

Rights-Protection Lawyers in China: A Behavioral and Rational Choice Analysis of Lawyers in an Authoritarian State

One peculiar feature of China's legal system is the existence of "weiquan" or rights-protection lawyers. This small, informal movement comprised of lawyers, academics, and activists emerged in the early twenty-first century alongside legal reforms that sought to increase the rule of law in China. In general, these lawyers work on civil and political rights cases and often make rights-based claims against the government. In the summer of 2015, the Chinese Communist Party ("CCP") detained over 200 of these rights-protection lawyers, a human rights violation that many observers viewed as a retreat from prior commitments to the development of the rule of law. This Note uses two theoretical frameworks—rational choice theory and behavioral law & economics—in an attempt to explain why the CCP, an authoritarian regime, would allow this movement to develop in the first instance and why, after more than a decade, the CCP reversed course.

The human rights literature has generally assumed a rational choice framework when analyzing a State's failure to comply with human rights norms. The major principle of rational choice theory is that an actor will pursue activities that she expects will maximize her utility. Some recent scholarship has used social science research, often referred to as behavioral research, to call this principle into question in the context of human rights. Even though much of the current literature treats these two frameworks as competitors, this Note explores how both rational choice theory and behavioral research offer insights into distinct aspects of a State's decision to deviate from human rights norms. After outlining these two frameworks in Part I, Part II provides

background on the development of China's legal system and the CCP's decision to detain China's rights-protection lawyers. Part III utilizes both rational choice and behavioral research to explain why the CCP tolerated the emergence of rights-protection lawyers and why it seemingly reverted to the expected authoritarian position by cracking down on these lawyers. This Note then concludes with a discussion of the distinct but complementary strategies that rational choice and behavioral research suggest could improve compliance with human rights norms.

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INTRODUCTION

Rational choice theory and behavioral law & economics are often presented in the literature as competing paradigms,¹ though it is common for scholars applying behavioral law & economics principles to acknowledge that rational choice is useful for explaining broad categories of decisions.² Instead of offering competing theories, however, the two paradigms illuminate different aspects of a given decision when that decision was not fully rational.³ Rational choice analysis often points to optimal solutions that could have been reached but for lapses in rationality or other systematic departures from self-interested action.⁴ Behavioral law & economics, on the other hand, illuminates the process by which decision-makers reached such a suboptimal decision.⁵

1. See, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1060–74 (2000) (describing the limitations of rational choice theory and the benefits of behavioral science); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1570 (1998) (defending rational choice theory and questioning the “empirical robustness of behavioral economics”).

2. See, e.g., Richard C. Chen, *Suboptimal Human Rights Decision-Making*, 42 FLA. ST. U. L. REV. 645, 650 (2015) (applying behavioral insights in the context of international human rights and acknowledging that “many human rights violations are the result of rational decision-making”).

3. Rose McDermott & Jacek Kugler, *Comparing Rational Choice and Prospect Theory Analyses: The US Decision to Launch Operation ‘Desert Storm’, January 1991*, J. STRATEGIC STUD., Sept. 2001, at 49, 80–81.

4. *Id.*

5. For an overview of behavioral research relevant to legal analysis, see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

Rational choice theory has had a significant impact on legal scholarship⁶ and has been applied in the international context.⁷ Insights from behavioral research became widely accepted by many legal scholars in the late 1990s and were applied to international law, mainly in the analysis of treaty design.⁸ This Note aims to contribute to this literature by applying both frameworks together to analyze certain parts of an authoritarian regime's legal system. Because of its shifting relationship with legal institutions and the rule of law more generally, China makes an ideal case study for deploying these two theoretical frameworks together. The analysis focuses on two decisions made by the Chinese Communist Party: (1) the decision to allow rights-protection lawyers to develop alongside other legal institutions in the 1990s,⁹ and (2) the decision to arrest and detain prominent rights-protection lawyers in the summer of 2015.¹⁰

First, this Note uses rational choice theory to argue that the CCP decision to allow rights-protection lawyers to develop as a part of China's legal system was rational, given the CCP's goal to remain in power. This conclusion may seem counterintuitive because of the tendency to associate the emergence of independent legal institutions with the fall of authoritarian regimes.¹¹ The Note then uses rational choice theory to argue that the Party-State's decision to attack this small group of lawyers was not in the regime's best interests; behavioral research helps explain how the regime reached this suboptimal decision. After analyzing these two decisions, the Note argues that both rational choice theory and behavioral law & economics point to distinct, but complementary, actions that the international community could take to reduce the risk that CCP officials would commit similar human rights abuses in the future.

6. There is a casebook dedicated to law and economics, a method of legal analysis utilizing rational choice theory. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (9th ed. 2014).

7. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

8. For a summary of the development of the application of behavioral research to international law and international relations, see Anne van Aaken, *Behavioral International Law and Economics*, 55 *HARV. INT'L L. J.* 421, 422–23 (2014).

9. See *infra* Section III.A.

10. See *infra* Sections II.A.2, III.C.

11. See, e.g., Tamir Moustafa, *Law in the Egyptian Revolt*, 3 *MIDDLE EAST L. & GOVERNANCE* 181, 183 (concluding that “the law and legal institutions became the primary avenue through which opposition activists challenged the regime within the formal political system” of Mubarak's Egypt).

Part I outlines the rational choice framework in the context of analyzing a State's actions and briefly discusses how behavioral research adds to this mode of analysis. Part II provides background information on the development of China's legal institutions and situates the recent crackdown on rights-protection lawyers, concluding that CCP officials perceived these lawyers as a threat to regime control. Part III then applies rational choice theory and behavioral law & economics to explain first, why the Chinese Party-State allowed rights-protection lawyers to emerge in the first place, and second, why CCP officials decided to suppress these lawyers during the summer of 2015. The analysis in Section III.A concludes that the CCP acted rationally when it allowed the rights-protection movement to develop because it gave them the ability to monitor the population's discontent and imbued the CCP with a degree of legitimacy. Given this finding, Section III.B.2 concludes that the CCP acted irrationally when it decided to arrest and detain rights-protection lawyers because the costs of suppression—including the increased risk of domestic discontent and international reputational losses—outweighed the potential benefits—i.e. increasing the stability of the regime's control. After discussing how behavioral research offers some partial explanations regarding how CCP officials arrived at this suboptimal decision in Section III.B.3, this Note concludes by briefly discussing the implications for human rights advocates that flow from rational choice and behavioral law & economics analysis in Section III.D.

I. ANALYZING STATES' ACTIONS USING RATIONAL CHOICE AND BEHAVIORAL LAW & ECONOMICS

The central principle of rational choice theory is that a rational actor will perform a certain action only if the actor can expect to benefit in some way.¹² The economist Gary Becker provides a more robust account: “[A]ll human behavior can be viewed as involving participants who (1) maximize their utility (2) from a stable set of preferences and (3) accumulate an optimal amount of information and other inputs in a variety of markets.”¹³

12. See Thomas S. Ulen, *Rational Choice Theory in Law and Economics*, in 1 *ENCYCLOPEDIA OF LAW AND ECONOMICS* 790 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); see also Korobkin & Ulen, *supra* note 1, at 1060–66 (describing the spectrum of conceptions of rational choice theory). Rational choice theory is often described informally. See Posner, *supra* note 1, at 1551 (“rationality” is defined as “choosing the best means to the chooser’s ends”).

13. GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976).

The rational choice framework “can anticipate options taken and assess their implications; it can disclose new options. It can evaluate their effects and anticipate their outcomes.”¹⁴ Rational choice analysis thus can be used to explain what outcomes would be in the decision-maker’s best interests and focuses the inquiry on her *ex ante* preferences. Stronger versions of rational choice theory go further in assuming that, on the whole, actors are rational and will thus behave as the theory predicts.¹⁵

Behavioral law & economics calls into question these stronger versions of rational choice theory. Instead of assuming that the decision-maker will pursue its preferences in a fully rational manner, this approach uses empirical research to predict certain systematic deviations from rational, self-interested behavior. Prospect theory, one of the more well-known cognitive “biases” that lead to deviations from perfect rationality,¹⁶ analyzes the decision-maker’s perceptions of its position in an attempt to explain these deviations.¹⁷ When acting from a secure position—where one expects that all options will lead to gains—the decision-maker is likely to proceed cautiously, whereas when she is deciding from a desperate position—where she stands to lose something or aims to recover something previously lost—she is more likely to make a risky choice.¹⁸ Behavioral law & economics is therefore useful in explaining exactly how a decision-maker chose an option that was not in its own rational self-interest.

Both theoretical approaches require explanation of how they apply in the context of group decision-making. They must account for the potential divergence between an individual decision-maker’s interests and the interests of her employer or the government that she serves.¹⁹ Additionally, where final decisions are the result of a series of smaller decisions delegated to different factions within an

14. McDermott & Kugler, *supra* note 3, at 50.

15. See, e.g., Daniel Kahneman, *New Challenges to the Rationality Assumption*, 150 J. INSTITUTIONAL & THEORETICAL ECON. 18, 19 (1994) (noting that some academics have attempted to expand the criteria for rationality, demanding “cogent relations between aims and objectives actually entertained by the person and the choices that the person makes” (quoting Amartya Sen, *Rational Behaviour*, in THE NEW PALGRAVE: UTILITY AND PROBABILITY 198, 210 (John Eatwell et al. eds., 1990))).

16. FLORIS HEUKELOM, BEHAVIORAL ECONOMICS: A HISTORY 120–21 (2014).

17. Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039, 1039 (1991).

18. McDermott & Kugler, *supra* note 3, at 51.

19. See GOLDSMITH & POSNER, *supra* note 7, at 6; Chen, *supra* note 2, at 655–56.

organization, the final decision may not be in the best interests of the organization.²⁰ Finally, behavioral law & economics faces an additional problem when analyzing group decision-making: much of the empirical behavioral research focuses exclusively on the individual decision-maker.²¹ Features of group decision-making may work to reduce or eliminate many of the irrationalities and cognitive errors that cause individuals to make suboptimal decisions.²²

The rational choice framework can generally be applied to collective actors without much complication. When applied to States, this approach predicts that a State's leaders act collectively on behalf of the government only if the benefits flowing from the decision outweigh the costs. The first challenge to this paradigm is that a diverse set of actors can make decisions on behalf of the State.²³ Each of these individuals has their own interests that may affect the decisions that they make in their official capacities.²⁴ In addition, "because states have complex organizational structures in which authority and information are dispersed among a variety of actors, the combined result of a group of decisions could be suboptimal even when all the individual actors involved made decisions that were rational within their respective spheres."²⁵ While these concerns may threaten some larger-scale projects, the decisions that this Note analyzes are all high-level decisions that are not the result of a rogue CCP official acting in her own best interest, rather than the interest of the regime. This clarification in scope leads to the second challenge: identifying the interests of the State. The rational choice literature generally assumes that the State's interests are identical with the preferences of the State's political leadership.²⁶ While far from perfect, this assumption reflects the interests of the people making decisions as influenced by various inputs, including

20. Other forms of "organizational irrationality" include "the problems of diffuse information and responsibility and incomplete communication." Note, *Organizational Irrationality and Corporate Human Rights Violations*, 122 HARV. L. REV. 1931, 1937–39 (2009). These problems lead to "structural deficiencies that prevent organizations from" making fully rational decisions. *Id.* at 1937.

21. Tomer Brode, *Behavioral International Law*, 163 U. PA. L. REV. 1099, 1130–32 (2015).

22. See, e.g., Eldar Shafir, *Prospect Theory and Political Analysis: A Psychological Perspective*, 13 POL. PSYCHOL. 311, 313–14 (1992).

