*).

237. Deng, supra note 230.

238. Shiyan Shi Yun Xian Anyang Zhen Weisheng Yuan Fashengle Yiqi Ling Ren Zhenjing De "Yinao" Shijian, Duo Ming Yiwu Gongzuozhe Zaodao Weigong (十堰市郧县安阳镇卫生院发生了一起令人震惊的"医闹"事件，多名医务工作者遭到围攻) [A Shocking Hospital Protest Occurred at Anyang Town Health Center of Shiyan Municipality, Yun County, Where Numerous Medical Staff Were Besieged], Yinet.com (益网) (Apr. 16, 2010), http://www.e120.com/plus/view.php?aid=34347 (on file with the *Columbia Law Review*); see also infra text accompanying notes 270–273 (discussing police reluctance to become involved in medical disputes).

rescued by local police after he was detained for twenty-six hours by a group of 100 protesters.[239] Reports on family members beating doctors and other hospital staff are common.[240] A hospital director in Shanghai described a protest in which twenty family members stormed into an operating room, throwing water at doctors and nurses; in another case in the same hospital, patients protested in the intensive care unit, disrupting doctors' ability to care for other patients.[241] Facing rising threats from protesters, a hospital issued doctors helmets; another equipped security staff with bulletproof vests.[242] One hospital announced that it was in-

239. Guangzhou Bai Ren Weidu Yiyuan, Yuanzhang 26 Xiaoshi Bei Ruanjin (广州百人围堵医院 院长26小时被软禁) [Over a Hundred People Blocked Hospital in Guangzhou; Hospital President Confined for 26 Hours], Feihua Jiankang Wang (飞华健康网) [Feihua Health Online] (Dec. 17, 2008), http://doctor.fh21.com.cn/zhuanti/ynzt/20081217/08321611.shtml (on file with the *Columbia Law Review*).

240. Hong Qiwang, 200 Min Sizhe Jiashu Danao Xian Renmin Yiyuan, Xian Zhengfu Chu Qian Peichang (200名死者家属大闹县人民医院, 县政府出钱赔偿) [200 Family Members of the Deceased Attacked County People's Hospital; County Government Pays Compensation], Yang Cheng Wanbao (羊城晚报) [Yang Cheng Evening News] (May 19, 2010, 3:04 PM), available at http://news.sina.com.cn/s/2010-05-19/150420304817.shtml (on file with the *Columbia Law Review*) (reporting protesters' destruction of obstetrics unit at hospital following mother's death during delivery); Li, Hospital Protesters, supra note 125 (reporting incident in which sixty-one persons were detained following violent protest at hospital in Jilin); Li Yuan, Jiejue Yihuan Jiufen Lu Zai Hefang (解决医患纠纷路在何方) [Where Is the Way for Resolving Hospital-Patient Disputes?], Dazhong Ribao (大众日报) [Dazhong Daily] (Jan. 12, 2011), available at http://news.sina.com.cn/o/2011-01-12/040521800444.shtml (on file with the *Columbia Law Review*) (noting incident in which family attacked doctors and security guards, leading to four arrests); Liu Shaolong, Baiyu Ren Yin Chanfu Siwang Daza Yiyuan Xu: Jinfang Zhua 17 Ming Weishou Zhe (百余人因产妇死亡打砸医院续: 警方抓17名为首者) [More Than 110 People Attack Hospital in Response to a Pregnant Woman's Death Continued: Police Arrested 17 Who Led the Action], Xiaoxiang Chenbao (潇湘晨报) [Xiaoxiang Morning News] (July 24, 2010), http://news.sina.com.cn/s/2010-07-24/023620746481.shtml (on file with the *Columbia Law Review*) (reporting protest that ensued after mother's death); Xinhua Xian Renmin Yiyuan Daza Shijian Neimu (新化县人民医院打砸事件内幕) [Inside Story of the Violent Incident at Xinhua County People's Hospital] (July 10, 2010, 7:39 AM), Tianya Shequ (天涯社区) [Tianya Community], http://www.tianya.cn/publicforum/content/no110/1/102583.shtml (on file with the *Columbia Law Review*) (describing destruction of hospital by deceased patient's family members).

241. Interview 2009-116.

242. Deng, supra note 230; Beijing 50 Duojia Yiyuan Baoan Peibei Fangdan Beixin Fangci Shoutao (北京50多家医院保安配备防弹背心防刺手套) [Security Guards of 50 Hospitals in Beijing Are Now Equipped with Bulletproof Vests and Cut-Resistant Gloves], Renmin Wang (人民网) [People's Daily Online] (May 7, 2012), http://news.163.com/12/0507/08/80SU05830001124J.html (on file with the *Columbia Law Review*); Shanghai Xinhua Yiyuan Yihuan Jiufen Xu, Jingfang Cheng Jiashu "Ruoshi Qunti" (上海新华医院医患纠纷续, 警方称家属"弱势群体") [Continued Coverage of Hospital-Patient Dispute at Shanghai Xinhua Hospital; Police Call Patient's Family "Disadvantaged Party"], Liaowang Xinwen Zhoukan (瞭望新闻周刊) [Outlook News Weekly] (Feb. 11, 2011), http://news.cntv.cn/society/20110211/109903.shtml (on file with the *Columbia Law Review*).

stalling locking devices on windows to prevent protesters from threatening to jump from windows.[243]

Bodies of the deceased are central to many protests. Lawyers report that families will often refuse to move the body out of the hospital until a settlement has been agreed.[244] Often families will refuse to permit an autopsy, instead insisting on compensation up front.[245] The use of bodies in protest draws directly on historical traditions of using bodies of the deceased as a last, but often effective, resort for those seeking compensation from more powerful figures.[246]

Doctors and nurses have also taken to the streets to protest violence. In Luoyang, nurses protested after a local Party official illegally imprisoned four nurses following the death of a family member in a local hospital, allegedly due to the nurses' inattention to the patient while changing bed linen.[247] In Nanping, Fujian, more than 100 medical workers protested after a violent clash between hospital staff and protesters following the death of a patient.[248]

---

243. Yiyuan Feng Chuang Fang Bingren Tiao Lou (医院封窗防病人跳楼) [Hospital Seals Windows To Prevent Patients from Jumping], Yang Cheng Wanbao (羊城晚报) [Yang Cheng Evening News] (Apr. 22, 2010), available at http://www.ycwb.com/ePaper/ycwbdfb/html/2010-04/22/content_807416.htm (on file with the *Columbia Law Review*).

244. E.g., Interview 2009-116 (mentioning family that left body in intensive care unit overnight).

245. Interview 2010-22 (describing protests against such procedures).

246. Makoto Ueda, Bei Zhanshi De Shiti (被展示的尸体) [The Corpse on Display], *in* Shijian, Jiyi, Xushu (事件、记忆、叙述) [Events, Memory, Narrative] 114 (Sun Jiang ed., Wang Xiaokui trans., 2004).

247. Shan Chungang, Henan Luoyang Xiang Ganbu Feifa Juliu 4 Ming Hushi Bei Tingzhi Juliu (河南洛阳乡干部非法拘禁4名护士被停职拘留) [Township Cadres in Luoyang, Henan, Were Removed from Office and Detained for Illegally Detaining 4 Nurses], Xinhua Wang (新华网) [Xinhua Online] (Nov. 21, 2007), http://news.163.com/07/1122/00/3TS6NC4N0001124J.html (on file with the *Columbia Law Review*); Wang Shouzhen, Zhongquan Chuji Da Yinao (重拳出击打医闹) [Heavy Fists Strike Hospital Protests], Wang Shouzhen Wenji (王守振文集) [Wang Shouzhen Anthology], http://www.qxzc.net/gr/wsz1/sb/5.htm (on file with the *Columbia Law Review*) (last visited Oct. 20, 2012). Similarly, in Hunan, local medical staff protested after they were allegedly beaten by protesters organized by local officials; the protesters were seeking compensation after a family member of a local official allegedly died following an allergic reaction to a tetanus shot. Gongpu Cheng Exing Yinao, Zhuzhou Shi Er Yiyuan Shijian Baodao (公仆成恶性医闹，株洲市二医院事件报道) [Public Servants Become Malicious Medical Protesters: Report on Incidents at No. 2 Hospital in Zhuzhou City], http://www.xcar.com.cn/bbs/viewthread.php?tid=9886474 (on file with the *Columbia Law Review*) (last visited Nov. 15, 2011).

248. Qiu Shuo, Nanping Shi Diyi Yiyuan Guanyu "6.21" Yihuan Jiufen Yinfa Bufen Yiwu Renyuan Shangfang Jinggao De Baogao (南平市第一医院关于"6.21"医患纠纷引发部分医务人员上访经过的报告) [Nanping City No. 1 Hospital's Report on the Protest of Medical Workers Following the June 21 Hospital-Patient Dispute], http://www.tianya.cn/publicforum/content/free/1/1603956.shtml (on file with the *Columbia Law Review*) (last visited Nov. 15, 2011).

Interviews confirm that violence is routine in medical disputes in Municipality *A*. In one 2010 case, the husband of a deceased cancer patient threatened to kill the responsible doctor and brought twenty people to protest.[249] The protesters broke the hospital's windows but were chased away by hospital bodyguards, who themselves called in friends with metal bars to repel the protesters. The police, lacking sufficient resources to intervene, stood and watched. In the end the hospital agreed to pay 15,000 yuan to the family, despite the fact that the patient had come to the hospital with late-term cancer. In another case a local village leader ordered each family in the village to send one male to protest against the hospital. And in a separate case the head of a local hospital was beaten following the death of a child at a small hospital. A county court judge in Municipality *A* estimated that there are ten to twenty major medical protests a year in the county in which patients or their families cause significant disruption, block access to a hospital, or place dead bodies inside hospital lobbies.[250]

A county health department official in Municipality *A* stated that when a patient dies in a hospital, family members are likely to protest: "If a living person goes in and a dead person comes out then the family will protest."[251] The official estimated that as many as 95% of cases in the county are settled through protest and negotiation, with hospitals often paying compensation absent evidence of wrongdoing.[252]

Numerous provincial and municipal governments have issued rules designed to curb medical protests. Such regulations provide insight into protest strategies and official sensitivities.[253] In Chengdu local regulations prohibit using banners and posters or creating mourning shrines outside hospitals, forcibly taking medical records, forcibly removing bodies, blocking the transfer of bodies from hospitals to funeral homes, and threatening or insulting hospital staff.[254] Chengdu authorities also an-

249. Interview 2010-17.

250. Interview 2010-24.

251. Interview 2010-23.

252. Id.

253. Many such strategies resonate with tactics used in protests more generally in China. Xi Chen, The Power of "Troublemaking": Protest Tactics and Their Efficacy in China, 41 Comp. Pol. 451, 458–59 (2009) [hereinafter Chen, Troublemaking] (describing persuasive tactics such as kneeling in supplication and self-induced suffering).

254. Liu Chunmei, Exing Yinao Jian Cheng Zhuanmen Shichang, Qiangduo Shiti Deng Xingwei Weifa (恶性医闹渐成专门市场, 抢夺尸体等行为违法) [Specialized Market Takes Shape for Violent Hospital Protests; Acts Such as Snatching Corpse Are Illegal], Hua Xi Dushi Bao (华西都市报) [West China Municipal Daily] (Apr. 1, 2010) [hereinafter Liu, Specialized Market], available at http://society.nen.com.cn/society/353/3475353.shtml (on file with the *Columbia Law Review*). For the text of the regulation, see Chengdu Shi Guanyu Yifa Weihu Yiyuan Zhengchang Yiliao Zhixu De Tonggao (成都市关于依法维护医院正常医疗秩序的通告) [Notice of Chengdu Municipality Regarding Maintaining Hospitals' Orderly Medical Services According to Law] (promulgated by Chengdu Mun. Bureau Health & Bureau Pub. Sec., Mar. 25, 2010, effective Mar. 25,

nounced that on-duty police would be stationed at hospitals to prevent protests. Regulations in Heilongjiang province ban not only shrines and publicly displaying or marching with the body of the deceased, but also kidnapping or detaining hospital staff.[255] Regulations in Zhejiang encourage rapid resolution of conflicts, requiring hospitals to notify authorities of all disputes.[256] In Shenyang, twenty-seven hospitals installed local public security officers as deputy directors to assist in managing disputes.[257] In Hunan, local Party officials are explicitly evaluated in part based on their ability to resolve medical disputes; one report noted that the number of incidents declined from 857 in 2009 to 317 in 2010 as a result of the evaluation system.[258] In 2012 the Ministries of Health and Public Security issued a joint notice that reflected many similar concerns about the security of medical facilities.[259] Yet not all hospitals have taken a hard

---

2010), available at http://www.cmda.org.cn/news/content_x31988_c050201__.html (on file with the *Columbia Law Review*).

255. Deng, supra note 230.

256. Zhejiang Province Methods, supra note 132. In Xuchang, in Henan, regulations state that the police shall sieze the body of the deceased in major medical disputes. Xuchang Shi Renmin Zhengfu Guanyu Yinfa Xuchang Shi Zhongda Yihuan Jiufen Yingji Chuzhi Yu'an De Tongzhi (许昌市人民政府关于印发许昌市重大医患纠纷应急处置预案的通知) [Notice Regarding the Issuance of Emergency Response Plans for Major Hospital-Patient Disputes in Xuchang Municipality] (promulgated by Hunan Province Xuchang Mun. People's Gov't., June 10, 2008), Xu Zhen (许政) [Xuchang Gov't Pub.] No. 39 (2008), available at http://www.lawxp.com/statute/s678324.html (on file with the *Columbia Law Review*).

257. Cao Si & Chen Feng, Shenyang 27 Jia Yiyuan Wei Fang Yinao Pin Jingcha Dang Fu Yuanzhang Yin Zhengyi (沈阳27家医院为防医闹聘警察当副院长引争议) [27 Hospitals in Shenyang Hired Policemen as Deputy Directors to Prevent Hospital Protests, Drawing Controversy], Nanfang Ribao (南方日报) [South Daily] (July 5, 2010), available at http://china.nfdaily.cn/content/2010-07/05/content_13451799.htm (on file with the *Columbia Law Review*). Reports from Henan similarly state that police stations are being established in hospitals. Qiao Weihui et al., Zhengzhou Jingfang Qidong "Lijian" Xingdong, Yiyuan Baojieyuan Meizhun Jiu Shi Qianfu Minjing (郑州警方启动"利剑"行动 医院保洁员没准就是潜伏民警) [Zhengzhou Police Start "Sword" Operation; Cleaner at Hospital Could Be Undercover Police], Dahe Bao (大河报) [Dahe Daily] (Jan. 19, 2011), available at http://news.shangdu.com/101/20110119/7_186709.shtml (on file with the *Columbia Law Review*).

258. Tang Jiangpeng, Hunan Shouci Jiang Chuzhi Yihuan Jiufen Naru Zongzhi Gongzuo Jixiao Kaohe (湖南首次将处置医患纠纷纳入综治工作绩效考核) [Hunan Will for the First Time Factor Handling of Hospital-Patient Disputes into Comprehensive Performance Review], Changwan Jituan Gundong Xinwen (长晚集团滚动新闻) [Changwan Group Rolling News] (Jan. 19, 2011), available at http://roll.changsha.cn/1/201101/t20110121_1215593.htm (on file with the *Columbia Law Review*).

259. See Guanyu Weihu Yiliao Jigou Chixu De Tonggao (关于维护医疗机构 秩序的通告) [Notice Regarding Maintaining the Order of Medical Institutions] (promulgated by the Health Ministry & Pub. Sec. Ministry, May 1, 2012, available at http://www.moh.gov.cn/publicfiles/business/htmlfiles/zwgkzt/s9968/201205/54607.htm (on file with the *Columbia Law Review*) (urging closer cooperation between police and hospital security). The regulations restrict the movement of the bodies of deceased patients and ban

line: A report on the Chengdu Military Hospital, in Sichuan, noted that in order to "ease the nervous atmosphere" the hospital installed flat screens with "photos of sexy nurses."[260]

A number of jurisdictions, including at least one county in Municipality *A*, have created new mediation institutions under local health departments that are designed to resolve medical disputes quickly and thus reduce conflict.[261] The creation of these institutions reflects national efforts to emphasize mediation as a tool for maintaining social stability. Official accounts have extolled the creation of such institutions, but they appear to be of only limited effectiveness on the ground.[262] Few

---

activities such as burning of paper money, creating memorials, and generally causing disturbances at hospitals.

260. Xinggan Hushi Jiu Yihuan Guanxi? Hen Sha Hen Tianzhen (性感护士救医患关系? 很傻很天真) [Sexy Nurses to Save Hospital-Patient Relationship? Very Stupid and Very Naïve], Zhongguo Xinwen Wang (中国新闻网) [China News Online] (Jan. 19, 2011), available at http://women.sohu.com/20110119/n278948925.shtml (on file with the *Columbia Law Review*).

261. See Cao Wenyi & Shen Haiseng, Di San Fang Tiaojie Rang Yinao Anjing De Zoukai (第三方调解让医闹安静地走开) [Third-Party Mediation Quietly Drives Away Hospital Protests], Fujian Ribao (福建日报) [Fujian Daily] (May 27, 2010), available at http://www.fj.xinhuanet.com/nmtsj/2010-05/27/content_19899305.htm (on file with the *Columbia Law Review*) (detailing successes of Nanping Medical Dispute Mediation Agency); Chuxian Yihuan Jiufen, Qu Yiyuan Zhengzhi De Shao (出现医患纠纷, 去医院争执的少) [Few Choose To Protest at Hospitals in Hospital-Patient Disputes], Xinhua Wang (新华网) [Xinhua Online] (May 11, 2010), http://js.xhby.net/system/2010/05/11/010747857.shtml (on file with the *Columbia Law Review*) (noting mediation has smoothed dispute resolution); Xu Yang, Tianjin Yinao Xianzhu Jianshao, Shang Wan Yuan Jiufen Zhuanjia Ding Zeren (天津医闹显著减少, 上万元纠纷专家定责任) [Hospital Protests in Tianjin Dramatically Decrease; Experts Decide Responsibility in Disputes Involving Ten Thousand Yuan or More], Renmin Wang (人民网) [People's Daily Online] (May 5, 2010, 9:31 AM), http://medicine.people.com.cn/GB/11521343.html (on file with the *Columbia Law Review*) (noting substantial decrease in medical disputes and compensation made after adoption of third-party medical dispute resolution agency in Tianjin); Zhang Wei & Miao Xingxiang, Fujian Yihuan Jiufen Di San Fang Tiaojie Yinao Guanzhu Le Ma (福建医患纠纷第三方调解医闹管住了吗) [Did Third-Party Mediation Resolve Hospital-Patient Disputes and Control Hospital Protests in Fujian?], Sina Fujian (新浪福建) (July 24, 2010, 9:03 AM), http://fj.sina.com.cn/news/m/2010-07-24/090355125.html (on file with the *Columbia Law Review*) (analyzing success of third-party mediation and dispute resolution agencies in Fujian).

262. In Yingtan, Anhui, local authorities established a specialized mediation committee in 2006 that combines officials from the health bureau, police, justice bureau, and the courts, as well as from the supervision, propaganda, and letters and visits departments. The committee maintains its own bank of medical experts whose goal appears to be to intervene in cases so as "to explain medical facts" to aggrieved patients and their families. Yet the committee has also been used to send a strong message that protesters will be dealt with harshly. One official report stated that the police had forcibly removed eighty-two protesters from near hospitals; forty-two were detained administratively and twelve were formally arrested. Of those arrested, seven were eventually convicted of crimes. Perhaps not surprisingly, local hospitals reported that their payouts decreased as a result of aggressive local government intervention. Yingtan Shi Dangzheng Zhongshi Bumen Xiezuo Tuoshan Huajie Yihuan Jiufen (鹰潭市党政重视部门

of the interviewees for this project mentioned resolving cases through specialized mediation institutions. Instead, direct negotiation between the parties remains common.[263]

Hospital and government officials and media accounts blame the rise in and escalation of protests on the emergence in recent years of professional protesters.[264] Such claims are difficult to evaluate; many protesters are friends or neighbors of patients. Numerous reports detail efforts to combat professional protesters.[265] In Guangdong, police intervened to break up a protest by seventy protesters seeking compensation after an eleven-month-old child died of brain cancer while in the hospital and the child's mother subsequently committed suicide by jumping out of a hospital window.[266] Local authorities alleged that most of the protesters had been hired by the family to coerce compensation from the hospital.[267] In Nanchang, Jiangxi, protesters seeking five million yuan in compensation blocked a local hospital for several hours and destroyed hospital facilities; the protest only dissipated after the police interviewed and arrested protest leaders. According to reporters, participants claimed to

---

协作妥善化解医患纠纷) [Yingtan Municipality Party Officials Place Emphasis on Coordination Between Departments to Properly Resolve Hospital-Patient Disputes], Fuyang Pingan Wang (阜阳平安网) [Fuyang Pingan Online] (Oct. 15, 2008, 11:28 AM), http://fypaw.org.cn/article/showinfo.asp?infoid=1124 (on file with the *Columbia Law Review*). Critics of such efforts note that mediation entities are often tied to insurance companies and health departments and are thus biased in favor of defendants. For example, in Zhejiang, regulations bar public hospitals from settling disputes for more than 10,000 yuan in an apparent effort to streamline the resolution of claims through newly established mediation entities. See Zhejiang Province Methods, supra note 132 ("For medical disputes with compensation of over 10,000 RMB, public medical institutions cannot consult to reach an agreement."). The regulations also state that no settlements shall be paid for more than 10,000 yuan without first obtaining a medical inspection decision—a clear effort to reduce pressure on hospitals to pay settlements. Id.

263. See, e.g., Interview 2010-17 (discussing unwillingness to pursue specialized mediation due to major time investment required); Interview 2010-23 (noting 60% of disputes are resolved via direct negotiation between parties).

264. See, e.g., Liu, Specialized Market, supra note 254 (noting arguments that "'hospital violators' have become a specialized market in society"). Judges also complain that "[s]ome lawyers encourage their clients to cause chaos." Interview 2009-126.

265. See, e.g., Qin Lei & Lin Xiaolei, Shehui Xiansan Renyuan "Yinao" Jianjue Daji (社会闲散人员"医闹" 坚决打击) [Firmly Attack Idlers in Society Who Engage in "Medical Chaos"], Sohu (搜狐) (Dec. 27, 2010, 9:42 AM), http://roll.sohu.com/20101227/n301446551.shtml (on file with the *Columbia Law Review*) (discussing crackdown on "medical chaos" protesters).