23. See Chen, *supra* note 2, at 655–56.

24. *Id.*

25. *Id.* at 656.

26. See, e.g., GOLDSMITH & POSNER, *supra* note 7, at 6–7.

the interest to remain in power as part of a legitimate regime.²⁷

A behavioral law & economics analysis faces the same challenges when applied to group decision-making: potential divergences among the interests of the individual, a faction of the group, or the whole group may mask the source of suboptimal decision-making. As discussed in the previous paragraph, limiting the discussion to high-level decisions and assuming that the interests of the State are identical to the interests of its political leadership help alleviate this concern.

The behavioral law & economics framework faces an additional criticism when used to analyze group decision-making: the empirical research underlying this theory generally focuses on *individual* lapses in rationality that may not surface in the context of *collective* decision-making.²⁸ The worry is that cognitive errors and biases present at the individual level either do not occur at all at the State-actor level or do not transfer up to that level because individual-level errors and biases cancel each other out or are otherwise minimized.²⁹ This criticism, while somewhat compelling, does not apply where the particular research being applied explicitly studies and draws conclusions about group decision-making. The broad assumption made in this Note is that these cognitive errors *can* be transferred up. The assumption should only be applied if there are empirical studies showing that group decision-making is subject to the particular type of cognitive error at issue.

The rational choice and behavioral law & economics frameworks each offer unique insights into decision-making. In the context of international human rights, rational choice theory can help illuminate the question of whether a government's decision to violate human rights norms was rational, given the government's presumed interest in remaining in power.³⁰ If there are some human rights violations that are irrational from the perspective of the violator, then such violations could be eliminated by using strategies that increase the rationality of the decision-maker. Behavioral law & economics

27. *Id.*

28. Broude, *supra* note 21, at 1121; Jack S. Levy, *Prospect Theory and International Relations: Theoretical Applications and Analytical Problems*, 13 POL. PSYCHOL. 283, 292–93 (1992).

29. See Broude, *supra* note 21, at 1121–30; van Aaken, *supra* note 8, at 439–49.

30. Professor Richard Chen's Note presented a parallel analysis, noting that it may be "possible to explain many human rights violations as rational profit-maximizing behavior" while also arguing that "violations that are against a company's self-interest may also take place" in the context of corporate human rights violations. Note, *supra* note 20, at 1932.

analysis, by explaining how the violator reached a particular irrational decision, can help shape such strategies.

The CCP offers a particularly ripe example of a regime whose human rights abuses could be limited by using strategies derived from behavioral law & economics. While many of the regime's human rights violations could be analyzed using this method, the shifting role of legal institutions in China—particularly of rights-based claims and rights-protection lawyers—is an area where the CCP's human rights abuses could be curbed without threatening regime stability. Before applying the rational choice and behavioral law & economics frameworks to analyze the decisions of the CCP, the next Part provides background on rights-protection lawyers in the context of China's developing legal system.

II. THE DEVELOPMENT OF CHINA'S LEGAL SYSTEM AND RECENT ATTACKS ON RIGHTS-PROTECTION LAWYERS: THE PERCEIVED THREAT TO REGIME STABILITY

This Part first discusses the development of legal institutions in China and outlines the regime's inconsistent relationship with the rule of law. Much of the CCP's most recent activity in this area could be considered violations of human rights, including the summer 2015 crackdown on rights-protection lawyers, which used both the legal system (through criminal sanctions) and the media. As noted above, behavioral law & economics suggests strategies to combat irrational decision-making. For example, such strategies could be applied to reduce human rights abuses without imposing costs on the regime in the form of increased social instability. The Part concludes by situating the crackdown within China's uneasy relationship with the rule of law and legal institutions. The CCP has incorrectly perceived rights-protection lawyers as a threat to regime stability. As Part III discusses, the decision to detain these rights-protection lawyers was, therefore, irrational.

A. China's Legal Institutions: A Brief Overview of Their Development and Recent Trends

1. Early Attempts to Establish the Rule of Law and Tensions with Social Stability

Legal institutions were virtually nonexistent in communist

China before Mao Zedong's death in 1976.³¹ During the Cultural Revolution, China generally lacked functioning legal and administrative systems for resolving disputes and addressing grievances.³² Instead, disputes were often resolved in mediation or directly within the official Party apparatus.³³

After Mao's death and Deng Xiaoping's rise to power in 1978, the CCP instituted legal and administrative reforms that gradually displaced informal dispute resolution in favor of adjudication in court according to formal law.³⁴ During the 1980s and 1990s, the CCP began formalizing procedural and evidentiary rules,³⁵ training judges, and enacting formal laws³⁶ in an effort to provide mechanisms to resolve disputes and grievances.³⁷ While the effects of these legal reforms were not felt equally throughout China,³⁸ the CCP appeared committed to national reform of legal institutions during the 1990s with the goal of increased formalization.³⁹

In the 2000s, the CCP seemingly reversed course as it became increasingly concerned with what it perceived as an increase in

31. STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 1–2 (1999) (noting that China “reject[ed] . . . the use of law as an instrument of governance under Mao”).

32. See Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935, 940–41 (2011).

33. *Id.* at 941.

34. *Id.*; see also Benjamin L. Liebman, *China's Law and Stability Paradox*, in CHINA'S CHALLENGES 157, 162 (Jacques deLisle & Avery Goldstein eds., 2015).

35. Fu Hualing & Richard Cullen, *From Mediator to Adjudicator Justice: The Limits of Civil Justice Reform in China*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 25, 38–43 (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011).

36. Benjamin L. Liebman, *Legitimacy Through Law in China?*, PBS: WIDE ANGLE (June 1, 2009), <http://www-tc.pbs.org/wnet/wp-content/blogs.dir/2/files/2009/04/legitimacy-through-law-in-china.pdf>.

37. Benjamin L. Liebman, *China's Courts: Restricted Reform*, 191 CHINA Q. 620, 622–25 (2007).

38. Rural populations reported more negative experiences with courts compared to those in Beijing. Ethan Michelson & Benjamin L. Read, *Public Attitudes Toward Official Justice in Beijing and Rural China*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA, *supra* note 35, at 169, 179 tbl.6.1. Disputes in rural areas continued to be resolved primarily by mediation rather than by trial. Minzner, *supra* note 32, at 941. A lack of fit between the demands of formal law and the practical realities of China's courts in rural areas partially explains the disparity between urban and rural areas. *Id.* at 947.

39. See Minzner, *supra* note 32, at 941–43.

protests and other activities associated with social instability.⁴⁰ At the outset, it should be noted that the CCP understood social instability broadly, grouping together disparate activities such as protests, expressions of discontent or conflict with the Chinese Party-State online, as well as discussion of any other controversial or sensitive political topic such as corruption, class litigation, or land disputes.⁴¹ As a result of this concern with stability, the CCP began prioritizing the swift resolution of any conflict with destabilizing potential.⁴² The aim was to remedy social instability in the short-term before such instability gained the potential to threaten the Chinese Party-State by addressing populist demands on a case-by-case basis rather than within the formalized legal system.⁴³ In a growing class of sensitive cases, China turned away from formal law, courts, and adjudication and back towards Mao-era informal mediation, with a mandate to resolve conflicts quickly, flexibly, and in accordance with popular conceptions of justice.⁴⁴ One of the major reasons for making this shift was that CCP leadership perceived a tension between an independent legal system and the flexibility necessary to address social stability.⁴⁵ Formal legal institutions were no longer trusted to address the most difficult and sensitive cases facing China during the rapid social transformation occurring during the early twenty-first century.⁴⁶ In practice, this shift entailed more coercive mediation—in which parties were pressured to resolve their disputes with little reference to relevant legal rules—as well as negotiated outcomes in criminal cases, increased use of nonlegal institutions to resolve conflicts, judicial responsiveness to petitioners threatening instability, and even refusal

40. *See id.* at 947–48.

41. Liebman, *supra* note 34, at 161–62.

42. *See* Minzner, *supra* note 32, at 944.

43. *Id.* at 961–62.

44. *Id.* at 947; for a discussion of the specific policy shifts implemented in creating China's adaptive legal system, see Benjamin L. Liebman, *A Return to Populist Legality? Historical Legacies and Legal Reform*, in *MAO'S INVISIBLE HAND: THE POLITICAL FOUNDATIONS OF ADAPTIVE GOVERNANCE IN CHINA* 165, 166–73 (Sebastian Heilman & Elizabeth J. Perry eds., 2010).

45. These policies also suggest a return to historical practices and an ambivalence about the role of law in managing social stability. *See* Liebman, *supra* note 34, at 158–59 (“[S]uch policies also suggest a continuation of historical approaches to resolving social conflict and attempts to align legal outcomes with popular demands [T]rends away from legal reform . . . also reflect ambivalence about the utility of law in managing a period of complex social transformation.”).

46. *Id.* at 158–59.

by the courts to accept certain sensitive cases.⁴⁷

2. China's Arrest and Detention of Rights-Protection Lawyers

One of the most egregious examples of China's shifting relationship with legal institutions occurred during the summer of 2015, when Chinese authorities detained over 200 "weiquan" or rights-protection lawyers, their family members and support staff, and unaffiliated rights activists and academics.⁴⁸ Rights-protection lawyers emerged in the early twenty-first century alongside legal reforms that sought to increase the rule of law in China.⁴⁹ In general, these lawyers work on civil and political rights cases and often make rights-based claims against the government or assert the rights of politically unpopular defendants.⁵⁰ This crackdown centered on the Fengrui Law Firm in Beijing, which represented activists and academics against criminal charges brought by the Chinese government,⁵¹ but there were detentions in other parts of Beijing, Changsha, Chengdu, Fujian, Guangdong, Guangxi, Guangzhou, Guiyang, Guizhou, Henan, Hunan, Jiangsu, Liaoning, Shandong, Shanghai, and Tianjin, among others.⁵² Police officers came to the homes of these individuals to question them or to detain them for further interrogation, often in the middle of the night.⁵³

Several reports recount troubling abuses committed by the police during this crackdown. One detainee, Ge Wenxiu, a lawyer in Guangzhou, reported that police threatened to forcefully enter his home around 11:30 PM on July 11, 2015.⁵⁴ After police presented a

47. *Id.* at 162–72.

48. Andrew Jacobs & Chris Buckley, *China Targeting Rights Lawyers in a Crackdown*, N.Y. TIMES (July 22, 2015), <http://www.nytimes.com/2015/07/23/world/asia/china-crackdown-human-rights-lawyers.html>. For a list of persons detained, summoned, or questioned see AMNESTY INT'L, CHINA: LAWYERS AND ACTIVISTS DETAINED OR QUESTIONED BY POLICE SINCE 9 JULY 2015 (Jan. 6, 2017), <https://www.amnesty.org/download/Documents/ASA1754282017ENGLISH.pdf>.

49. For a discussion of the emergence of rights-protection lawyers in China, which overlapped with the State's broader development of formal legal structures, see *infra* Section III.A.

50. Fu Hualing & Richard Cullen, *Climbing the Weiquan Ladder: A Radicalizing Process for Rights-Protection Lawyers*, 205 CHINA Q. 40, 41 (2011).