266. According to the subsequent police report, the infant died of manual asphyxiation, suggesting that the mother had strangled the baby before committing suicide. Liao et al., supra note 236.

267. Id.

have come to protest because the patient's family promised them compensation.[268]

Despite media accounts describing local police working with hospitals to manage protests,[269] there is also evidence of police avoiding involvement, reflecting both concessive policies toward protesters and a reluctance to assume responsibility. Hospital officials and their lawyers complain that the police are often slow or unwilling to respond.[270] Police avoid involvement because they fear they will become the targets of the protesters if they intervene. As one doctor said, "The police don't dare to touch [protesters]."[271] In Municipality *A*, hospital officials and lawyers describe local police as largely cooperative.[272] Yet they complain of light punishments, even for protesters who cause significant disruption or who block or physically attack hospitals and staff.[273]

B. *Effects: Settlement and Flexibility*

Protest works: Faced with protests, "most hospitals just pay."[274] Hospital officials say that protests force them to pay compensation even in cases where they were not liable or to pay more compensation than they believe was warranted.[275] Hospitals are reluctant to share data on settlements. Nevertheless, interviews with lawyers and hospital and government officials make clear that hospitals settle the overwhelming majority of cases, generally more than 90%.[276] This is not surprising: Most

---

268. Nanchang: Sizhe Jiashu Du Yiyuan Suo 500 Wan (南昌: 死者家属堵医院索500万) [Nanchang: Family of Deceased Patient Blocked Hospital Seeking 5 Million Yuan in Damages], Dajiang Wang (大江网) [Dajiang Online] (Aug. 8, 2007, 2:17 PM), http://doctor.fh21.com.cn/zhuanti/ynzt/20061008/10345694.shtml (on file with the *Columbia Law Review*).

269. Li Guo et al., Jingcha Jinzhu Yiyuan Zhenshe Yituo Yinao (警察进驻医院震慑医托医闹) [Police Stationed in Hospital Deter Medical Introducers and Medical Protesters], Sohu (搜狐) (Feb. 2, 2007, 3:46 AM), http://news.sohu.com/20070202/n247994130.shtml (on file with the *Columbia Law Review*) (describing collaboration between police and hospitals to control medical introducers and professional protesters).

270. Interview 2010-6 (complaining that one needs relationship with police for them to help).

271. Interview 2009-116.

272. See Interview 2010-22 (stating responsible mayor would get involved in event of protests).

273. Interview 2010-23 (noting some protesters were detained for fifteen years for destroying computers and windows).

274. Liu, Specialized Market, supra note 254.

275. Luo et al., supra note 125; Interview 2010-18 (discussing pressure on hospitals to appease protesters).

276. Interview 2010-23 (noting high incidence of settlement even when hospital was not negligent); Interview 2009-101 (discussing incidents of disputes and settlements); Interview 2009-116 (noting varying settlement amounts to prevent protests). Often both parties seek a rapid resolution of cases. Lawyers and officials for hospitals say that in cases in which they uncover genuine errors, they will seek a rapid settlement. Interview 2010-6.

civil cases (in China and elsewhere) are resolved outside the courts. What is unusual is the degree to which concerns about protests influence settlement practice.

Settlements are often made with little regard to legal provisions and often exceed the amounts that would be payable in court. Hospitals say they often settle when they believe they face no risk of liability in court and agree to pay more than they would have to pay if the dispute went to court in order to avoid protests.[277] Hospital officials describe themselves as playing a social insurance role in medical cases and note that they are responsible for maintaining social stability.[278]

The financial risk of litigation is a minor concern in most disputes. An official at a county-level hospital in Municipality *A* stated that the economic impact of litigation remains small even for a county hospital: Hospitals pay on average 1% of revenue a year in compensation, with a modest increase in recent years. The hospital, a major public hospital, paid out 280,000 yuan in compensation for medical disputes in 2009, against income of approximately 96 million yuan.[279] Hospital officials in Shanghai likewise describe the total payments made in medical cases as modest. An official at a major Shanghai teaching hospital estimated that the hospital pays out approximately five million yuan a year in compensation for medical disputes, a relatively small amount considering the hospital's size and annual revenue.[280] Hospital officials appear unconcerned that pushing more disputes into the formal legal system will encourage copycat lawsuits, likely because damage awards in the courts are low.

Patients and their families often seek negotiated settlements to avoid an inspection by the medical review board and because litigants are aware that they will receive less money if they pursue their claims through court. Interview 2010-2; Interview 2009-101; Interview 2009-102; see also Interview 2009-116 (stating that parties do not want inspection; they want money).

277. Interview 2009-116.

278. Interview 2009-103 (stating courts "are . . . responsible for social stability"); Interview 2009-116 (stating that courts must have skill to maintain stability). Some hospital officials say they are also increasingly letting cases wind up in court because they do not want to make it too easy for plaintiffs to recover. Interview 2009-114. Others argue that they are facing a rise in malicious cases—those brought by patients who fake injury in order to obtain settlements from hospitals. Interview 2010-22.

279. Interview 2010-22. The largest single judgment to date in the county was a judgment of 280,000 yuan for a patient who had become permanently disabled. The hospital official said that the judgment was not a major financial burden for the defendant hospital, which has 480 beds, 150 doctors, and 130,000 outpatient visits a year. Id.

280. Interview 2009-116. The financial risk of litigation is more significant for small hospitals and clinics, where a large judgment could exceed the defendant's ability to pay. In Municipality *A*, however, no clinics have been forced to close in response to adverse judgments or large settlements. This is largely because the clinics only see routine minor illnesses and are not allowed to provide care in high-risk cases. Interview 2010-18 (noting that bigger hospitals take bigger cases and bigger risks); Interview 2010-24 (stating doctors in small hospitals will send patients requiring complex procedures to bigger hospitals because of large financial risk otherwise).

Protests, in contrast, impose significant costs.[281] Protests often disrupt hospitals' ability to operate. The reputational consequences for individual doctors and hospitals of an adverse finding from a medical review board can be extremely damaging.[282] Adverse outcomes may affect the career development of doctors.[283] For big hospitals, protests can also affect their relationships with their administrative supervisors;[284] hospitals thus seek to avoid health bureaus becoming aware of their problems.[285] In rare cases medical disputes can result in the local health bureau sanctioning or revoking the license of a hospital or doctor.[286] In general, however, health departments avoid becoming involved in cases because they are concerned they will themselves become the targets of protesters.[287]

Although health departments may seek to avoid becoming directly involved in disputes, many disputes become conflicts between protesters

---

281. Interview 2010-17 (stating that "this is not a money issue" and that hospital is concerned about reputation); Interview 2009-101 (noting violent protests and that medical disputes have become a "hot issue"); Interview 2009-116 (describing hospital concerns about disruption and reputation).

282. Interview 2009-110. For discussion of how reputational sanctions may compensate for a weak legal regime in other contexts in China, see generally Benjamin L. Liebman & Curtis J. Milhaupt, Reputational Sanctions in China's Securities Market, 108 Colum. L. Rev. 929 (2008).

283. Interview 2009-116 (noting number of disputes is factor in considering doctor's salary and general professional review). Liability in medical disputes is virtually always put on the defendant hospital, not individual doctors. Nevertheless, hospitals generally require doctors to pay a share of any damage award. The system varies from hospital to hospital, but generally medical staff will be asked to contribute a small percentage of any damage award or settlement; in some cases the supervising doctor or department head will also be required to pay a share. Interview 2009-103. In general the amount will be capped at 100,000 yuan, or about two months' average salary for a doctor. But individual departments within a hospital may also be asked to cover up to half of any compensation paid to patients or their families. Interview 2010-17. In some cases individual departments within the hospital may settle cases on their own, in order to minimize problems and to maintain their ability to claim they have had no complaints in a given year. Id. Although it is rare for doctors to lose their licenses, errors may affect promotion decisions and can lead to demotions for doctors who are responsible for errors. Interview 2010-17; Interview 2009-103.

284. Interview 2010-7 (stating that "the big hospitals don't care about money, they care about [their] administrative superiors").

285. See, e.g., Interview 2010-17 (declaring hospital's policy of usually keeping health bureaus out of disputes). Nevertheless, in Municipality *A* the local health bureau reported mediating 111 disputes in 2009. Interview 2010-16. Reflecting concerns about the risk of protest, a health department official in Municipality *A* said that the health bureau will request that the patient's family bring no more than three people to the negotiations. In reality, patients and their families often bring more people. See, e.g., Interview 2010-17 (noting 100 people came to settle dispute).

286. Interview 2010-6; Interview 2010-10.

287. Interview 2010-9 (describing effort by health bureau to avoid mediation); Interview 2009-116 (stating local health bureau does not want to mediate in part due to risk of blame).

and the state. Hospitals sometimes welcome intervention by local authorities because such involvement shifts pressure onto the shoulders of local officials. Yet intervention by Party-state officials often results in pressure on the hospital to settle[288] and leads hospitals to pay more than they believe they should.[289] In one case in Municipality *A*, 100 protesters surrounded a hospital following the death of a local resident caused by head injuries resulting from a fall.[290] Family members argued that the hospital was responsible because an initial CT scan had found no sign of bleeding in the brain. Faced with the large protest, the hospital entered into negotiations with the family, which took place over a week in a local hotel. Local police and government officials also participated, with government officials pressuring the hospital to settle for 50,000 yuan, despite the hospital's view that it had not committed error. Likewise, in a case that arose in a county town in Municipality *A*, protesters turned the hospital "into a funeral zone."[291] In the end, the local Party secretary ordered the hospital to compensate the protesters. In some cases local governments provide funds to assist hospitals in settling cases.[292]

The threat of protest also shapes courts' handling of malpractice lawsuits. Numerous judges noted that in cases involving protests or the threat thereof, they adjust outcomes to mollify plaintiffs.[293] Sometimes judges do this on their own; other times they do so in consultation with or at the instruction of local Party-state officials.[294] Judges say they sometimes order hospitals to pay damages in cases in which there are no er-

---

288. Interview 2010-18 (recounting government's concern about stability and resultant pressure on small hospital to settle).

289. See id. (noting government pressure even where defendant believes there is no liability); see also Interview 2009-103 (detailing settlement methodology).

290. Interview 2010-17.

291. Interview 2010-22.

292. Interview 2010-17 (describing case where government provided 60,000 yuan in settlement assistance). Another case against a hospital in Municipality *A* arose as the result of a patient dying from cancer in 1999. The family did not initially complain, and the local health bureau found no medical error. But the family sued and the local court ordered 30,000 yuan in compensation as a result of numerous changes in the medical records; on appeal the award was increased to 60,000 yuan. Following the appellate decision, the wife of the decedent began protesting to Beijing demanding more compensation. After more than ten years of petitions, authorities organized a "hearing" at her house where the case was discussed and local authorities attempted to negotiate a settlement. The case was unresolved as of late 2010, but hospital officials predicted that local authorities would step forward and pay significant compensation to the petitioner. Id.

293. See, e.g., Interview 2010-24 (stating that hospitals are powerful and courts "must maintain a harmonious society"); Interview 2009-114 (stating that "we will find a reason to pay out" damages even in cases where no negligence has been shown).