51. Jacobs & Buckley, *supra* note 48.

52. AMNESTY INT'L, *supra* note 48.

53. *Id.*

54. Didi Kirsten Tatlow, *Police Raids on Chinese Lawyers: The View from the Inside*,

summons, Ge was taken to a police station and released after four hours of questioning.⁵⁵ Another detainee, He Yanyun, a legal assistant, reported that the State Security and police officers arrived at his apartment the morning of July 22, 2015.⁵⁶ Because the officers did not bring a summons, search warrant, or any other legal document authorizing them to enter his home, He refused to open the door.⁵⁷ After several hours, the officers broke down the door, hit He several times, and brought him to the local police station for questioning.⁵⁸ He was detained for seven hours and warned not to associate with rights-protection lawyers.⁵⁹

The details of lawyers who have been arrested and formally charged are even more alarming. Wang Yu, a former commercial lawyer working at the Fengrui Law Firm who represented rights advocates, was arrested in July 2015 and held in isolation for approximately six months prior to being charged with “subverting state power” in January 2016.⁶⁰ If convicted, Wang could face a life sentence.⁶¹ Her husband, Bao Longjun, a lawyer-in-training who worked with Wang, was also arrested and charged with “inciting subversion of state power,” a slightly less serious offense.⁶² Authorities also revoked the passport of their sixteen-year-old son, Bao Zhuoxuan, who attempted to travel to Australia to attend school in July 2015.⁶³ Chinese authorities subsequently captured Bao in Myanmar as he was attempting to flee to the United States.⁶⁴ Bao was placed under house arrest at his grandparents’ home in Inner

N.Y. TIMES: SINOSPHERE: DISPATCHES FROM CHINA (July 31, 2015, 7:00 AM), <http://sinosphere.blogs.nytimes.com/2015/07/31/police-raids-on-chinese-lawyers-the-view-from-the-inside>.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Chris Buckley, *China Arrests Rights Lawyer and Her Husband on Subversion Charges*, N.Y. TIMES (Jan. 13, 2016), <http://www.nytimes.com/2016/01/14/world/asia/china-rights-lawyer-wang-yu.html>.

61. *Id.*

62. *Id.*

63. Michael Forsythe, *Bao Zhuoxuan, Son of Rights Lawyer Held in China, Is Said to Be Under House Arrest*, N.Y. TIMES (Oct. 12, 2015), <http://www.nytimes.com/2015/10/13/world/asia/china-bao-zhuoxuan-son-wang-yu-rights-lawyer-house-arrest.html>.

64. *Id.*

Mongolia.⁶⁵

The Chinese government took a two-pronged approach to attack rights-protection lawyers: (1) it used criminal prosecutions to deter rights-protection lawyers from pursuing cases the CCP viewed as problematic, and (2) it propagated a negative media campaign designed to discredit these lawyers and paint them as criminals. These interrelated attacks signal that the CCP will no longer tolerate certain classes of activities performed by rights-protection lawyers.

First, Chinese Party-State authorities began using the legal system itself to intimidate the rights-protection movement by bringing formal criminal charges against individual lawyers. These criminal charges often include “picking quarrels and provoking troubles,” a vague crime that was expanded in late 2013⁶⁶ by the Supreme People’s Court and the Supreme People’s Procuratorate.⁶⁷ This expanded interpretation made it a crime to cause disorder in public spaces, including public online forums.⁶⁸ Violations of this speech-related crime carries a maximum sentence of five years for first-time offenders.⁶⁹ The case against Pu Zhiqiang is illustrative of the severe legal consequences rights-protection lawyers face. The police arrested Pu in May 2014 as part of a crackdown on activists and detained him for more than a year before charging him with “picking quarrels” and “inciting ethnic hatred.”⁷⁰ After his trial on

65. *Id.*

66. Edward Wong, *China Uses ‘Picking Quarrels’ Charge to Cast a Wider Net Online*, N.Y. TIMES (July 26, 2015), <http://www.nytimes.com/2015/07/27/world/asia/china-uses-picking-quarrels-charge-to-cast-a-wider-net-online.html>. For an overview of the offense, see Jeremy Daum, *Updated: Quick Note on ‘Picking Quarrels’*, CHINA L. TRANSLATE (May 6, 2014), <http://chinalawtranslate.com/quick-note-on-picking-quarrels/?lang=en>. Because these changes in the criminal law occurred in a top-down fashion, they are the inverse of the bottom-up innovations driving change in the courts. Benjamin L. Liebman, *China’s Courts: Restricted Reform*, 21 COLUM. J. ASIAN L. 1, 30–36 (2007).

67. The Supreme People’s Court is the highest court in mainland China. XIANFA art. 127 (1982) (China). The Supreme People’s Procuratorate is the highest national agency responsible for criminal investigation and prosecution. *Id.* art. 132.

68. Wong, *supra* note 66.

69. *Id.*

70. Jane Perlez, *Chinese Rights Lawyer, Pu Zhiqiang, Is Given Suspended Prison Sentence*, N.Y. TIMES (Dec. 21, 2015), <http://www.nytimes.com/2015/12/22/world/asia/china-pu-zhiqiang-sentence.html>. Pu’s charges were based on seven posts he wrote on the social media site Weibo between 2011 and 2014 that were satirical and critical of the government. Patrick Boehler, *China’s Case Against a Civil Rights Lawyer, in Seven Social Media Posts*, N.Y. TIMES (Dec. 14, 2015), <http://www.nytimes.com/2015/12/15/world/asia/pu-zhiqiang-china-trial-weibo-posts.html>.

December 14, 2015, the Second Intermediate People's Court of Beijing⁷¹ convicted Pu and handed down a suspended sentence of three years in prison.⁷² Even though Pu will be able to return home, he will not be allowed to practice law as a result of the conviction.⁷³ In a sensitive case such as this one, it is believed that senior CCP officials, rather than the judges on the panel, dictated the outcome based on political, rather than legal, considerations.⁷⁴

Two features of this case are noteworthy. First, CCP authorities can utilize the legal system in ways that serve Party control and enhance stability. The conviction of Pu signals to rights-protection lawyers that they will face grave consequences if they conduct their work in ways that undermine the government or threaten social stability. Second, the progression of this case reflects the Chinese trend away from western rule-of-law models and towards flexible applications of rules responsive to the perceived political needs of the government.⁷⁵ The outcome-determinative influence that actors outside the judicial system were believed to have exercised in this case serves as further indication of a shift away from the rule of law.

The second prong of the recent crackdown involved a coordinated media campaign to discredit rights-protection lawyers.⁷⁶ State-controlled media portrayed rights-protection lawyers as “venal con artists, sexual predators and foul-mouthed hooligans.”⁷⁷ The Party-controlled newspaper *People's Daily* accused rights-protection lawyers of slandering judges and other government officials.⁷⁸ The same report went on to label the Fengrui Law Firm a major criminal syndicate and accused its lawyers of disrupting social order, inciting violence against the government, as well as using the publicity

71. Intermediate People's Courts are courts of first instance that have jurisdiction over criminal trials, among other matters. *Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhi* (中华人民共和国人民法院组织法) [Organic Law of the People's Courts of the People's Republic of China] (promulgated by the Fifth Nat'l People's Cong., July 1, 1979, amended by the Standing Comm. Nat'l People's Cong., Oct. 31, 2006), arts. 22–24.

72. Perlez, *supra* note 70.

73. *Id.*

74. *Id.*

75. *See supra* notes 44–45 and accompanying text.

76. Jacobs & Buckley, *supra* note 48.

77. *Id.*

78. Chris Buckley, *People's Daily Details Allegations Against Lawyers Detained in China*, N.Y. TIMES: SINOSPHERE: DISPATCHES FROM CHINA (July 13, 2015, 6:10 AM), <http://sinosphere.blogs.nytimes.com/2015/07/13/peoples-daily-details-allegations-against-detained-lawyers>.

surrounding controversial cases as a means to promote the firm, increase profits, and enlarge their professional status.⁷⁹ Somewhat ironically, the People's Daily report criticized Zhou Shifeng, the Fengrui Law Firm's director, for using extralegal methods—such as protests—to affect the outcomes of difficult or sensitive cases.⁸⁰ This negative media campaign, when viewed alongside the criminal charges some lawyers face as a result of this crackdown, is a clear signal that the CCP will no longer tolerate certain forms of engaging with the legal system.

B. Rights-Protection Lawyers and Stability

This Section argues that the CCP currently perceives rights-protection lawyers as a threat to social stability. The first Subsection situates the crackdown on rights-protection lawyers within the CCP's broader retreat from the rule of law and addresses two counterarguments. The second Subsection then analyzes China's rising rights consciousness to conclude that the CCP currently perceives any increase in rights consciousness caused by the activities of rights-protection lawyers as a threat to stability, despite certain forms of rights consciousness contributing to regime stability.

1. An Instrumental Approach to the Rule of Law

China's crackdown on rights-protection lawyers can be explained in light of the Party-State's concern with social stability.⁸¹ Many of the allegations made by the Party-controlled media include references to lawyers "provoking trouble" and utilizing protest as a means to influence court proceedings,⁸² suggesting that much of the lawyer's wrongdoing is tied not to the types of claims made in court but instead with the increased social instability surrounding rights-protection cases. The offense of "picking quarrels"—used as the basis of arrests of rights-protection lawyers—explicitly criminalizes causing disorder in a public place.⁸³ Understanding that the Party-

79. *Id.*

80. *Id.*

81. See generally Dali L. Yang, *China's Troubled Quest for Order: Leadership, Organization and the Contradictions of the Stability Maintenance Regime*, 26 J. CONTEMP. CHINA 35 (2017).

82. *Id.* at 51.

83. Daum, *supra* note 66.

State opposes the means that are used by rights-protection lawyers explains some of the tension between the CCP's recent crackdown and its prior ambivalence towards the development of rights-protection lawyers.

The CCP's attack on rights-protection lawyers is a serious violation of international human rights norms⁸⁴ and a threat to the rule of law in China. This violation raises the issue of whether the CCP is hostile towards any rights-based claims, including human rights. Commenters have noted that China is not uniformly opposed to human rights concerns.⁸⁵ For example, in 2015, the criminal definition of rape was expanded to include homosexual rape and sex with a minor engaged in prostitution, which previously carried a lighter sentence.⁸⁶ Additionally, China's Ministry of Education promulgated national regulations requiring that disabled students receive "reasonable accommodation" when taking the national university entrance exams.⁸⁷ While it can be argued that CCP

84. *China: Detained Lawyers, Activists Denied Basic Rights*, HUM. RTS. WATCH (Apr. 3, 2016), <https://www.hrw.org/news/2016/04/03/china-detained-lawyers-activists-denied-basic-rights>.

85. David Volodzko, *The Consequences of China's Obsession with Stability*, DIPLOMAT (Nov. 27, 2015), <http://thediplomat.com/2015/11/the-consequences-of-chinas-obsession-with-stability>.

86. Alyssa Abkowitz & Lilian Lin, *Male Rape Is Now a Crime in China After Criminal Law Revision*, WALL ST. J. (Nov. 4, 2015), <http://blogs.wsj.com/chinarealtime/2015/11/04/male-rape-is-now-a-crime-in-china-after-criminal-law-revision>; see also *World Report 2016: China: Events of 2015*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2016/country-chapters/china-and-tibet> (last visited May 7, 2017) (noting that "[h]omosexuality was decriminalized in 1997 and removed from an official list of mental illnesses in 2001"). Traditionally, human rights law has not addressed the concern of rape and sexual violence against men and boys. See generally Lara Stemple, *Male Rape and Human Rights*, 60 HASTINGS L.J. 605 (2009). This has begun to change globally, however, including in China. For example, in 2012 the United Nations High Commissioner for Refugees released guidelines on improving support for "male victims of rape and other sexual violence in conflict and displacement situations." Fatoumata Lejeune-Kaba, *UNHCR Issues Guidelines on Protection of Male Rape Victims*, UNHCR: THE U.N. REFUGEE AGENCY (Oct. 8, 2012), <http://www.unhcr.org/en-us/news/makingdifference/2012/10/5072bfa69/unhcr-issues-guidelines-protection-male-rape-victims.html>.

87. *World Report 2016: China: Events of 2015*, supra note 86. The report goes on to note, however, that "[o]fficial guidelines continue to allow universities to deny enrollment in certain subjects if the applicants have certain disabilities." *Id.* The obligation of the State to accommodate students with disabilities under human rights law is well-established. See, e.g., Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3; see also UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION [UNESCO], THE RIGHT TO EDUCATION FOR PERSONS WITH DISABILITIES: OVERVIEW OF THE MEASURES SUPPORTING THE RIGHT TO EDUCATION FOR PERSONS WITH DISABILITIES REPORTED ON BY MEMBER STATES (2015), <http://unesdoc.unesco.org/images/0023/002325/>

leadership improved their record on human rights in these areas merely pretextually—i.e. to increase the domestic or international perception of China’s progress on human rights—these examples show that, at least in limited contexts, the regime may be willing to make changes aimed at improving domestic human rights conditions.

Even though the direct attack on rights-protection lawyers centers on their tactics which produce instability, the shifting role of formal legal institutions in China over the past fifteen years⁸⁸ provides context that shows that, by cracking down on rights-protection lawyers, the CCP is also attacking the rule of law. One piece of evidence of this broader attack was discussed above: Wang Yu’s family members were included in the crackdown in an attempt to intimidate Wang and other rights-protection lawyers.⁸⁹ Commenters also viewed Pu Zhiqiang’s conviction as clear evidence that the Chinese Party-State is retreating from earlier movements toward the rule of law.⁹⁰ Using the legal system to intimidate and discourage certain uses of the law—those that the CCP views as undesirable—signals that regime stability sometimes trumps the rule of law. The crackdown on rights-protection lawyers is thus not only focused on the specific tactics used by these lawyers in specific cases. Instead, it represents the CCP’s perception that the very idea of rights enforceable against the government threatens social stability, which in turn is viewed as a dangerous step on the path to undermining the current authoritarian regime.

The relationship between the rule of law and social stability in China is complex. The intuitive explanation of this relationship is that the authoritarian regime currently views strong, independent legal institutions as a threat to regime control. This explanation fits within a framework that links the existence of independent courts with the overthrow of authoritarian regimes as happened, for example, in Egypt in 2011.⁹¹ Other scholars have added nuance to

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88. See *supra* Section II.A.

89. See *supra* notes 60–65 and accompanying text; see also Volodzko, *supra* note 85 (“The state routinely goes well beyond what’s needed to maintain stability.”).

90. See *supra* notes 70–74 and accompanying text; see also Hu Yong, *No, Pu Zhiqiang’s Release Is Not a Victory*, CHINAFILE (Dec. 30, 2015), <https://www.chinafile.com/reporting-opinion/viewpoint/no-pu-zhiqiangs-release-not-victory> (noting that Pu’s conviction served as a touchstone that demonstrates that the rule of law in China has been moving backward).

91. See Moustafa, *supra* note 11 (arguing that the legal institutions used to maintain authoritarian rule under Mubarak are also necessary to allow democratic reform to emerge).

this account by analyzing modern China's unique historical and political position. For example, Professor Benjamin Liebman argues compellingly that China's growing distaste for using law to address social conflict reflects a general retreat from a rules-based model of authoritarian governance, a continuation of historical approaches to dispute resolution, and the CCP's ambivalence regarding the law's utility in managing social stability.⁹² The recent crackdown on rights-protection lawyers thus naturally fits within a broad account of the CCP's retreat from the rule of law.

The claim that this crackdown is a part of China's movement away from its prior commitments to the rule of law—while arguably accurate—may not capture the unique attributes of China's authoritarian system of law and the conflict created between law and stability. A discussion of two complications will help to explain this conflict: first, the CCP's insistence that the crackdown is consistent with the rule of law, and second, the observation that there is a rising disparity between rights-based claims in commercial cases—which have been normalized—and those made in civil or political rights cases.

First, Chinese authorities do not acknowledge a tension between the crackdown and the Party-State's commitment to the rule of law. In a speech in April 2015, President Xi Jinping recently dismissed the paradox between rule of law and the extralegal activities of the CCP as “a tricky political pitfall.”⁹³ Officially, the crackdown is a defense of the rule of law because the rights-protection lawyers targeted were behaving criminally. This official adherence to rule-of-law principles can be partially traced to the Fourth Plenum of the Eighteenth Central Committee of the CCP, which centered on strengthening the rule of law.⁹⁴ Emphasis was placed on distinguishing socialist rule of law with Chinese characteristics from the western rule-of-law tradition.⁹⁵ Practically,

92. Liebman, *supra* note 34, at 158–59.

93. Shannon Tiezzi, *China Versus the Lawyers*, DIPLOMAT (July 28, 2015), <http://thediplomat.com/2015/07/china-versus-the-lawyers>.

94. Zachary Keck, *4th Plenum: Rule of Law with Chinese Characteristics*, DIPLOMAT (Oct. 20, 2014), <http://thediplomat.com/2014/10/4th-plenum-rule-of-law-with-chinese-characteristics>. For an English translation of this decision, see *CCP Central Committee Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward*, CHINA COPYRIGHT & MEDIA (Oct. 30, 2014), <https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward>.

95. Randall Peerenboom, *Fly High the Banner of Socialist Rule of Law with Chinese Characteristics! What Does the 4th Plenum Decision Mean for Legal Reforms in China?* 7

socialist rule of law with Chinese characteristics entailed bringing diverse local customs in line with national CCP policy.⁹⁶ This model takes an instrumental view of the law: the Party-State uses the law as a tool to implement its policies but its actions are not constrained by legal norms. While the Chinese Party-State itself is considered “above the rule of law,” individual CCP members are expected to act according to legal rules.⁹⁷ After the Fourth Plenum’s commitment to “socialist rule of law,” central CCP leadership endeavored to enforce rules more consistently and to reign in corruption.⁹⁸ This recentralization of power was one of the major goals of promoting socialist rule of law,⁹⁹ which served to enhance stability by binding individual CCP members to rules while also allowing for flexibility and responsiveness to popular demands.¹⁰⁰ To the extent that rights-protection lawyers attempted to bring legal reforms to China that resembled a western rule-of-law model, these efforts conflicted with socialist rule of law, which places the Party-State beyond the reach of the law and preserves flexible extralegal methods of enforcement.

Second, some outside observers view a dichotomy emerging between rights law and other areas of civil law—primarily commercial law—that complicates the picture of the status of the rule of law in China.¹⁰¹ According to this line of reasoning, China has

HAGUE J. ON RULE L. 49, 54–55 (2015). Compared to conceptions of the rule of law in Western liberal democracies in which the government itself is constrained by law, “socialist rule of law with Chinese characteristics” emphasizes “the leadership role of the Party.” *Id.* (noting that critics view “socialist rule of law” as “rule by law, not rule of law: law is a tool to be wielded by the authoritarian state as it wishes without imposing meaningful constraints on state and Party power”).

96. Keck, *supra* note 94.

97. *See id.*

98. President Xi Jinping’s anti-corruption campaign represents another wide-ranging reform related to social stability and the rule of law in China. *See* James T. Areddy & Yang Jie, *China’s Anticorruption Campaign Will Continue, Party Watchdog Pledges*, WALL ST. J. (Jan. 25, 2016), <http://blogs.wsj.com/chinarealtime/2016/01/25/chinas-anticorruption-campaign-will-continue-party-watchdog-pledges> (discussing statistics from the anti-corruption campaign). For a visualization of China’s anti-corruption campaign, see *Visualizing China’s Anti-Corruption Campaign*, CHINAFILE (Jan. 21, 2016), <https://www.chinafile.com/multimedia/infographics/visualizing-chinas-anti-corruption-campaign>.

99. Peerenboom, *supra* note 95, at 73.

100. Corruption at the local level is one source of the public’s distrust of the Party-State that can lead to social instability; the current anti-corruption campaign takes place partially outside the courts in Party discipline committees, allowing for the flexible application of rules. *Id.* at 51, 55–56.

101. Gabriel Collins, *China and the ‘Magna Carta Moment’*, DIPLOMAT (Nov. 5, 2015), <http://thediplomat.com/2015/11/china-and-the-magna-carta-moment>.

regularized many areas of commercial law within the courts and granted robust property and economic rights, leading to an untenable division between the CCP's stance on economic disputes and more sensitive rights-based claims.¹⁰² The rights-based decisions in commercial law would then supply the basis for making broader rights-based claims in areas of civil and human rights—a rising rights consciousness—which, in turn, would lead to potential conflicts with Party-State objectives.¹⁰³

The summer 2015 attack on rights-protection lawyers is not a straightforward retreat from rule-of-law principles. Instead, the CCP appears to have perceived rights-protection lawyers as posing a unique threat to regime stability, likely in the form of precipitating a rising rights consciousness. The next Subsection discusses complications arising from divergent conceptions of China's rising rights consciousness. It concludes that the CCP perceived this rising rights consciousness, however conceived, as a threat to social stability.

2. Rising Rights Consciousness

Different conceptions of rights consciousness may lead to divergent conclusions about the implications that a rising rights consciousness has on CCP regime stability. As a preliminary matter, understanding China's population as experiencing a rising rights consciousness has been controversial. Scholars have distinguished between rules and rights consciousness and have debated which best describes the situation in China. Rules consciousness is defined as “a combination of awareness of the necessity for protection from *local* rule-enforcement authorities and eagerness to obtain such protection through direct or indirect participation in rule-enforcement.”¹⁰⁴ In contrast, rights consciousness is “a combination of awareness of the necessity for protection from *central* rule-making authorities and eagerness to acquire such protection through direct or indirect participation in rule-making.”¹⁰⁵ Both rules and rights consciousness, however, “share the common goal of stopping or preventing the arbitrary exercise of power.”¹⁰⁶ Professor Lianjing Li concludes his

102. *Id.*

103. *Id.*

104. Lianjiang Li, *Rights Consciousness and Rules Consciousness in Contemporary China*, 64 CHINA J. 47, 50 (2010).

105. *Id.* at 54.

106. *Id.* at 64.

empirical study by stating that “the mobilization of rules consciousness can contribute to the growth of rights consciousness by encouraging popular protests against local authorities, because such contention often weakens popular trust in central leaders, which in turn may foster rights consciousness.”¹⁰⁷ This study provides some evidence that China is experiencing rising rights consciousness alongside its rising rules consciousness and that both could lead to popular demands for “converting revocable ‘state-endowed rights’ into inalienable rights,” thereby threatening CCP control.¹⁰⁸

Other scholars challenge the view that there is a rising rights consciousness in China that threatens Party rule. Professor Elizabeth Perry traces the unique Chinese conceptions of rights as reflected in the discourse of philosophers, political leaders, and protesters, and concludes that the country is not experiencing rising rights consciousness, but instead rising rules consciousness.¹⁰⁹ She argues that contemporary Chinese political thought emphasizes a conception of civil rights that involves each citizen’s right to socioeconomic security, in contrast to American conceptions emphasizing political freedom.¹¹⁰ In China, “rights are seen more as state-authorized channels to enhance national unity and prosperity than as naturally endowed protections against state intrusion.”¹¹¹ Even though popular protest sometimes leads to the removal of unpopular or corrupt lower-level CCP officials, challenges to the authority of the CCP itself is rare.¹¹² Protesters often seek specific social welfare provisions guaranteed by the government using the language of rights-based claims instead of making broad claims for protection against the government or demands for democratic participation.¹¹³ While her argument acknowledges that there are other rights at issue in much of the discourse of Chinese academics, activists, and protesters,¹¹⁴ her analysis cautions against hastily concluding that rights-based activism inevitably poses a fundamental challenge to Party-State authority.¹¹⁵ This analysis does, however, leave room to

107. *Id.* at 65.