294. Hospital officials likewise argue that courts pressure them to agree to payments to patients in order to avoid unrest. Interview 2010-17 (describing case in which court articulated concern that plaintiff's family "won't be happy" and pushed municipal hospital to settle); Interview 2010-22 (relating view that courts are on side of patients and want hospitals to pay more).

rors in order to appease protesters.[295] A judge in Municipality *A* noted that cases potentially involving unrest are not resolved according to law; law, reason, and sympathy are mixed together, and cases are resolved by local officials rather than by the courts.[296] Hospital officials also complain that courts make them compensate plaintiffs to prevent escalation of protests.[297] For example, a hospital official in Municipality *A* reported that court officials told the hospital to accept a judicial inspection in one case because "the family will not be happy" if the hospital insisted on an inspection by a medical review board.[298] The judicial inspection found that the hospital was 10% liable for failure to discover the injury in time. Yet the court refused to follow the recommended apportionment of liability. Instead, the court assigned 30% of the blame to the hospital and ordered it to pay 111,000 yuan in compensation.

Judges justify their flexibility in medical disputes by noting that hospitals are generally the stronger party in malpractice cases.[299] Courts must "maintain a harmonious society, especially when [patients] bang at the door."[300] Judges say they will consider plaintiffs' situations, and admit that they may grant compensation to plaintiffs facing extremely difficult circumstances, even when the defendant committed no error.[301] Judges also note that they avoid medical review board determinations by awarding emotional damages or compensation for changes to medical records or for hospitals' failures to provide adequate information to patients.[302]

Judges describe themselves as caught between patients' demands and legal requirements. As one judge in Shanghai described the situation, courts have been told not to pay out in excess of the amounts allowable under the Regulations.[303] At the same time, however, they have been told to resolve cases involving protests. As a result, courts "find ways to expand liability" against hospitals.[304] The goal in doing so, said the judge,

---

295. Interview 2009-114 (stating that "according to the law" there would often be no recovery in these cases, but judges "find a reason to pay out").

296. Interview 2010-20.

297. Interview 2009-116.

298. Interview 2010-17.

299. See, e.g., Interview 2010-24 (describing hospitals as "strong party" and stating "because of this in 99% of cases they will have to pay more money").

300. Id. For a discussion of courts' obligation to ensure social harmony—even by ignoring formal law—see Liebman, A Return to Populist Legality, supra note 20, at 168–69.

301. See, e.g., Interview 2009-114 (admitting judges sometimes award compensation even where recovery not permitted by law).

302. See, e.g., Interview 2009-114 (stating judges find liability for failure to disclose information). Judges say that they sometimes will award emotional damages to compensate plaintiffs in cases in which there was error but no causation between the error and the patient's injury or death. Interview 2009-118.

303. Interview 2009-114.

304. See id.

is to increase compensation so that amounts recoverable in medical cases do not vary from ordinary tort cases.[305] Judges say they will sometimes tell hospitals to pay plaintiffs more than is specified in a decision to ensure that the case is resolved.[306] Courts themselves may sometimes contribute funds to help resolve particularly troublesome cases.[307]

The threat of protest also affects treatment decisions of doctors. Doctors report avoiding difficult cases out of concern that adverse outcomes might result in protest.[308] Doctors argue that law is of little use when patients and their families resort to disruptive protests.[309] Doctors allege that many disputes involve people who simply died at the hospital, with no other basis for complaint.[310] As a result, some doctors in Municipality *A* now avoid taking on certain complex cases, instead sending the patients to the provincial capital for treatment.[311]

Despite the emphasis on settlement, hospital officials and judges report a steady increase in the volume of cases winding up in court.[312] This may reflect an increase in the total number of medical disputes. The increase may, however, also reflect escalating patient demands and greater legal consciousness among patients.[313] Hospital officials say that in some cases they prefer court judgments; a court decision may also make it easier for the hospital to assign blame internally to doctors who have committed an error.[314]

IV. IMPLICATIONS: AN OVERRESPONSIVE STATE?

Evidence from court decisions and from the informal resolution of medical disputes yields insights into trends in institutional evolution, dispute resolution, and governance in China. This Part discusses the implications for these three interrelated areas and for legal development in China more generally.

---

305. Id.

306. Id.

307. Id.

308. Wang, Criminal Syndicates, supra note 8 (noting litigation risk shouldered by doctors and stating "[t]o play it safe, one encounters many incurable diseases doctors invariably choose to avoid").

309. Interview 2009-101 (complaining about lack of "clear law" and "lack of trust in system by patients" and observing that dispute resolution mechanisms are ineffectual); Interview 2009-102 (noting rise in protests and arguing that patients and their families "don't understand law").

310. Interview 2009-102 ("[A]s soon as [medical] result is not what [the patient] had hoped, then they will certainly come and complain."); Interview 2009-116 (stating patients blame doctors even when doctors have not committed any errors).

311. Interview 2010-24.

312. Interview 2009-101 (noting increase in number of medical disputes).

313. Id.

314. Interview 2010-17.

A. *Institutional Evolution*

Medical malpractice litigation in China appears to be in part a story of institutional failure. A system designed to protect hospitals has encouraged patients and their families to engage in disruptive behavior.[315] Informal mechanisms have developed in significant part because the formal system is neither able nor permitted to resolve patients' claims. The creation of new institutions such as medical review boards has had little stabilizing effect. Faced with formal institutions widely perceived as unfair, patients and their families take matters into their own hands.

Medical disputes show how lack of trust in formal institutions—in healthcare, in the legal system, and in local authorities—is an important source of unrest. Medical disputes combine widespread distrust of the healthcare and legal systems with often severe harm. Others have engaged in empirical study of trust in China; their findings largely support the observations in this Essay regarding popular distrust of medical and legal institutions.[316] As Elizabeth Perry has noted, trust in the state—in particular the central Party-state—is common and widespread in China.[317] Trust in institutions and individual state actors, however, is weak.[318] State response to this distrust has been a combination of concessive and repressive policies: yielding to protesters but also taking steps to ban certain acts and prevent escalation. Reform of institutional structures has been slow.

The problem is not just that institutions are weak; rather it is that reforms to these institutions have failed to keep up with popular expectations regarding both the courts and the healthcare system. Medical disputes show that trust can cycle downward even as institutions improve. Despite widespread problems in both the healthcare system and the courts, both have improved markedly since the early years of the reform

315. The fact that hospital officials have resisted changing the current system when it would seem in their interest to do so may suggest that the combination of defendant-friendly legal provisions and a system of ad hoc informal dispute resolution and protest serves hospital interests. Although protests cause disruption, the current system imposes no significant financial cost on most defendants and allows hospitals to prevent external review of most serious cases. See supra notes 279–280 and accompanying text (discussing lack of financial impact of disputes on hospitals); supra notes 284–286 and accompanying text (noting hospital preference that government supervisors not become aware of disputes).

316. For discussion of distrust in the context of medical disputes, see Xu & Lu, supra note 7, at 83, 90 (describing cycle in which distrust in healthcare system leads to violence and violence further exacerbates distrust).

317. Elizabeth J. Perry, Chinese Conceptions of "Rights": From Mencius to Mao—and Now, 6 Persp. on Pol. 37, 39, 45–47 (2008) (arguing, despite some signs of protest movements, Chinese citizenry continue to exhibit trust in national government and state authority).

318. See Lianjiang Li, Political Trust in Rural China, 30 Modern China 228, 232 (2004) ("In the eyes of these villagers, the Center is qualitatively different from, and even directly antagonistic to, lower levels.").

period.[319] The decrease in institutional trust is the product of continuing problems and increased expectations. In the courts, enhanced capacity and competence have failed to yield greater public acceptance of court decisions.[320]

One lesson of medical disputes is that failure to permit the evolution of autonomous institutions, be they courts, medical review boards, or the legal profession, may breed even more instability.[321] Lawmakers, courts, and academics have failed to create or even propose institutions for evaluating medical error that balance patient rights with the need for experts to assist in evaluating whether or not medical error has occurred. The problem is not just that decisions on medical error are made by doctors answerable to the local health bureau; it is that there is no way to conceptualize including patient voices in the process. Even if authorities wanted to make the medical review boards fairer, for example by including patient advocates, they would find it hard to find such people because of restrictions on the development of NGOs and other autonomous institutions.[322]

Yet focusing on the failure to develop autonomous institutions risks overlooking two more subtle implications for institutional development in China. First, medical disputes suggest that much of the institutional weakness, or flexibility in practice, is by design. The Chinese Party-state appears committed to improving formal institutions at the same time that it continues to be ambivalent about how much autonomy such institutions should be permitted to develop. Party-state officials who intervene in medical disputes, like judges who adapt or ignore formal legal rules because of stability concerns, are acting just as they are supposed to act. Arguments that the formal legal system is being undermined by courts and officials who yield to protest miss the fact that flexible interpretation (or disregard) of formal legal rules has long been central to the Chinese political-legal system. Courts that rigidly apply the law place

---

319. See Liebman, A Return to Populist Legality, supra note 20, at 177–80 (discussing changes in courts); supra note 29 (discussing overall improvements in health of Chinese population).

320. Writing on Chinese labor disputes, Mary Gallagher notes a similar dynamic of "informed disenchantment"—litigants, despite having greater knowledge of the law and willingness to sue, become more frustrated with the legal system as a result of increased exposure to it. Mary E. Gallagher, Mobilizing the Law in China: "Informed Disenchantment" and the Development of Legal Consciousness, 40 Law & Soc'y Rev. 783, 785–86 (2006).

321. For example, some local jurisdictions have sought to curtail the ability of lawyers to use contingent fees in a clear attempt to discourage lawyers from taking on medical disputes. But others have stepped into the void left by the lack of legal services—most notably professional protesters.

322. On NGO development, see generally Tony Saich, Negotiating the State: The Development of Social Organizations in China, China Q., Mar. 2000, at 124; Karla W. Simon, Two Steps Forward One Step Back—Developments in the Regulation of Civil Society Organizations in China, Int'l J. Civ. Soc'y L., Oct. 2009, at 51.

themselves in a far more precarious position than those who take account of stability concerns. Courts that innovatively adapt or ignore formal legal rules because of stability concerns are doing their jobs.[323]

Similarly, the expanding role of professional protesters may reflect state ambiguity about the role of formal institutions. Although widely criticized in the official media, protesters serve important functions.[324] The role of nonlegal intermediaries is of course not unique to China.[325] Yet in China the expanding roles of such intermediaries may reflect the emergence of new institutional arrangements in response to weaknesses in the formal legal system as well as state concerns about permitting further development of legal institutions.[326]

Second, medical cases demonstrate that innovation in the Chinese legal system does not equate to increased autonomy for legal institutions. Evidence from medical disputes reveals the adaptive and innovative capabilities of China's courts. Courts have adopted flexible interpretations of existing regulations in order to appease plaintiffs and defendants and have resisted legal standards many view as unfair. Yet such innovation is not aimed at increasing court autonomy; instead, it is designed to insulate courts from direct protest and blame for allowing disputes to escalate.

These two observations add depth to existing understandings of the development trajectory of courts in authoritarian systems and of institutional evolution in China. Most recent literature on courts in authoritarian systems has focused on ways in which courts begin to challenge existing institutional arrangements and political authority, particularly as courts develop new competence.[327] Similarly, literature on China's legal development has focused overwhelmingly on formal legal institutions and processes and has generally assumed that the end goal of legal re-

---

323. See supra note 300 and accompanying text (discussing legal system's goal of maintaining "harmonious society").

324. In his study of informal debt collectors, Xu Xin argues that the existence of intermediaries strengthens state control by resolving grievances that formal legal institutions fail to resolve. Xu Xin, Falü Shifou Zhongyao—Laizi Huanan De Yige Minjian Shouzhai Anli (法律是否重要—来自华南的一个民间收债案例) [Is Law Important?—A Case Study on Informal Debt Collection in Southern China], Soc. Stud. (社会学研究), Feb. 18, 2004, no. 1, 53–63.