108. *Id.* at 66.

109. Elizabeth J. Perry, *Chinese Conceptions of “Rights”: From Mencius to Mao—and Now*, 6 *PERSP. ON POL.* 37, 37, 47 (2008).

110. *Id.* at 44–45.

111. *Id.* at 46.

112. *Id.* at 45.

113. *Id.* at 46.

114. *Id.* at 44–45.

115. *Id.* at 45 (“I am skeptical of . . . suggest[ions] that the popular discourse of ‘rights’

distinguish between protests that do not challenge regime stability from ones that may have wider destabilizing effects. Professor Perry's framework allows for the possibility that grievances taking the form of rights-based claims may serve to engender further popular protest.¹¹⁶ The upshot of this analysis is that any discussion linking rights-based claims with broad challenges to Party-State authority must carefully examine what redress the claimants seek and the rhetoric they use in order to determine what effects, if any, such activity may have on regime stability. Professor Perry's work thereby allows for subtler analysis of whether rights-based claims undermine or undergird stability.

A different approach to understanding rights claims in China involves developing a rational choice framework that distinguishes three factors that could lead to rights-conscious behavior.¹¹⁷ Under this method of analysis, rights consciousness is defined broadly as "a greater willingness by an aggrieved individual or group to make a claim for redress on the basis of a 'right.'"¹¹⁸ The framework begins with the basic rational choice assumption that "[a] rational actor will only make a claim if he or she expects to benefit in some way."¹¹⁹ A claimant's expected net benefit can be calculated by multiplying the probability that her claim will succeed (p) by the benefit of making the claim (b) and subtracting any associated costs (c) (expected net benefit = $pb - c$).¹²⁰ Generally, a rational actor will make a claim when the expected net benefit is positive; an increase in the rate of claims suggests that the expected net benefit has increased as a result in a change in one or more of p , b , or c . The first source of an increase in rights-conscious behavior is changing values. Briefly, the value of the psychological benefit (a component of b) gained by raising a claim can change over time as values change.¹²¹ This change can lead to social instability if values shift toward a greater defense of civil and political rights,¹²² as in the case of rights-protection lawyers. The second source of an increase in rights-

observable in recent protests indicates a newfound claim to citizenship that poses a fundamental challenge to state authority.").

116. *Id.* at 46.

117. Peter Lorentzen & Suzanne Scoggins, *Understanding China's Rising Rights Consciousness*, 223 CHINA Q. 638 (2015).

118. *Id.* at 639–40.

119. *Id.* at 641.

120. *Id.*

121. *Id.* at 642–44.

122. *Id.* at 643.

conscious behavior is changing government policies, which would alter either the individual claimant's assessment of the probability of success (p) or the costs incurred (c).¹²³ The government's shift in policy can encompass two changes. First, the government can alter how receptive it will be to the type of claim made, changing the value of p . Second, the government can change how harshly it will punish unsuccessful attempts or it can alter the difficulty of the procedures necessary to make a change, altering the value of c . Assuming that the CCP lacks the resources to credibly threaten to repress every citizen directly, the government will rationally change government policies to allow narrow rights-based claims under certain circumstances.¹²⁴ Allowing narrow rights-based claims generally has a stabilizing effect because claimants recognize that the government is the source of the rights they seek to vindicate.¹²⁵ The third source of an increase in rights-conscious behavior is changing shared expectations, which alter an individual claimant's "consciousness of how other members of society will respond to a rights claim,"¹²⁶ choosing either to support the claim or not. When a rights-based claim's success depends on others' support, a change in shared expectations shifts the game-theoretic equilibria: "Either there will be a commonly-held expectation that rights claims will receive broad public support, and they will be made (one equilibrium), or there will be a commonly-held expectation that this will not occur, and they will not be made (the other equilibrium)."¹²⁷ While the equilibrium has yet to shift towards support of rights-based claims in China, the threat of a rapid shift in that direction can partially explain why the CCP views rights-protection lawyers who attempt to gather large-scale popular support as a threat to social stability and the authoritarian regime's control. In sum, the sources of rights-conscious behavior determine what effect rising rights consciousness will have. If the change is caused by changing values or changing expectations of the behavior of others, the resulting rights

123. *Id.* at 644–48.

124. *Id.* at 645–47 ("A hard-line policy that forbids even narrow claims is risky because it pushes the [claimants] into making broad claims that the regime is unwilling to countenance, while a rights-granting policy is appealing because it entices the [claimants] into making narrower claims that do not pose a fundamental challenge to the existing system.").

125. Lorentzen and Scoggins acknowledge that this source of an increase in rights consciousness is identical to the rules consciousness described by Perry. *See supra* notes 109–116 and accompanying text.

126. Lorentzen & Scoggins, *supra* note 117, at 648.

127. *Id.*

consciousness will likely have a destabilizing effect. If, however, the change is caused by changing government policies, any resulting increase in rights-conscious behavior will likely have a regime-stabilizing effect.

As this Part argues, in China, the relationship between the rule of law and a rising rights consciousness, on the one hand, and social stability and CCP control, on the other, is complex. Attempting to fit the recent crackdown on rights-protection lawyers into one of the three analytic frameworks discussed above involves many empirical questions which are not within the scope of this Note. For present purposes, it is enough to note that the CCP perceives rights-protection lawyers as a threat to social stability under any of these frameworks.¹²⁸ The next Part shows that the Chinese Party-State previously allowed or tolerated rights-protection lawyers to develop within the legal system in part to increase its legitimacy, which correlates with voluntary compliance with the regime's policies. The analysis then turns to a discussion of the reasons that CCP officials decided to crack down on rights-protection lawyers.

III. RATIONAL CHOICE AND BEHAVIORAL LAW & ECONOMICS: RIGHTS-PROTECTION LAWYERS IN CHINA

This Part first provides background information on the development of rights-protection lawyers in China. Using rational choice theory, the analysis suggests the counterintuitive conclusion that the CCP rationally allowed these lawyers to practice because they: afforded the regime a degree of legitimacy, increased citizens' voluntary compliance with government policies, allowed the CCP to collect certain information that it would otherwise not be able to access, and served as a useful safety valve for social unrest. Insights from behavioral research help explain the mechanism by which these goals were achieved. Two distinct branches of social science research prove useful to this analysis: social proof and social networks. Social proof shows that groups may publicly conform to a norm even though everyone within the group privately rejects this

128. For an argument as to how rights-protection lawyers specifically threaten the authoritarian regime in China, see Peter Lorentzen & Suzanne Scoggins, *A Chinese Rights Revolution Reversed?*, DIPLOMAT (Aug. 21, 2015), <http://thediplomat.com/2015/08/a-chinese-rights-revolution-reversed/> (“As ‘rights defenders’ traded notes about how to take on local autocrats, they formed networks and developed tactics that could someday pose a real threat.”).

norm. Rights-protection lawyers—and the claims that they bring—can serve as highly-publicized examples of the socially acceptable way in which rights-based claims ought to be made, channeling such claims into regime-preferred fora. Analysis of social networks shows how such information spreads among a diffuse population. These explanations challenge the more widely-accepted incremental view, which situates China's legal development within the broader context of rapid economic growth and the need for stable, predictable rules to resolve commercial disputes.

The Part then turns to examine the crackdown on rights-protection lawyers that occurred in the summer of 2015. Given the CCP's rational decision to allow rights-protection lawyers to practice, the crackdown was irrational because it deprived the regime of the benefits of the existing system without significant offsetting benefits. These offsetting benefits, in the form of a reduction in the potential for rights-based legal challenges to regime authority, were minimal given the low levels of judicial independence in China. The analysis then explores the reasons for this departure from rational decision-making using a behavioral law & economics approach. Party officials may have over-valued potential losses in social stability, a cognitive error described by prospect theory and colloquially known as "loss aversion." Additionally, they may have been overconfident in the regime's ability to control the consequences of the crackdown or they may have made this decision based on emotion-based pattern recognition, employing methods to combat dissent that had been successful in the past. This Part concludes by briefly discussing some strategies that the analysis suggests could improve China's decision-making and reduce its human rights abuses.

A. Three Explanations of the Emergence of Rights-Protection Lawyers in China

This Section examines the reasons why CCP officials have allowed or tolerated the existence of rights-protection lawyers for many years. There are three partial explanations that help illuminate this decision. All three explanations are helpful in analyzing this complex decision, though the latter two—which utilize rational choice theory and behavioral law & economics—fit better with the social, political, and economic history of China. First, some scholars have argued that the developments in legal institutions, including the existence of rights-protection lawyers, follow as logical, incremental reforms based on rule-of-law foundations put in place to grow the

economy (the “incremental explanation”).¹²⁹ The incremental explanation is not fully satisfying because the historical evidence shows that China’s economy developed without an independent legal system that guaranteed property rights and a minimum level of predictability.¹³⁰ The second explanation, based on rational choice theory, argues that the CCP rationally decided that allowing rights-based claims served a valuable information-gathering function and allowed potentially regime-destabilizing grievances to be resolved within the formal legal system rather than in the streets—rights-protection lawyers and the claims that they bring serve as a “safety valve” for popular grievances. The third explanation utilizes insights from behavioral research to argue that the CCP allowed rights-protection lawyers to practice in order to increase perceived legitimacy and voluntary compliance.

More broadly, the latter two explanations add some detail to the literature on the question of the possible limits of legal development in non-democratic societies. A complete explanation would include a discussion of a wide range of factors, including the more general need to provide stability and predictability in order to foster economic development as well as China’s rising international profile and an accompanying desire to comply with international norms. These explanations are not fully satisfactory as they do not account for the historical development of China’s legal institutions and do not credit China’s legitimate, though severely limited, progress on certain human rights issues. Instead, the discussion below focuses on the relationship between the CCP’s legitimacy as perceived by the population and voluntary compliance with official policies.

1. The Incremental Explanation

Many scholars take the position that courts and the rule of law developed in China in order to create a level of stability and predictability necessary to drive economic growth and attract foreign investment. Rights-protection lawyers—and the rights-based claims they bring—necessarily followed as a logical, incremental step from property and contract rights necessary for economic growth. This incremental explanation of why authoritarian regimes develop relatively independent legal institutions starts with the instrumental

129. See *infra* Section III.A.1.

130. See *infra* notes 137–39 and accompanying text.

economic benefits such a strategy makes available.¹³¹ These legal institutions generally include a relatively independent legal profession¹³² that could develop the capacity to make rights-based claims—i.e. some form of rights-protection lawyers. Authoritarian regimes that seek to attract foreign investment make the rational decision “to institutionalize relatively independent and effective courts to assure investors of legal protections.”¹³³ According to this view, a legal system robust enough to guarantee property rights is viewed as a necessary condition for serious economic development.¹³⁴ A concern with international stature also leads the authoritarian regime to implement guarantees of civil rights that it has no intention of fully implementing, even going so far as to draft written constitutions.¹³⁵ These independent courts, in conjunction with rights-protection lawyers, “will move on incrementally to protect the human rights enshrined in the national constitution,” which the regime will tolerate “because it wishes to maintain the competitive investment attraction advantages it receives from a property-protecting independent judiciary.”¹³⁶

The incremental explanation does not fit with the conditions surrounding China’s legal development. China’s economic development progressed without a robust and independent legal system that guaranteed property rights.¹³⁷ While the Party-State’s concern over economic development can explain the development of robust property rights, it is unclear whether allowing the development of civil or political rights—and allowing rights-protection lawyers to practice—would have any effect on whether international investors

131. Hilton L. Root & Karen May, *Judicial Systems and Economic Development*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 304, 304 (Tom Ginsburg & Tamir Moustafa eds., 2008) (“A staple of the development policy literature is the idea that a better quality legal system will help generate economic growth . . .”).

132. See RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARDS RULE OF LAW* 343 (2002) (“[R]ule of law requires . . . various institutions, of which a legal profession is one.”).

133. Martin Shapiro, *Courts in Authoritarian Regimes*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES*, *supra* note 131, at 326, 330.

134. See generally Root & May, *supra* note 131.

135. Shapiro, *supra* note 133, at 330.

136. *Id.*

137. Liebman, *supra* note 66, at 38. There is significant agreement, however, that rule of law has contributed to economic development. See PEERENBOOM, *supra* note 132, at 60 (“Rule of law is a way to rein in increasingly independent local governments and ensure that central Party and government policies are carried out. It is also a weapon to be used in the fight against corruption and a means of promoting economic development.”).

would find China an attractive market.¹³⁸

It is equally unsatisfying to explain why the CCP allowed rights-protection lawyers to practice by reference to Party-State officials' instrumental concern with China's international reputation on human rights. China has a written constitution that can be used as the source of rights-based claims made in courts, though the CCP severely circumscribed the justiciability of these rights.¹³⁹ The CCP also appears to be making progress in some areas of human rights¹⁴⁰ and in providing fora in which citizens can raise grievances.¹⁴¹ Instead of explaining China's tolerance of rights-protection lawyers by reference to a merely instrumental concern with international reputation, the CCP's willingness to address a small number of domestic human rights concerns may provide a partial explanation of this phenomenon.¹⁴²

2. The Rational Choice Explanation

A more convincing explanation of why the Chinese Party-State tolerated the emergence of rights-protection lawyers is that CCP officials exploited some of the characteristics of legal institutions, of which rights-protection lawyers are a part, in order to enhance social stability. Recent research utilizing rational choice theory supports the conclusion that rights-protection lawyers can serve as a safety valve, channeling popular outrage into an official forum controlled by the CCP, where it will be less stability-threatening compared to leaving social conflict to boil over outside of any State-controlled institution.¹⁴³

138. Some commentators have proposed campaigns aimed at withholding investments in China until the CCP improves its human rights record, though there has not yet been a concerted effort to do so. See, e.g., Sophie Richardson, *It's Time to Rethink the World's Approach to Human Rights in China*, FOREIGN POL'Y (Sept. 1, 2016), <http://foreignpolicy.com/2016/09/01/its-time-to-rethink-the-u-s-approach-to-human-rights-in-china>.

139. See Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 U. PA. E. ASIA L. REV. 51, 54 (2011) ("In the realm of constitutional law, the Party-state has strictly limited efforts to promote the development of constitutional adjudication mechanisms.").

140. See *supra* notes 85–87 and accompanying text.

141. Liebman, *supra* note 66, at 38–39.

142. See Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 TEX. INT'L L.J. 211, 273–75 (1999) ("Although it may be premature to draw broad conclusions regarding the significance of China's development of legal aid for the protection of individual rights, human rights issues have played a role in the development of legal aid.").

143. Liebman, *supra* note 66, at 38–39.

The safety valve function of rights-protection lawyers can be understood by analogy to current rational-choice-based research on protests in authoritarian regimes. Professor Peter Lorentzen set out to explain why the CCP would tolerate and even encourage some protests.¹⁴⁴ This research calls into question the common assumption that frequent protests in an authoritarian regime reflect its instability.¹⁴⁵ Professor Lorentzen develops a game-theoretical framework that models when an authoritarian government would rationally choose to allow protests rather than suppress them.¹⁴⁶ This framework takes into account two problems confronted by authoritarian leaders, problems that are especially prevalent in China: (1) central governments in authoritarian regimes have limited resources to gather information about the discontent of its citizens and about the corrupt behavior of lower-level officials;¹⁴⁷ and (2) given this lack of information, these governments cannot hope to suppress every instance of social conflict that could threaten the regime.¹⁴⁸ Authoritarian regimes confront the first problem because they have eliminated many of the cost-effective institutions that allow governments to collect the relevant information, including the democratic political process and freedom of the press.¹⁴⁹ The Arab Spring is evidence that authoritarian regimes face the second problem; even stable authoritarian governments with wide-ranging means to suppress their populations have the potential to collapse quickly.¹⁵⁰ Classic accounts of authoritarian regimes failed to take this problem seriously because they were generally focused on the regime's use of networks of informants and secret police to suppress political dissent.¹⁵¹ Given China's size and the rapid pace of its social and economic development, it is unlikely that such systemic suppression would effectively protect CCP control. Professor

144. Peter L. Lorentzen, *Regularizing Rioting: Permitting Public Protest in an Authoritarian Regime*, 8 Q.J. POL. SCI. 127 (2013).

145. *Id.* at 128.

146. *Id.* at 131–42.

147. *Id.* at 152.

148. See Lorentzen & Scoggins, *supra* note 128 (“[T]he Communist Party in China is no totalitarian monolith and never has been. It is simply too hard for the bureaucrats in Beijing to keep track of everything that goes on around the country.”).

149. Lorentzen, *supra* note 144, at 129.

150. Steve Hess, *From the Arab Spring to the Chinese Winter: The Institutional Sources of Authoritarian Vulnerability and Resilience in Egypt, Tunisia, and China*, 34 INT'L POL. SCI. REV. 254, 260–63 (2013).

151. Lorentzen, *supra* note 144, at 129.

Lorentzen's formal model shows "that tolerating regular small-scale protests . . . can enhance [an authoritarian regime's] stability rather than detract[] from it" because protests can provide the regime with information it would otherwise not be able to cost-effectively acquire.¹⁵² Professor Lorentzen explains this counterintuitive result:

Permitting protests of limited scale and scope can enable a regime to identify and deal with discontented communities before they turn to more extreme counter-regime activities or revolt. Protests, being costly, provide a clear division between groups whose grievances are tolerable and those with grievances severe enough to drive counter-regime challenges. Protests also serve as a useful device with which to monitor local governments, inhibiting corruption.¹⁵³

An increase in protests and other "mass incidents" in China does not, therefore, necessarily reflect the CCP's vulnerability.

One potential counterargument to this analysis is that the CCP may have a particular interest in suppressing certain types of protests, primarily those that risk drawing large numbers demanding social and political rights that could be asserted against the government. First, it is unclear whether these demands would necessarily be regime-destabilizing. Limited rights granted by the government, which could be asserted against it, may enhance legitimacy and increase voluntary compliance with the government's policies. These rights do not necessarily lead to democratic revolution and instead could increase citizens' satisfaction with the regime. Second, even if protests demanding these rights would have a destabilizing effect, the regime still benefits by openly allowing demonstrations. Protests help the CCP gain information about social discontent that it may not otherwise have been able to obtain. Further, protests—even if they involve claims of civil or political rights—act as "safety valves" by allowing the government to provide redress before unrest rises to a level that could threaten regime control. By taking the opportunity to address the protestors' grievances, the government can provide limited relief before the protestors demand more serious regime-threatening reforms.

An analysis similar to Professor Lorentzen's applies to the CCP's tolerance of rights-protection lawyers. The regime has an interest in allowing—and even encouraging—the development of rights-protection lawyers. These lawyers can provide information

152. *Id.* at 128.

153. *Id.* at 129.

similar to that provided by protests by allowing the regime to monitor citizens' dissatisfaction—with the numbers, locations, and types of claims brought serving as a proxy. While the courts are not the only forum in which citizens can raise grievances,¹⁵⁴ they act as safety valves that prevent at least some claims from going unheard or from being resolved in the streets.¹⁵⁵ Allowing citizens to make narrow rights-based claims in court¹⁵⁶ may also contribute to regime stability by directing these claims to a forum where the CCP can generally control outcomes. Even cases in which courts are pressured by popular support to reach a certain outcome, regime control can be strengthened when the aggrieved party and her supporters view the Party-State as successfully vindicating the individual's rights.

3. The Behavioral Explanation

The discussion of the safety-valve function above overlaps significantly with the third explanation for CCP officials allowing rights-protection lawyers to develop: the existence of quasi-independent courts and rights-protection lawyers contributed to the CCP's legitimacy among ordinary Chinese citizens.¹⁵⁷ This explanation relies on behavioral research to show that there are behavioral mechanisms that authoritarian regimes can exploit to increase the perceived legitimacy of the nondemocratic regime and foster voluntary compliance with government policies. Many authoritarian regimes seek to establish courts in order “to bring legitimacy to decisions that may not be fair or equitable.”¹⁵⁸ This simple explanation, however, does not provide an answer to the

154. Liebman, *supra* note 34, at 167–70.

155. Liebman, *supra* note 66, at 38–39.

156. The specific language employed in making the rights-based claim will determine, in part, whether the claim challenges the CCP's authority or merely asserts a right to redress provided by the regime. See *supra* note 113 and accompanying text. CCP officials would likely encourage the latter and attempt to eliminate the former. It would still be rational for the regime to encourage the work of rights-protection lawyers, however, as long as officials believed that they could sufficiently control the types of claims brought, the outcome of the claims, or that the stability-enhancing benefits otherwise outweighed the stability-threatening costs.

157. Liebman, *supra* note 66, at 39; see generally Pierre Landry, *The Institutional Diffusion of Courts in China: Evidence from Survey Data*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES*, *supra* note 133, at 207; Margaret Levi et al., *The Reasons for Compliance with Law*, in *UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS* 70 (Ryan Goodman et al. eds., 2012).

158. Landry, *supra* note 157, at 207.

question of why genuinely credible, partially independent rights-protection lawyers were allowed to develop within an otherwise authoritarian system. As noted above, the Party-State lacks the resources to suppress all instances of opposition.¹⁵⁹ It would also be cost-prohibitive for the CCP to provide rewards to a large enough portion of the population that would induce compliance with the regime's policies. Successful implementation of CCP policy therefore depends to a large degree on citizens' voluntary compliance and cooperation.

Empirical research in behavioral psychology shows that a population's¹⁶⁰ positive perceptions of its government's trustworthiness and procedural fairness is a precondition for creating a sense of obligation to voluntarily comply with government policy ("value-based legitimacy").¹⁶¹ An increase in value-based legitimacy positively influences actual compliance with government policy ("behavioral legitimacy").¹⁶² The strength of a population's *perceptions* of its government's trustworthiness and procedural fairness thus partially determines actual compliance rates.¹⁶³ This finding is significant "because it suggests that how governments exercise their authority influences their legitimacy and shapes their ability to secure widespread compliance from their citizens."¹⁶⁴

Applying these findings to explain the Chinese Party-State's decision to allow rights-protection lawyers to develop in China leads to three conclusions: (1) allowing rights-protection lawyers to practice may be in the best interest of the CCP, even assuming that rights-protection lawyers pose some threat to regime stability; (2) increasing legitimacy among the Chinese population is contingent on changing its *perception* of procedural fairness rather than actual

159. See *supra* note 148 and accompanying text.

160. The authors of this particular study explicitly aimed to move beyond prior analysis of individual-level behavior in order to explain population-level effects. See Levi et al., *supra* note 157, at 82–83 ("This [result] provides evidence that the climate of legitimacy has objective consequences for a polity because it influences the general rate of rule following within it.").