325. See, e.g., Curtis J. Milhaupt & Mark D. West, The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime, 67 U. Chi. L. Rev. 41, 44 (2000) (analyzing organized crime in Japan and its role as nonlegal intermediary).

326. As one lawyer commented in response to a presentation of this Essay in China, the state may actually prefer professional protesters to lawyers, because the actions of the former are more predictable.

327. See, e.g., Tamir Moustafa & Tom Ginsburg, Introduction: The Functions of Courts in Authoritarian Politics, *in* Rule by Law: The Politics of Courts in Authoritarian Regimes 1, 2 (Tom Ginsburg & Tamir Moustafa eds., 2008) ("Courts are often used to advance the interests of authoritarian regimes, and yet paradoxically, they are also sometimes transformed into important sites of political resistance.").

forms is to create robust legal institutions. Medical disputes in China show that court innovation may be designed to insulate courts from external pressure and criticism, not to expand court autonomy.

Analysis of medical disputes in China also contributes to literature on institutional development in China. Prior scholarship has examined how "institutional conversion," the use of existing institutions for new purposes, plays out in China.[328] Medical cases highlight ways in which China's courts are taking on new roles and how such roles may reinforce rather than challenge state authority. Litigants are bringing a widening range of claims into the courts, forcing courts to confront new issues. Courts are developing strategies to deal with these new uses of the courts. Yet institutional conversion in the courts is not only coming from litigants; it is also coming from the state's use of the courts to help maintain stability by providing largely low-value remedies to those with grievances. Courts are serving as strategic resources both for litigants and for the state.[329]

Understanding the processes courts use—innovative legal reasoning combined with attempts to place such decisions in line with Party-state concerns regarding stability—suggests that courts are able to channel new claims in ways that provide litigants redress without challenging the political status quo. Courts are able to use their growing competence selectively. The coping strategies courts are employing are consistent with those recognized in existing literature on endogenous institutional evolution in China.[330] Over time, this increased capacity for innovation, combined with a willingness to engage in subtle pushback, may provide a base for continued evolution in the roles courts play.

Evidence from medical disputes reinforces the observation that increased institutional competence and sophistication will not necessarily lead to rapid change or political challenges. Medical cases suggest that

---

328. See, e.g., Xi Chen, Collective Petitioning and Institutional Conversion, *in* Popular Protest in China 54, 55 (Kevin J. O'Brien ed., 2008) [hereinafter Chen, Collective Petitioning] ("[I]t is not clear under what conditions or through what mechanisms repressive institutions are converted into instruments of popular action. This study aims to address these questions through an examination of the Chinese petition system . . . ."); Kellee S. Tsai, Adaptive Informal Institutions and Endogenous Institutional Change in China, 59 World Pol. 116, 118 (2006) (explaining that "even in non-democratic contexts, the etiology of formal institutional change may lie in the informal coping strategies devised by local actors to evade the restrictions of formal institutions"). For an overview of the process of institutional conversion, see generally Wolfgang Streeck & Kathleen Thelen, Introduction: Institutional Change in Advanced Political Economies, *in* Beyond Continuity: Institutional Change in Advanced Political Economies 1 (Wolfgang Streeck & Kathleen Thelen eds., 2005).

329. Cf. Streeck & Thelen, supra note 328, at 27 (describing institutions as strategic resources, not just constraints).

330. See, e.g., Tsai, supra note 328, at 119–22 (summarizing three mechanisms of endogenous institutional evolution, including path dependence and sequencing, institutional layering and friction, and institutional conversion).

continued endogenous institutional evolution in the courts is possible but that such evolution is most likely to come from courts continuing to expand their adaptive capacities in routine disputes, not from cases that directly challenge political norms. Such a process also carries risk: As Xi Chen has noted, the inability of institutions sufficiently to adapt to popular uses may also give rise to unrest.[331] In the courts, the potential for instability stems not only from the failure to adapt to new uses or to meet new demands. The use of the courts for new purposes—by litigants to pursue a broader range of claims and by the state to ensure stability—is also in tension with avowed state goals of developing a rule-based system of governance. A central insight from medical cases is that some litigants are able to use the legal system to obtain compensation but what appear to be normatively desirable outcomes (aggrieved individuals winning redress) are often achieved through flexible application of legal rules.

B. *Law in the Shadow of Protest*

Despite three decades of emphasis on constructing a comprehensive legal framework, medical cases show that in many disputes in China the "shadow of the law"[332] is weak or nonexistent. In medical disputes, law operates in the shadow of protest. The threat of protest keeps many cases out of court and also casts a shadow over how courts handle cases that do wind up in the formal legal system. As the discussion above has shown, hospital officials, judges, and health department officials acknowledge that whether or not they face a protest or threat thereof is generally the most important factor influencing resolution of medical disputes. Most disputes are resolved with little, if any, reference to potential legal liability, evidenced by the fact that negotiated outcomes in medical disputes frequently exceed the amounts awardable in court.

Much existing literature on China has assumed and argued that the primary goals of legal reforms include the creation of rules that facilitate economic development and the state's retreat from micromanagement of individuals' lives.[333] Conventional understandings of China's legal development have assumed that China is transitioning to a rule-based system, albeit one with many weaknesses, with a gradual expansion of the binding power of law and formal legal institutions. Recognizing the shadow that the threat of instability casts on legal proceedings challenges many existing assumptions about the trajectories of China's legal reforms. Medical disputes show there remain significant limitations on the impact of legal rules on contentious social issues even in areas in which

---

331. See Chen, Collective Petitioning, supra note 328, at 63.

332. 1 Alexis de Tocqueville, Democracy in America 140 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1946) (1835).

333. For a summary of such literature, see Liebman, A Return to Populist Legality, supra note 20, at 166–73.

the state has devoted resources to creating rules, institutions, and procedures.

Scholars have long recognized that many disputes, in China and elsewhere, are resolved primarily with reference to informal social norms, not formal law.[334] Medical disputes highlight two ways in which contemporary Chinese practice appears to be diverging from existing models. First, in medical disputes in China, law is of limited relevance even among arm's-length actors. Claims are not being resolved within closed communities or among repeat players.[335] Instead, disputes often escalate into moral claims against the state, in which law plays little role in ordering outcomes.

Second, the most important determinant of outcome is the threat of unrest and violence. Evidence from medical cases suggests that law-related protests are not merely serving as pressure valves and the risk of violence is not a minor external annoyance for China's courts. Violence and protest are now key aspects of how the system functions, part of the cycle of dispute resolution. The risk of instability is a key determinant of the resolution of disputes both inside and outside the courtroom. The process is dynamic and claimants often pursue multiple strategies. The influence runs in only one direction, however: Protest impacts law, yet law plays little role in influencing or limiting the resolution of protests.

Medical disputes are particularly likely to result in escalation and violence, reflecting their high stakes and the problems in the healthcare system. Yet the phenomenon is not unique to medical disputes. Similar dynamics exist in other contentious social spheres, most notably land, labor, and mass torts,[336] where, despite extensive attention to the construction of formal legal standards, much of the action in resolving disputes remains outside the courtroom. Literature on China has, with

---

334. See, e.g., Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes, at vii (1991) ("[P]eople frequently resolve their disputes in cooperative fashion without paying attention to the laws that apply to those disputes."); Haini Guo & Bradley Klein, Bargaining in the Shadow of the Community: Neighborly Dispute Resolution in Beijing Hutongs, 20 Ohio St. J. on Disp. Resol. 825, 909 (2005) ("Hutong residents can be seen as 'bargaining in the shadow of the community' in the most comprehensive sense. Shared community norms provide the preferred basis for dispute resolution, and they animate the activities of the non-legalistic public authorities charged with mediating disputes and maintaining community harmony.").

335. Some hospitals are beginning to develop internal norms governing how they respond to cases; over time informal norms may thus come to govern the resolution of hospital-patient disputes. Yet there is little evidence of such norms playing a role thus far.

336. For further discussion of the impact of petitioning and protesting on the legal system, see Benjamin L. Liebman, A Populist Threat to China's Courts?, *in* Chinese Justice: Civil Dispute Resolution in Contemporary China 269, 269–71 (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011) (presenting "evidence that protesting, petitioning, or simply threatening to do either often is a successful means for litigants to pressure courts to rule in their favor or to alter decided cases").

few exceptions,[337] focused on how courts function inside the courtroom. Doing so, however, risks failing to see the important roles that protest and violence play in influencing court outcomes.

Recognizing that law operates in the shadow of protest in China raises questions about the commitment and capacity of the Chinese state to strengthen the legal system. The state encourages (and at times compels[338]) settlement, often closing the courtroom doors to contentious claims. Courts' institutional weakness means that they find it difficult to resolve high-profile cases, even where existing laws provide clear standards for adjudication. Within China, the frequency with which litigants either eschew litigation entirely or use litigation as a strategy alongside protest is often explained as resulting from lack of public confidence in the courts and from a tradition in which litigation is rarely the default mechanism for resolving disputes. Medical cases highlight another factor: Litigants accurately understand that the most effective route to compensation is often outside the formal legal system.

It would be an overstatement to describe China as a society in which every legal issue is transformed into a nonlegal issue, the reverse of de Tocqueville's famous observation about the United States.[339] Yet that description of China would not be far off, at least with regard to significant social issues and cases that pose a threat of even mild protest. There is a lot of ordinary law in China, cases that are resolved routinely through the formal legal system. Popular practice and discourse regarding law are shaping the evolution of how the legal system functions. But there is also a strong tendency for a wide range of cases to be taken out of the legal system, or to be resolved within the courts without reference to the law on the books.[340] Courts are limited in their authority to impact formal law and actual practice on contentious or high-profile issues.

---

337. See id. at 269 (discussing influence of protesting, petitioning, or threatening such action on Chinese legal decisions); Yang Su & Xin He, Street as Courtroom: State Accommodation of Labor Protest in South China, 44 Law & Soc'y Rev. 157, 158–59 (2010) (describing resolution of cases "on the street," sometimes with judicial participation).

338. The most notable examples involve mass torts: claims by the victims of the Wenzhou high speed rail crash, by the victims of melamine contaminated milk, and by victims of the 2008 Wenchuan earthquake. See, e.g., Andrew Jacobs, Chinese Parents Reject Milk Settlement, Seeking Care for Victims, N.Y. Times, Jan. 14, 2009, at A9 (discussing parents who rejected "government-sanctioned compensation package"); Andrew Jacobs, Victims' Sons in Tough Fight for Redress After China Rail Crash, N.Y. Times, Aug. 29, 2012, at A1 (discussing difficulty of settling with Chinese ministry); Edward Wong, China Concedes Possible Flaws in Schools that Collapsed in May Earthquake, N.Y. Times, Sept. 5, 2008, at A6 (discussing how "governments acted as if they were corporations seeking to settle embarrassing lawsuits").

339. 1 de Tocqueville, supra note 332, at 280 ("Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.").

340. For examples, see Benjamin L. Liebman, Professionals and Populists: The Paradoxes of China's Legal Reforms, *in* China in and Beyond the Headlines 214, 214–19 (Timothy Weston & Lionel M. Jensen eds., 3d. ed. 2012).