161. *Id.* at 70. Application of the results of this study arguably may not translate well to the Chinese context. The paper analyzes data from both the United States and developing states in Africa, however, and draws similar conclusions for both of those populations. *Id.* at 89–90. While the effects of a government's trustworthiness and procedural fairness on value-based legitimacy and behavioral legitimacy may vary in degree, the study suggests that a similar effect will be found in most countries. *Id.*

162. *Id.* at 70–71.

163. *Id.* at 74.

164. *Id.* at 80.

improvements in fair treatment; and (3) increasing behavioral legitimacy may lead to stronger forms of pro-regime behavior, including punishment of those who do not conform to government policies.

First, assuming that the primary goal of the Party-State is to remain in power and that rights-protection lawyers do pose a threat to the regime, this decision could still be in the best interest of the CCP.¹⁶⁵ Allowing rights-protection lawyers to practice and expending the resources necessary to create and maintain relatively independent courts as a forum for conflict resolution signals to the public that the Party-State takes procedural fairness seriously.¹⁶⁶ Many rights-protection lawyers represent individuals accused of political crimes in high-profile cases.¹⁶⁷ Outcomes in such cases are sometimes affected by public opinion,¹⁶⁸ which shows that courts in China can operate to increase Party-State legitimacy by being responsive to popular demands.¹⁶⁹ By conducting a trial where the accused has legal representation, the Party-State can increase perceptions of procedural fairness, as it is ostensibly complying with procedural norms. CCP officials may have reached the conclusion that the benefits of increased behavioral legitimacy outweighed the costs of allowing the development of rights-protection lawyers, including the increased, but limited, risk that rights-based claims pose a threat to the regime's power. Allowing rights-protection lawyers to develop thus could have been an inexpensive way to buy a measure of legitimacy, reducing the costs otherwise necessary to induce the population's compliance with Party-State policies.

Second, it is important to note that *perceptions* of fairness are what results in an increased sense of obligation to voluntarily comply with government policy—i.e. value-based legitimacy. Because

165. This point is similar to Professor Lorentzen's argument that allowing protests in China may enhance stability by serving as a safety valve and information gathering mechanism. *See generally* Lorentzen, *supra* note 144.

166. For a discussion of the mechanism used to distribute this message, see *infra* Section II.C.

167. HUMAN RIGHTS WATCH, "WALKING ON THIN ICE": CONTROL, INTIMIDATION AND HARASSMENT OF LAWYERS IN CHINA 15 (2008), <https://www.hrw.org/reports/2008/china0408/china0408webwcover.pdf>.

168. Tiezzi, *supra* note 93 ("Lawyers have used social media to drum up interest in cases and sympathy for clients. In one notable case from 2012, a death sentence against a Chinese entrepreneur convicted of fraud was overturned after a massive public outcry.").

169. For a discussion of the influence of extrajudicial factors on outcomes in the medical malpractice context, see generally Benjamin L. Liebman, Essay, *Malpractice Mobs: Medical Dispute Resolution in China*, 113 COLUM. L. REV. 181 (2013).

Levi's research¹⁷⁰ involved data related to the public's *perceptions* of their government's procedural fairness, the study allows for the possibility that the government gained value-based legitimacy by providing the *illusion* of increased procedural fairness. CCP officials could have allowed rights-protection lawyers to develop in order to increase the population's value-based legitimacy—i.e. voluntary compliance—without actually granting significantly more civil or political rights.¹⁷¹ Assuming that the primary interest of the CCP is to remain in power, it would be irrational for the CCP to allow the development of rights-protection lawyers if CCP officials believed that this development would lead to social revolution threatening the regime. A more compelling explanation is that Party-State allowed rights-protection lawyers to emerge, in part, because officials were confident that they could control the rhetoric that they employed in making rights-based claims.¹⁷² Social control of this sort would reduce the costs associated with allowing rights-protection lawyers to practice by reducing the risk that claims using “rights” language actually threaten CCP authority. Reducing these costs further tips the regime's cost-benefit analysis in favor of allowing limited-scope rights-protection lawyers to develop within the Chinese legal system.

Third, the benefits of increased behavioral legitimacy may go beyond the public's willingness to comply with CCP policy. Behavioral research on strong reciprocity¹⁷³—an individual's propensity to (1) cooperate with others similarly situated, even at personal cost (“altruistic cooperation”); and (2) punish those who violate cooperative norms, even when punishing is costly to the punisher (“altruistic punishment”)¹⁷⁴—finds that social behavior generally exhibits both altruistic cooperation and altruistic punishment.¹⁷⁵ This research implies that the CCP may exploit group identities and individuals' commitments to fairness and reciprocity in order to gain certain benefits. The primary benefit is inducing

170. See *supra* notes 160–64 and accompanying text.

171. Ryan Goodman et al., *Coda: The Reasons for Compliance with Law*, in UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS, *supra* note 157, at 94, 97–98.

172. Evidence of the CCP's control of rhetoric is discussed by Professor Perry. See generally Perry, *supra* note 109. This assertion conforms to the view that China encourages the rise in rules consciousness but would attempt to prevent a rise in rights consciousness. See *supra* notes 106–08 and accompanying text.

173. See generally Herbert Gintis, *Human Rights: An Evolutionary and Behavioural Perspective*, in UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS, *supra* note 157, at 135.

174. *Id.* at 142–43.

175. *Id.* at 143.

citizens to comply with the law and to participate in punishing those who break the law, even when such compliance or participation would not be in the individual citizen's best interest. This research uses several experimental games played in the laboratory¹⁷⁶ and a case study on the decline in support for the welfare state in the United States and some European countries¹⁷⁷ to show that individuals can act altruistically, that is, against their narrow individual interests, when undertaking a shared social task.¹⁷⁸ Although Professor Gintis argues primarily that this research supports a view that human beings inherently support an egalitarian version of human rights,¹⁷⁹ the empirical research, separated from the research into evolutionary biology, is consistent with the conclusion that authoritarian regimes can exploit this individual tendency towards altruism. By allowing rights-protection lawyers to enforce fair application of the regime's rules, the CCP may stand to gain additional benefits in the form of citizens' voluntary compliance with these rules or willingness to informally punish those who violate such rules. Increasing these benefits further tips the regime's cost-benefit analysis in favor of allowing limited-scope rights-protection lawyers to develop within the Chinese legal system.

B. Increasing Regime Legitimacy: Behavioral Tactics

In addition to providing a plausible explanation of why the CCP rationally decided to allow rights-protection lawyers to emerge in the 1990s and early 2000s, behavioral research can also yield insight into how an authoritarian regime utilizes social influence—i.e. the general proposition that behavior is influenced by the social context in which that behavior occurs—to enhance stability. Two strands of social science research are particularly relevant to explaining these mechanisms: social proof and social networks.

First, social proof is the phenomenon by which a group of people conforms to a norm—even though each individual privately rejects that norm—because the group, as a whole, outwardly supports the norm.¹⁸⁰ Individuals within the group simply lack information

176. *Id.* at 144–50.

177. *Id.* at 151–53.

178. *Id.* at 142–43.

179. *Id.* at 153.

180. TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION 162–67 (1995).

regarding the true preferences of the others, which are in tension with their expressed preferences.¹⁸¹ Social proof can, therefore, explain rapid shifts in group behavior caused by the introduction of information about actual peer preferences.¹⁸² Professor Woods discusses several examples to illustrate this concept. In late nineteenth-century China, campaigns against footbinding successfully eliminated the practice “less than a generation after the creation of the first antifootbinding societies.”¹⁸³ One technique that these societies used in their campaign was social proof: antifootbinding advocates would publicly pledge not to bind their daughter’s feet and prohibited their sons from marrying women with bound feet.¹⁸⁴ This public vow provided the information about peer preferences necessary to overcome the psychological hurdle of conformity to peers’ views of acceptable social behavior.¹⁸⁵ Similarly, studies of public health campaigns to reduce binge drinking on college campuses also support a finding that social proof has a profound impact on behavior. These anti-binge-drinking campaigns were successful because they targeted students’ beliefs about peer behavior, informing them that the majority of college students do not binge drink.¹⁸⁶ The effects of social proof are not always in favor of the public interest. During the Rwandan genocide in 1994, radio broadcasters “invoked a script suggesting that everyone else [other Hutus] was already working to find and kill Tutsis.”¹⁸⁷ While these broadcasts were not the sole cause of the genocide, they conveyed powerful messages of peer behavior (other Hutus are killing Tutsis), prevailing norms (killing Tutsis is socially acceptable), and worked to shame Hutus who were not yet participating.¹⁸⁸

Applying this concept to China, social proof can partially explain how the development of rights-protection lawyers can cause an increase in the regime’s perceived legitimacy and citizens’ willingness to bring grievances into court. By allowing some highly

181. Andrew K. Woods, *A Behavioral Approach to Human Rights*, 51 HARV. INT’L L.J. 51, 58–59 (2010).

182. *Id.*

183. *Id.* at 58.

184. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 63 (1998).

185. *See* Woods, *supra* note 181, at 59.

186. *Id.* at 60.

187. *Id.* at 61.

188. *Id.*

visible rights-based claims to succeed in Chinese courts, the CCP informs the population of how other citizens behave and what they consider acceptable social behavior. As long as the description of this behavior remains constrained to narrow rules consciousness,¹⁸⁹ social proof of this sort will have the positive effect of informing citizens that their government is sensitive to some class of rights-based claims, increasing the CCP's perceived legitimacy. This conformity-inducing tactic will also channel more citizen grievances into the courts—which will act as a safety valve for public discontent¹⁹⁰—because the message that peers are seeking redress in courts successfully will cause others to behave similarly. These effects are stability-enhancing, but social proof could also be the mechanism by which political revolution could rapidly spread in China. Social proof offers a compelling explanation for the sudden outbreak of the general strike in Egypt in 2008: Facebook allowed citizens to publicly reveal their private dissatisfaction with labor conditions and to discover peer views about the topic.¹⁹¹ The Chinese Party-State could face a similar threat if enough citizens held private anti-regime sentiments that suddenly became public.

The second strand of social science research relevant to explaining how an authoritarian regime utilizes social influence to enhance stability is the mechanism of social networks. Analyzing social networks involves determining the relations between individuals, how they interact, and how information moves between various parts of the network in order to offer insight into social dynamics.¹⁹² Networks can emerge naturally but “can also be reconfigured to enhance the distribution of norms, and access can be strategically expanded or curtailed.”¹⁹³

There are several relevant actors in the social network comprised of CCP officials, courts, rights-protection lawyers, consumers of legal services, and the general public. Professor Pierre Landry conducted an empirical study of ordinary Chinese citizens' perception of the country's legal institutions, with the goal of specifying how and why these autonomous legal institutions take root in an authoritarian regime.¹⁹⁴ Social proof and social networks

189. *See supra* Section II.B.1.

190. *See supra* Section III.A.2.

191. Woods, *supra* note 181, at 60–61.

192. *Id.* at 62–63.

193. *Id.* at 63.