In China, as in other countries, a range of factors shape the formation of legal norms and of popular understanding of law. Writing about the United States, Michael Grossberg notes that law consists not only of formal law and court practices but also of "social currents, political developments, economic changes, and other forces in the larger society."[341] China appears striking for the limited impact of formal law and court practice in shaping public understandings of law. Court cases may result in media coverage and shape official and popular practices and understandings, but such impact rarely stems from court decisions. Many such cases are notable for the fact that they are resolved without a formal court decision or with a decision dictated by Party-state officials.[342] Feedback on legal norms in China comes from negotiated outcomes and state responses to protest and popular attention; feedback from court decisions is much less influential. Recent high-profile cases in which court decisions are said to impact popular behavior and understanding of law have often been cases in which popular behavior has been shaped by courts' misapplication of law.[343] Legal institutions have become important spaces of contestation in China, but they are not the only such spaces and lack a privileged role in resolving disputes or in shaping the resolution of disputes outside the courts.

C. *Protest and Responsiveness: Nationalizing Private Litigation*

Medical disputes show how claims that begin as private law disputes become claims against the state. Rather than facilitating the development of legal institutions to resolve private disputes, official responsiveness sends the message that a range of private law disputes are in fact claims against the state. This is not an observation unique to medical disputes: Similar dynamics exist in other areas that also frequently give rise to un-

---

341. Michael Grossberg, A Judgment for Solomon: The d'Hauteville Case and Legal Experience in Antebellum America 3 (1996).

342. See Benjamin L. Liebman, Changing Media, Changing Courts, *in* Changing Media, Changing China 150, 151 (Susan L. Shirk ed., 2010) ("In some criminal cases, media coverage has resulted in rushed trials in which assuaging populist demands for harsh treatment of defendants is more important than observance of procedural or substantive legal standards.").

343. In what is probably the most well-known example, in the 2006 Peng Yu case a court in Nanjing imposed liability on a self-proclaimed Good Samaritan who had taken an elderly woman to the hospital and was then sued by the woman. The court held that common sense suggested that the defendant only helped the woman because he was responsible for her injuries. The case received extensive attention in China and was widely blamed as being one of the causes of the 2011 "Yueyue" incident, a video of which shows eighteen passers-by ignoring a two-year-old girl who had been run over by two vehicles. Karson Yiu, "Nanjing Judge" Blamed for Apathy in Toddler's Hit and Run, ABC News (Oct. 18, 2011, 12:16 PM), http://abcnews.go.com/blogs/headlines/2011/10/nanjing-judge-blamed-for-apathy-in-toddlers-hit-and-run/ (on file with the *Columbia Law Review*).

rest, including land and labor disputes.[344] Hospitals are not purely private actors: Most are state-owned and remain overseen by local health bureaus.[345] Nevertheless, official responsiveness to protest reinforces popular views that hospitals are representatives of the state.

Medical disputes represent an increasingly common phenomenon in contemporary China: the nationalization of private litigation. Many disputes on contentious issues are resolved outside the legal system. Protest and petitioning can transform even routine claims by individuals into direct negotiations with the state. The result may be "order without law," but such disputes are not resolved via private ordering.[346] Resolution takes place through direct bargaining with the state. Obsession with stability means that in a wide range of cases authorities rush to resolve cases before they reach court by paying off aggrieved individuals. Concerns about stability also trump legal rules when cases do reach court.[347]

Leading explanations of state responsiveness to protest in China focus on two central factors: incentives facing local officials to prevent unrest[348] and the ability of protesters to escalate their demands.[349] Medical cases suggest that incentives to maintain stability are only part of the story. Grievances and resulting protests, in medical cases as in other spheres, are effective not just because they threaten escalation or unrest, but also because they challenge the legitimacy-narrative that the Party-state has sought hard to create.[350] Implicit in claims against the state are both threats of escalation and appeals to the state's responsibility to care for those with grievances. This tension demonstrates that despite three decades of legal reform, officials continue to view themselves as universal ordering agents. Officials are responsive to claims that the state should care for those who have suffered misfortune.

Medical disputes highlight the over- and underresponsiveness of the Chinese Party-state. There is widespread shirking by state institutions. Hospital officials complain that they are left to resolve disputes on their

344. For a discussion of labor disputes, see Su & He, supra note 337, at 159 ("When employers fail to pay the (already very low) wages on which many migrant workers count for their daily survival, collective actions are easily triggered.").

345. See supra Part I.A (discussing state oversight and control of most hospitals).

346. For an example of existing private ordering, see Ellickson, supra note 334 (discussing dispute resolution among neighbors).

347. See supra Part II.D (discussing court efforts to appease aggrieved plaintiffs).

348. For a discussion of incentives facing officials, see generally Carl F. Minzner, Riots and Cover-Ups: Counterproductive Control of Local Agents in China, 31 U. Pa. J. Int'l L. 53 (2009).

349. See, e.g., Kevin J. O'Brien & Lianjiang Li, Rightful Resistance in Rural China 67 (2006) (discussing protester escalation); Chen, Troublemaking, supra note 253, at 463–66 (same).

350. As Elizabeth Perry has written, "The idea that good governance rests upon guaranteeing the livelihood of ordinary people has been a hallmark of Chinese political philosophy and practice from Mencius to Mao—and beyond." Perry, supra note 317, at 39.

own because other state institutions, including the police and health bureaus, refuse to get involved out of fear that they will become targets of protest.[351] At the same time, state intervention can transform disputes between largely private actors into the concern of local authorities and thus implicitly into disputes that test the legitimacy of the state.

State over- and underresponsiveness reflects uncertainty about the role of the state and the role of the legal system. Conventional arguments regarding why the Party-state remains wary of allowing courts and the legal system to expand their authority focus on state concerns that even modest steps toward independent courts would pose a political risk to the Communist Party. Official sensitivities regarding Western-funded rule of law efforts have clearly been heightened in the wake of revolutions in the Arab world, and there are signs of increased state distrust of the legal profession. Such concerns explain crackdowns on rights lawyers and restrictions on courts' abilities to hear constitutional claims and other major public law disputes.[352] Yet focusing on a hypothetical political threat from the development of stronger courts is barely credible in a system in which court appointments are largely controlled by the Party Organization Department and in which there is little history or evidence of courts challenging political authority.[353] Such concerns also cannot explain the tendency to transform even routine cases into claims against the state.

A more likely explanation is that unease regarding the role of law and courts and unwillingness to allow courts more autonomy to resolve private disputes reflects broader uncertainty about the role of the state. Litigants and officials continue to expect the state to play a strong role in resolving a wide range of disputes; the idea of an all-powerful, or "*quanneng*," state remains strong. Party-state officials appear unwilling to let go of this role, particularly in a time of rapid change.

As Anthony Saich noted nearly a decade ago, the post-reform Chinese state lacks a clear vision of its role.[354] As a result the state engages in micromanagement and flexible resolution of problems, what Saich referred to as "the politics of muddling through."[355] Medical disputes show how this flexibility interfaces with the legal system. Rather than stepping back and allowing the legal system to resolve disputes, the Party-state continues to micromanage individual disputes and to encour-

---

351. See supra Part III (discussing reluctance of police and health bureaus to become involved).

352. For an insightful discussion of China's recent "turn against law," see generally Carl F. Minzner, China's Turn Against Law, 59 Am. J. Comp. L. 935 (2011).

353. See Liebman, Restricted Reform, supra note 10, at 18 ("Courts continue to be subject to Party leadership.").

354. Tony Saich, China's New Leadership: The Challenges to the Politics of Muddling Through, Current Hist., Sept. 2002, at 250, 253.

355. Id. at 255.

age, and at times require, local officials to intervene. At the same time, however, the Party-state continues to devote extensive resources to developing China's legal infrastructure.

The cycle of protest, responsiveness, and disregard of legal rules and procedures appears unstable. The success of protesting incentivizes others to do the same. Literature on protest in China, however, offers another possible interpretation of the rise and tolerance of protest: Allowing such protest may have a stabilizing effect.[356] Permitting protest may prevent escalation, play a useful oversight function, and provide the regime with information. Evidence from medical protests largely fits into this stability-enhancing model. Protests are mostly atomized, and protesters voice their complaints in terms of demands for redress in individual cases, not regime challenges.[357] Many such claims resonate with a tradition of claims for a "fundamental right to subsistence."[358] A process that encourages claims to morph from protest into settlement also dovetails with official distrust of the formal legal sphere.

Medical cases highlight another possible benefit to a system that rewards protest: Protest may help to screen for those with the most serious grievances and may be cheaper than providing a robust social welfare system. As Xi Chen and Peter Lorentzen have noted, the state takes protest as evidence of the credibility of grievances.[359] In a system in which the state is unable or unwilling to provide the resources necessary to transform the healthcare system radically, allowing protest may serve both to highlight problems in the system and to identify those most aggrieved. Focusing on those with the strongest grievances helps not only to maintain stability but also to reduce costs to hospitals and to the state. The same may be true for the legal system more generally, which may be

---

356. See Peter L. Lorentzen, Regularizing Rioting: Permitting Protest in an Authoritarian Regime 3 (June 9, 2010) (unpublished manuscript), available at http://ssrn.com/abstract=995330 (on file with the *Columbia Law Review*) ("[R]egular protest in an authoritarian regime can actually enhance its stability rather than detract from it."); Peter Lorentzen & Suzanne Scoggins, Rising Rights Consciousness: Undermining or Undergirding China's Stability? 3 (2011) (unpublished working paper), available at http://ssrn.com/abstract=1722352 (on file with the *Columbia Law Review*) ("[W]e argue that the increase in rights consciousness thus far has been predominantly policy-driven, with a stabilizing and regime-supporting effect."). Elizabeth Perry has similarly noted that the "right to rebel" in China "may prove more system-supportive than system-subversive." Perry, supra note 317, at 45. Perry notes that protest has long been viewed as a legitimate response to the state's failure to provide for the livelihood of its people and characterizes protest in China as reflecting "rules consciousness," not "rights consciousness." Id. at 47. This argument is controversial; for a counterargument that recent protests also reflect a rise in rights consciousness, see generally Lianjiang Li, Rights Consciousness and Rules Consciousness in Contemporary China, China J., July 2010, at 47.

357. See Lorentzen, supra note 356, at 4 ("[P]rotestors' demands almost always have to do only with material interests and local grievances.").

358. Perry, supra note 317, at 43.

359. Chen, Troublemaking, supra note 253, at 469; Lorentzen, supra note 356, at 3.

ill-equipped to confront the full range and quantity of claims resulting from China's rapid social transformation and proliferation of new laws.

Despite the potential for protest to reinforce stability, however, medical disputes also reflect tensions at the heart of legal reforms. Protest may reinforce regime stability, but relying on protest remains in tension with state efforts to improve the legal system. The Chinese system continues to be one in which outcomes, not procedure, provide the primary external metric for evaluation of the courts and other institutions. In the short term, such an approach may enhance stability by focusing on compensation for those with the strongest grievances. In the long term, however, whether stability will be enhanced by state emphasis on responsiveness to grievances, not the embrace of rules and procedures, is less clear. Recognizing the dynamic of overresponsiveness challenges not only the state's avowed commitment to law, but also basic understandings regarding the importance of rule-based governance to the sustainability of China's model of authoritarian governance.

CONCLUSION

The level of violence and unrest in medical disputes is in some respects unsurprising: The combination of high stakes, a healthcare system widely perceived as focused on profit rather than patient care, lack of a social safety net, and biased dispute resolution institutions might well produce instability in any system. The trend toward resolution of claims through protest and violence appears likely to become more widespread absent significant reforms.

Some recent reforms appear designed to reduce unrest. Efforts by the Supreme People's Court to streamline the handling of medical cases and reduce reliance on doctor-controlled medical review boards may help to lessen tension and encourage litigants to pursue their claims in court, as would allowing larger damage awards. Modest steps toward fairness can be taken by making review board determinations reviewable in court and by providing for nonlocal review of medical cases. Proposed reforms to address inequality in the healthcare system can likewise be understood as, in part, an attempt to begin to address the destabilizing effects of China's healthcare crisis. Such efforts may, over time, reduce conflict over medical cases; the transformation of Taiwan's healthcare system over the past twenty years may provide a useful example, albeit on a much smaller scale. Yet changes to the healthcare system will take time and will come at enormous cost. The grim reality is that conflict appears likely to get worse absent radical state action to address problems in the healthcare system.

The rise in medical disputes is a story of evolution of formal law in China and also the limits of such evolution. Medical disputes show how the state has invested in formal law in an effort to reduce conflict and how state concerns about instability are often in tension with commit-

ment to strengthening the legal system. In medical disputes, as in healthcare and law more generally, the Party-state is both over- and underresponsive. Disputes are resolved not in the shadow of the law, but through micromanagement by the state in the shadow of protest. Medical cases show how increased institutional competence does not necessarily lead to challenges to the political status quo. The cycle of distrust, protest, and concession that characterizes medical disputes in China reflects uncertainties about how the Chinese state is ordered and how it manages and resolves conflict.

SELECTED BIBLIOGRAPHY

Alford, William P., "Second Lawyers, First Principles": Lawyers, Rice-Roots Legal Workers, and the Battle over Legal Professionalism in China, *in* Prospects for the Professions in China 48 (William P. Alford, Kenneth Winston & William C. Kirby eds., 2011).

Cai, Wenzhi, et al., Antecedents of Medical Workplace Violence in South China, 26 J. Interpersonal Violence 312 (2011).

Chen, Gang, Beijing Shi Gaoji Renmin Fayuan Guanyu Shenli Yiliao Sunhai Peichang Jiufen Anjian Ruogan Wenti De Zhidao Yijian (Shixing) De Lijie Yu Shiyong (北京市高级人民法院关于审理医疗损害赔偿纠纷案件若干问题的指导意见(试行)的理解与适用) [Understanding and Applying Beijing High People's Court's Guidance on Some Issues Concerning the Trial of Medical Injury Dispute Cases (For Trial Implementation)], Zhao Fa Wang (找法网) [FindLaw Online] (Aug. 16, 2010), http://china.findlaw.cn/lawyers/article/d34931.html.

Chen, Lincoln & Dong Xu, Trends in China's Reforms: The Rashomon Effect, 379 Lancet 782 (2012).

Chen, Xi, Collective Petitioning and Institutional Conversion, *in* Popular Protest in China 54 (Kevin J. O'Brien ed., 2008).

Chen, Xi, The Power of "Troublemaking": Protest Tactics and Their Efficacy in China, 41 Comp. Pol. 451 (2009).

Chu, Jou-juo & Donglong Lin, Yiliao Gongdao Ruhe Tao? Taiwan Yiliao Jiufen Chuli Jizhi Bibing Zhi Tantao (醫療公道如何討?台灣醫療糾紛處理機制弊病之探討) [How to Seek Medical Justice? A Discussion on the Problems of Taiwanese Medical Dispute Resolution Mechanisms], 11 Yishi Faxue (醫事法學) [J.L. & Med.] (2003).

de Tocqueville, Alexis, Democracy in America vol. 1 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1946) (1835).

Eggleston, Karen, et al., Comparing Public and Private Hospitals in China: Evidence from Guangdong, 10 BMC Health Services Res., art. 76, (2010), available at http://www.ncbi.nlm.nih.gov/pmc/articles/pmc2858143.

Eggleston, Karen, et al., Health Service Delivery in China: A Literature Review, 17 Health Econ. 149 (2008).

Ellickson, Robert C., Order Without Law: How Neighbors Settle Disputes (1991).

Feldman, Eric A., Law, Culture, and Conflict: Dispute Resolution in Postwar Japan, *in* Law in Japan: A Turning Point 50 (Daniel H. Foote ed., 2007).

Feldman, Eric A., The Ritual of Rights in Japan: Law, Society, and Health Policy (2000).

Gallagher, Mary E., Mobilizing the Law in China: "Informed Disenchantment" and the Development of Legal Consciousness, 40 Law & Soc'y Rev. 783 (2006).

Grossberg, Michael, A Judgment for Solomon: The d'Hauteville Case and Legal Experience in Antebellum America (1996).

Guo, Haini & Bradley Klein, Bargaining in the Shadow of the Community: Neighborly Dispute Resolution in Beijing Hutongs, 20 Ohio St. J. on Disp. Resol. 825 (2005).

Harris, Dean M. & Chien-Chang Wu, Medical Malpractice in the People's Republic of China: The 2002 Regulation on the Handling of Medical Accidents, 33 J.L. Med. & Ethics 456 (2005).

Herd, Richard, et al., Improving China's Health Care System (OECD Econ. Dept., Working Paper No. 751, 2010), available at http://www.oecd-ilibrary.org/economics/improving-china-s-health-care-system_5kmlh4v2fv31-en.

Ho, Christina S., China's Health Care Reform: Background and Policies, *in* Implementing Health Care Reform Policies in China: Challenges and Opportunities 1 (Charles W. Freeman III & Xiaoqing Lu Boynton eds., 2011).

Ho, Christina S., Health Reform and De Facto Federalism in China, 8 China: Int'l J. 33 (2010).

Hu, Shanlian, et al., Reform of How Health Care Is Paid for in China: Challenges and Opportunities, 372 Lancet 1846 (2008).

Huang, Yanzhong, The Sick Man of Asia: China's Health Crisis, 90 Foreign Aff. 119 (2011).

Ji, Jianlin, et al., Suicide in Contemporary China: A Review of China's Distinctive Suicide Demographics in Their Sociocultural Context, Harv. Rev. Psychiatry, Jan.–Feb. 2001.

Ji, Min, President, First Civil Trial Court of Supreme People's Court, Zai Quanguo Minshi Shenpan Gongzuo Zuotan Hui Shang De Zongjie Jianghua (在全国民事审判工作座谈会上的总结讲话) [Concluding Remarks at the National Civil Trial Work Forum] (Apr. 10, 2007),

available at http://law.baidu.com/pages/chinalawinfo/11/4/fef1f4b3a7264f73d85e6a6e92ea04ad_0.html.

Li, Lianjiang, Political Trust in Rural China, 30 Modern China 228 (2004).

Li, Lianjiang, Rights Consciousness and Rules Consciousness in Contemporary China, China J., July 2010.

Liang, Cong, et al., Guangdong High People's Ct., Ershen Minshi Anjian Gaipan Biaozhun De Diaoyan Baogao (二审民事案件改判标准的调研报告) [Research Report on the Standards for Modifying Judgments of Civil Cases on Appeal], Guangdong Fayuan Wang (广东法院网) [Guangdong Courts Online] (Feb. 6, 2009), http://www.guwenlvshi.com/ShowArticle.shtml?ID=20099710505732365.htm.

Liebman, Benjamin L. & Curtis J. Milhaupt, Reputational Sanctions in China's Securities Market, 108 Colum. L. Rev. 929 (2008).

Liebman, Benjamin L., A Populist Threat to China's Courts?, *in* Chinese Justice: Civil Dispute Resolution in Contemporary China 269 (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011).

Liebman, Benjamin L., A Return to Populist Legality? Historical Legacies and Legal Reform, *in* Mao's Invisible Hand: The Political Foundations of Adaptive Governance in China 165 (Sebastian Heilmann & Elizabeth J. Perry eds., 2011).

Liebman, Benjamin L., Changing Media, Changing Courts, *in* Changing Media, Changing China 150 (Susan L. Shirk ed., 2010).

Liebman, Benjamin L., China's Courts: Restricted Reform, 21 Colum. J. Asian L. 1 (2007).

Liebman, Benjamin L., Professionals and Populists: The Paradoxes of China's Legal Reforms, *in* China in and Beyond the Headlines 214 (Timothy Weston & Lionel M. Jensen eds., 3d. ed. 2012).

Liebman, Benjamin L., Watchdog or Demagogue? The Media in the Chinese Legal System, 105 Colum. L. Rev. 1 (2005).

Lin, Wangchuan, et al., Urban Resident Basic Medical Insurance: A Landmark Reform Toward Universal Coverage in China, 18 Health Econ. S83 (2009).

Liu, Yan & Feng Tian, Qian Xi Yiliao Jiufen De Chengyin Yu Fangfan (浅析医疗纠纷的成因与防范) [Brief Analysis of the Causes and Prevention of Medical Disputes], 1 Zhonghua Xiandai Yiyuan Guanli

Zazhi (中华现代医院管理杂志) [Chinese J. Current Hosp. Admin.], no. 1, 2003, available at http://journal.9med.net/html/qikan/yyglyyfyxwsx/zhxdyyglzz/2003911/ysfg/20080903014220702_15972.html.

Liu, Yuanli, et al., Health System Reform in China 7: China's Health System Performance, 372 Lancet 1914 (2008).

Lorentzen, Peter L., Regularizing Rioting: Permitting Protest in an Authoritarian Regime (June 9, 2010) (unpublished manuscript), available at http://ssrn.com/abstract=995330.

Lorentzen, Peter & Suzanne Scoggins, Rising Rights Consciousness: Undermining or Undergirding China's Stability? (2011) (unpublished working paper), available at http://ssrn.com/abstract=1722352.

Lu, Yuhau, Jianding Jielun Yu Sifa Jianding Tizhi Gaige (鉴定结论与司法鉴定体制改革) [Inspection Conclusions and Reform of the Judicial Inspection System], Hunan Xiangjian Lüshi Shiwusuo (湖南湘剑律师事务所) [Hunan Xiangjian Law Firm], http://www.xj148.com/xjlw/lunwen_luyh01.htm (last visited Sept. 21, 2012).

Lubman, Stanley B., Bird in a Cage: Legal Reform in China After Mao (1999).

Meng, Qun, et al., Trends in Access to Health Services and Financial Protection in China Between 2003 and 2011: A Cross-Sectional Study, 379 Lancet 805 (2012).

Milhaupt, Curtis J. & Mark D. West, The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime, 67 U. Chi. L. Rev. 41 (2000).

Ministry of Health of P.R. China, 2011 Nian 4 Yue Quanguo Yiliao Fuwu Qingkuang (2011年4月全国医疗服务情况) [Report on Nationwide Health Services in April 2011] (May 9, 2011), available at http://www.moh.gov.cn/publicfiles/business/htmlfiles/mohwsbwstjxxzx/s7967/201106/52031.htm.

Minzner, Carl F., China's Turn Against Law, 59 Am. J. Comp. L. 935 (2011).

Minzner, Carl F., Riots and Cover-Ups: Counterproductive Control of Local Agents in China, 31 U. Pa. J. Int'l L. 53 (2009).

Moustafa, Tamir & Tom Ginsburg, Introduction: The Functions of Courts in Authoritarian Politics, *in* Rule by Law: The Politics of

Courts in Authoritarian Regimes 1 (Tom Ginsburg & Tamir Moustafa eds., 2008).

O'Brien, Kevin J. & Lianjiang Li, Rightful Resistance in Rural China (2006).

Perry, Elizabeth J., Chinese Conceptions of "Rights": From Mencius to Mao—and Now, 6 Persp. on Pol. 37 (2008).

Potter, Pitman B., Dilemmas of Access to Healthcare in China, 8 China: Int'l J. 164 (2010).

Qian, Jiwei, Reforming Public Hospitals in China, 3 E. Asian Pol'y 75 (2011).

Qian, Xianliang, Falü Zhuanjia Chen Guangzhong: Faguan Kaoping Jizhi Daozhi Ershen Gaipanlü Di (法律专家陈光中：法官考评机制导致二审改判率低) [Legal Scholar Chen Guangzhong: Judges Evaluation System Causes Low Modification Rates in Cases on Appeal], Zhenyi Wang (正义网) [Justice Online] (July 12, 2008), http://www.jcrb.com/zhuanti/fzzt/ntyydlt/ntyydzxbd/200807/t20080712_36692.html.

Qinquan Zeren Fa Shishi Yihou, Naxie Falü Fagui Hui Shoudao Yingxiang? (侵权责任法实施以后, 哪些法律法规会受到影响?) [Which Laws and Regulations Will Be Affected by the Implementation of the Tort Liability Law?], Guanxi Yishi Wang (广西医师网) [The Guangxi Physician] (June 10, 2011), http://www.gxmda.com/zilvweiquan/falvfagui/2011-06-10/77.html.

Saich, Tony, China's New Leadership: The Challenges to the Politics of Muddling Through, Current Hist., Sept. 2002.

Saich, Tony, Negotiating the State: The Development of Social Organizations in China, China Q., Mar. 2000.

Simon, Karla W., Two Steps Forward One Step Back—Developments in the Regulation of Civil Society Organizations in China, Int'l J. Civ. Soc'y L., Oct. 2009.

Sinclair, James A.C., China's Healthcare Reform, 36 China Bus. Rev. 32 (2009).

Streeck, Wolfgang & Kathleen Thelen, Introduction: Institutional Change in Advanced Political Economies, *in* Beyond Continuity: Institutional Change in Advanced Political Economies 1 (Wolfgang Streeck & Kathleen Thelen eds., 2005).

Su, Yang & Xin He, Street as Courtroom: State Accommodation of Labor Protest in South China, 44 Law & Soc'y Rev. 157 (2010).

Sun, Shengkun & Wei Wang, Violence Against Chinese Health-Care Workers, 377 Lancet 1747 (2011).

Tsai, Kellee S., Adaptive Informal Institutions and Endogenous Institutional Change in China, 59 World Pol. 116 (2006).

Ueda, Makoto, Bei Zhanshi De Shiti (被展示的尸体) [The Corpse on Display], *in* Shijian, Jiyi, Xushu (事件、记忆、叙述) [Events, Memory, Narrative] 114 (Sun Jiang ed., Wang Xiaokui trans., 2004).

Wang, Huifeng, A Dilemma of Chinese Healthcare Reform: How To Re-define Government Roles?, 20 China Econ. Rev. 598 (2009).

Wang, Jinfan & Haiyan Wang, Yiliao Shigu Jishu Jianding Cunzai De Wenti He Gaijin Jianyi (医疗事故技术鉴定存在的问题和改进建议) [Problems in Technical Reviews of Medical Accidents and Suggestions for Improvement], 20 Weisheng Ruan Kexue (卫生软科学) [Soft Sci. Health], no. 6, 2006, available at http://so.med.wanfangdata.com.cn/ViewHTML/PeriodicalPaper_wsrkx200606024.aspx.

Wang, Lianyin, Zuigao Renmin Fayuan Min Yi Ting Fuzeren Jiu Shenli Yiliao Jiufen Anjian De Falü Shiyong Wenti Da Jizhe Wen (最高人民法院民一庭负责人就审理医疗纠纷案件的法律适用问题答记者问) [Head of Supreme People's Court Civil No. 1 Division Answers Reporter's Questions Regarding the Applicable Laws in the Trial of Medical Dispute Cases], Zuigao Renmin Fayuan Wangzhan (最高人民法院网站) [Supreme People's Court Website] (Apr. 12, 2004, 3:31 pm), http://www.law-lib.com/fzdt/newshtml/21/20050709153310.htm.

Wang, Ping, Yiliao Shigu Zhengyi 110 Li Jishu Jianding Fenxi (医疗事故争议110例技术鉴定分析) [Analysis of Technical Reviews in 110 Disputed Medical Accident Cases], 16 Hainan Yixue (海南医学) [Hainan Med. J.], no. 12, 2005, available at http://so.med.wanfangdata.com.cn/ViewHTML/PeriodicalPaper_hainanyx200512112.aspx.

Wang, Yaxin & Ying Wang, Nongcun Falü Fuwu Shizheng Yanjiu (农村法律服务实证研究) [An Empirical Study of Legal Services in Rural Areas], 2 Tsinghua L. Rev. 5 (2008), available at http://d.wanfangdata.com.cn/periodical_qhfx200805005.aspx.

Wang, Zhu & Ken Oliphant, Yangge Dance: The Rhythm of Liability for Medical Malpractice in the People's Republic of China, 87 Chi.-Kent L. Rev. 21 (2012).

Watts, Jonathan, Protests in China over Suspicions of a Pay-or-Die Policy, 369 Lancet 93 (2007).

Whyte, Martin King & Zhongxin Sun, The Impact of China's Market Reforms on the Health of Chinese Citizens: Examining Two Puzzles, 8 China: Int'l J. 1 (2010).

Wo, Zhongdong, Dui Woguo Yiliao Shigu Jishu Jianding Zhidu De Jidian Sikao (对我国医疗事故技术鉴定制度的几点思考) [Some Thoughts on Our Nation's Rules of Reviewing Medical Accidents], 4 Zhonghua Xiandai Yiyuan Guanli Zazhi (中华现代医院管理杂志) [Chinese J. Current Hosp. Admin.], No. 12, 2006, available at http://www.39kf.com/cooperate/qk/xdyygl/0612/2007-04-26-349428.shtml.

Xi, Chao & Lixin Yang, Medical Liability Laws in China: The Tale of Two Regimes, 19 Tort L. Rev. 65 (2011).

Xu, Xin & Rongrong Lu, Baoli Yu Bu Xinren—Zhuanxing Zhongguo De Yiliao Baoli Yanjiu: 2002–2006 (暴力与不信任—转型中国的医疗暴力研究: 2002–2006) [Violence and Mistrust—A Study on Medical Violence in a Transforming China: 2002–2006], 2008 Fazhi Yu Shehui Fazhan (法制与社会发展) [Legal Sys. & Soc. Dev.] (2008), available at http://www.usc.cuhk.edu.hk/PaperCollection/Details.aspx?id=6776.

Xu, Xin, Falü Shifou Zhongyao—Laizi Huanan De Yige Minjian Shouzhai Anli (法律是否重要—来自华南的一个民间收债案例) [Is Law Important?—A Case Study on Informal Debt Collection in Southern China], Soc. Stud. (社会学研究), Feb. 18, 2004, no. 1.

Yang, Honghui, et al., Shaoyang: Ershen Minshi Anjian Lianxu 3 Nian "San Sheng Er Jiang" (邵阳： 二审民事案件连续3年"三升二降") [Shaoyang Saw Three Measurements Go Up and Two Others Go Down Among Civil Cases on Appeal for Three Consecutive Years], Zhongguo Fayuan Wang (中国法院网) [China Courts Online] (July 8, 2011), http://www.mzyfz.com/cms/fayuanpingtai/anjianshenli/minshishenpan/html/1074/2011-07-08/content-98833.html.

Yang, Lixin, "Qinquan Zeren Fa" Yiliao Sunhai Zeren Gaige De Chenggong Yu Buzu ("侵权责任法"改革医疗损害责任制度的成功与不足) [Success and Shortcomings of the Medical Malpractice Liability System Reform Through the "Tort Liability Law"], 4

Zhongguo Renmin Daxue Xuebao (中国人民大学学报) [J. Renmin U. China] (2010).

Yip, Winnie Chi-Man, et al., Early Appraisal of China's Huge and Complex Health-Care Reforms, 379 Lancet 833 (2012).

You, Zongxian & Xiuyi Yang, Taiwan Yiliao Jiufen Zili Jiuji Zhi Shizheng Yanjiu—Jianbao Ziliao Fenxi (台灣醫療糾紛自力救濟之實證研究—剪報資料分析) [Case Studies on Self-Help in Medical Disputes in Taiwan—An Analysis Based on Newspaper Clippings], 14 Yishi Faxue (醫事法學) [J.L. & Med.] 1 (2006).

Yu, Danghui & Tiantian Li, Facing Up to the Threat in China, 376 Lancet 1823 (2010).

Zhao, Zhongwei Income Inequality, Unequal Health Care Access, and Mortality in China, 32 Population & Dev. Rev. 461 (2006).

Zhongguo Yishi Xiehui (中国医师协会) [Chinese Med. Doctors Ass'n], Qian Tan Yiliao Zeren Baoxian (浅谈医疗责任保险) [Brief Discussion on Medical Liability Insurance] (Nov. 11, 2005), available at http://2009.cmda.gov.cn/yishiweiquan/weiquanzhishi/2008-12-10/2295.html.

Zhu, Jianjun & Hong Wang, Shi Tongguo Liang Ze Anli Jiedu Yiliao Shigu Jianding De Falü Xingzhi (试通过两则案例解读医疗事故鉴定的法律性质) [An Attempt to Interpret the Legal Nature of Medical Accident Reviews Through Two Cases], Zhongguo Minshang Falü Wang (中国民商法律网) [China Civ. Com. L. Online] (Oct. 8, 2003), http://www.civillaw.com.cn/article/default.asp?id=13055.

Bacheng Beijingren Da Guansi Bu Qing Zhen Lüshi (八成北京人打官司不请真律师) [Eighty Percent of Beijing Residents Do Not Hire Real Lawyers for Litigation], Falü Zixun (法律咨询) [Legal Advice], available at http://www.110.com/ziliao/article-121216.html (last visited Oct. 20, 2012).

Dui Zuigao Renmin Fayuan Guanyu Shenli Yiliao Sunhai Zeren Jiufen Anjian Shiyong Falü Ruogan Wenti De Jieshi Zhengqiu Yijian Gao De Jidian Jianyi (对最高人民法院关于审理医疗损害责任纠纷案件适用法律若干问题的解释(征求意见稿)的几点建议) [A Few Suggestions for the Supreme People's Court's Interpretation of Some Issues Concerning the Application of Law for the Trial of Medical Malpractice Liability Dispute Cases (Draft for Comment)], Yiliao Sunhai Qinquan Zeren Wang (医疗损害侵权责任网) [Medical Malpractice Tort Liability Web] (Jan. 11, 2012), http://www.yiliaosunhai.com/medicaltreatment/yuanchuangwenzhan/yuanchuangwenzhan3138.html.

Yiliao Shigu Jianding Yu Yiliao Guocuo Jianding Qubie (医疗事故鉴定与医疗过错鉴定区别) [The Difference Between Medical Accident Inspection and Medical Negligence Inspection], Zhao Fa Wang (找法网) [Findlaw Online] (Nov. 5, 2002), http://china.findlaw.cn/yiliao/hot/guocuojianding/24950.html.