194. Landry, *supra* note 157, at 209.

combine to explain how current consumers of legal services cause others to participate in legal institutions: “Bandwagoning is more likely to occur when potential adopters learn from actual adopters with whom they are networked that an innovation is worthwhile, or not.”¹⁹⁵ Thus, analysis of the social network in which potential and actual consumers of legal services are embedded provides an explanation of the rate of diffusion and acceptance of new legal institutions. In China, during the late twentieth century, the recent creation of legal institutions¹⁹⁶ meant that courts were novel and not widely used. CCP officials likely had several reasons for wanting to increase court use, including the link between independent courts and increased legitimacy. In order to increase the use and acceptance of courts, officials exploited—explicitly or implicitly—the ability of social networks to rapidly disperse information and alter behavior.¹⁹⁷ These officials decided to allow rights-protection lawyers to exist, in part, to increase the public’s trust in courts. Successful rights-based claims against, for example, a local official accused of corruption would reasonably increase public trust in these legal institutions. Once trustworthiness is established, social networks will disperse this information about the courts and court use and acceptance will grow. “Rapid diffusion is likely to occur when a high proportion of satisfied and trusting end-users propagate their behavior through dense social networks.”¹⁹⁸

C. From a Rational Point of View? Explaining the Crackdown on Rights Lawyers

As discussed above in Sections III.A and III.B, the CCP acted rationally in allowing the rights-protection movement to develop. In doing so, the CCP used social proof tactics and social networks to increase its perceived legitimacy and the perceived procedural fairness of a certain class of claims. During the summer of 2015, however, the regime abruptly changed its policy and disempowered the Chinese legal system by cracking down on rights-protection lawyers.¹⁹⁹ In light of the CCP’s originally rational decision, this Section finds that the reversal in policy was irrational. Further,

195. *Id.* at 215.

196. *See supra* Section II.A.

197. *Cf.* Woods, *supra* note 181, at 61–64 (discussing the exploitation of social networks in the context of the Rwandan genocide).

198. Landry, *supra* note 157, at 217.

199. *See supra* Section II.A.2.

Section III.C.2 uses behavioral law & economics to assess exactly how the CCP may have reached this irrational decision: (1) Party officials may have systematically over-valued potential losses in regime stability caused by rights-protection lawyers; (2) officials may have been overly confident in the government's ability to control the outcome of the crackdown; and (3) officials may have ordered the crackdown because of emotion-based pattern recognition—i.e. they may have responded to what they perceived as dissent using methods that they used in the past to combat dissent.

1. The Rational Choice Explanation: The Irrationality of the Crackdown

The CCP's decision to suppress rights-protection lawyers, viewed *ex ante*, was irrational because it removed the benefits of the existing system—increased legitimacy, citizens' voluntary compliance with government mandates, information gathering regarding social discontent, and “safety valve” protections against sudden threats to stability—without offsetting gains in predicted social stability. The CCP tightly controls courts in China and could easily shape the types of claims that rights-protection lawyers could successfully bring.²⁰⁰ Despite disapproving of some of the methods rights-protection lawyers use, there is little evidence to suggest that rights-protection lawyers posed a serious threat to regime stability. The minimal benefits were dramatically outweighed by the severe costs.

The rational choice explanation begins with the proposition that a rational actor will perform a certain action only if the actor can expect to benefit in some way.²⁰¹ According to this proposition, the Chinese Party-State would be willing to incur the costs associated with a crackdown on rights-protection lawyers, including risks of increased domestic discontent²⁰² and international reputational

200. Landry, *supra* note 157, at 209 (“There is no pretense of judicial independence: judges—who are almost always members of the Communist Party—are appointed by the state and vetted by Party Organization Departments set up within the judiciary that must in practice answer to bureaucratic superiors within local governments.”).

201. See *supra* Part I.

202. See Jacobs & Buckley, *supra* note 48 (reporting that “[d]espite the intense police pressure, and the previous imprisonment of lawyers under President Xi Jinping, dozens have organized petitions denouncing the detentions and volunteered to defend those held by the police”). There have also been protests at the criminal trial of Pu Zhiqiang. Tom Phillips, *Scuffles Outside Beijing Court as Human Rights Lawyer Pu Zhiqiang Goes on Trial*,

losses,²⁰³ if and only if the crackdown's benefits, broadly identified with stability of CCP control, outweigh the costs.

One potential benefit to the CCP from the crackdown on rights-protection lawyers is the chilling of rights-based legal challenges to the Party-State's authority. Such legal challenges could potentially evolve into widespread protest and even revolution. The crackdown would thus merely be a routine reversion to the authoritarian norm. This purported benefit, however, is likely illusory given the conditions of China's courts. Despite China's steps towards stronger legal institutions, there could be little doubt that the courts, as constituted, fail to credibly threaten CCP authority. The CCP has a wide variety of tools to control the judiciary. Court appointments continue to be controlled by the CCP.²⁰⁴ Individual judges are subject to a disciplinary system that "encourages [them] to seek guidance on handling individual cases from their superiors—both within their court and in higher courts."²⁰⁵ Similarly, courts are not generally trusted to decide sensitive cases.²⁰⁶ These characteristics show that courts in China generally enforce the rules and policies of the authoritarian regime, despite courts' authority to hear some rights-based claims.²⁰⁷ China's courts may thus fail to protect rights against the authoritarian regime and may also serve to reinforce regime control. The CCP has a variety of ways to influence the outcome of proceedings in Chinese courts, implying that the net benefits of a crackdown in the form of increased control of legal institutions were minimal.

The other identifiable benefit gained from a crackdown for the CCP is a reduction in protests and other "mass events," which rights-protection lawyers often use in an attempt to influence judicial decisions.²⁰⁸ It is unclear how a reduction in protests would benefit Party-State stability given that the CCP allows protests to occur in

GUARDIAN (London) (Dec. 14, 2015), <http://www.theguardian.com/world/2015/dec/14/violence-outside-beijing-court-as-human-rights-lawyer-pu-zhiqiang-goes-on-trial>.

203. The detention of rights lawyers has been widely criticized by the international community. See Jamey Keaten, *UN Rights Chief Airls Worry About Lawyers Detained in China*, ASSOCIATED PRESS, Sept. 14, 2015, <http://bigstory.ap.org/article/b065b70db9cb4178af8582d406adeb5c/un-rights-chief-airls-worry-about-lawyers-detained-china>.

204. Liebman, *supra* note 66, at 17–18.

205. *Id.* at 18.

206. Sensitive cases are generally declined by courts, accepted but left undecided, or decided by other Party-State institutions. *Id.* at 27–28, 39.

207. This description falls under the category of rules consciousness. See *supra* notes 109–16 and accompanying text.

208. Tiezzi, *supra* note 93.

many other contexts,²⁰⁹ such as those in response to allegations of medical malpractice,²¹⁰ governmental takings of private property, and environmental pollution.²¹¹ Because allowing protests as a means to acquire information about social dissatisfaction is in the regime's best interest, it would be inconsistent to also claim that restricting protests instigated by rights-protection lawyers enhances stability. The benefits to be gained by a crackdown on rights-protection lawyers, in the form of a reduction in protests, were minimal.

One response to this rational choice analysis is that rights-protection lawyers represent particularly high-profile clients, often facing criminal charges for political crimes, who pose a particular threat to Party-State control due in part to the rhetoric that the clients themselves use to challenge the State.²¹² A crackdown on rights-protection lawyers thus acts to silence this more threatening discourse. This benefit to the CCP, however, is offset by the cost of an increased risk of the rapid spread of these more regime-threatening ideas. Forcing this threatening discourse to exist privately risks a rapid shift should support for these ideas become public. A crackdown on rights-protection lawyers removes one of the primary ways in which the CCP can gather information about social and political conflict, so it is plausible that a rapid shift in support of regime-threatening rights would take CCP officials by surprise.

Viewing the CCP's decision to crack down on rights-protection lawyers *ex ante*, this decision was not in the Party-State's best interest. Instead, several options appear to serve the CCP's interests more efficiently, such as allowing rights-protection lawyers to continue practicing uninterrupted while continuing to shape the rhetoric used in rights-based claims and emphasizing socialist rule of law with Chinese characteristics. The arrest and detention of rights-protection lawyers was thus unnecessary to protect the Party-State from instability.

209. See generally Lorentzen, *supra* note 144.

210. Liebman, *supra* note 169.

211. Barbara Demick, *Protests in China Over Local Grievances Surge, and Get a Hearing*, L.A. TIMES (Oct. 8, 2011), <http://articles.latimes.com/2011/oct/08/world/la-fg-china-protests-20111009>.

212. The most prominent recent example is Mo Shaoping's representation of Pu Zhiqiang. See Verna Yu, *Using China's Law to Fight for Rights*, N.Y. TIMES (Dec. 22, 2009), <http://www.nytimes.com/2009/12/23/world/asia/23iht-lawyer.html>; see also *supra* notes 70–73 and accompanying text.

2. The Behavioral Explanation: How Did the CCP Get It Wrong?

Though the CCP's decision to suppress rights-protection lawyers was irrational, the process by which it reached this decision can be explained using theories derived from behavioral research. A behavioral approach to explain the CCP's crackdown on rights-protection lawyers finds that certain predictable failures of rationality—prospect theory and loss aversion, overconfidence, and emotion-based decision-making—resulted in the Party-State leadership's decision to act against its own interests. Behavioral analysis identifies certain features of the decision-making process that are susceptible to distortions or lapses in rational thought. These behavioral insights, when applied to the CCP's decision to crack down on rights-protection lawyers, will yield an increased understanding of exactly how the decision-making process went wrong.

Three areas of behavioral research are particularly relevant here: prospect theory, overconfidence, and emotion-based decision-making. Each of these causes of suboptimal decision-making is applied in an attempt to understand how the CCP reached the decision to crack down on rights-protection lawyers.

a. Prospect Theory and Loss Aversion

The primary insight of prospect theory is that the value individuals place on a given outcome varies depending on the reference point.²¹³ Prospect theory challenges the rational choice

213. See Tversky & Kahneman, *supra* note 17, at 1039. Prospect theory is one explanation for the “endowment effect,” i.e. the tendency to value something that one already has more than an equivalent object that could be acquired. See Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39 (1980). In experiments testing the endowment effect, researchers gave a mug to a third of the group (the sellers) and asked them whether they would sell the mug at a series of increasing prices. Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1339 (1990). Others in the group were given the opportunity to choose either a cash payment or the mug (the choosers). *Id.* Thus, the sellers and the choosers face identical decisions, but the sellers view selling the mug as a loss for which they must be compensated, while the choosers view receiving the mug as a gain. The median value that sellers indicated they were willing to accept for the mug was \$7.12, while the median value that the choosers were willing to forgo to receive the mug was \$3.12. *Id.* Prospect theory explains that, because the transactions were framed differently—as losses for the sellers and gains for the choosers—the sellers valued the mug more than the choosers despite facing an identical set of options. See Tversky & Kahneman, *supra* note 17, at 1041–42.

assumption that individual preferences are fixed by the perceived costs and benefits and would not vary based on how choices are presented.²¹⁴ The phenomenon of loss aversion is one aspect of prospect theory which influences preferences for risk.²¹⁵ Generally, “[t]he basic intuition concerning loss aversion is that losses (outcomes below the reference state) loom larger than corresponding gains (outcomes above the reference state).”²¹⁶ An individual will thus take larger risks to gain back what she previously lost (“operating in the realm of . . . losses”) compared to the risks she would take to obtain an equal gain where there was no prior loss.²¹⁷ Put another way, an individual has a tendency not to accommodate her losses, but instead takes excessive risks to cover them.²¹⁸ Loss aversion creates an asymmetry between losses and gains that would not occur if decision-makers were fully rational.

China may have been operating in the realm of losses when deciding what to do about rights-protection lawyers. A perceived increase in instability caused in part by these lawyers can plausibly be viewed as a loss to the CCP. Similarly, the CCP could have viewed the increased public use of the rhetoric espoused by rights-protection lawyers regarding relatively thick conceptions of rule of law as a loss. The CCP thus acted in an excessively risky way when it decided to detain rights-protection lawyers with the goal of regaining a degree of control it had lost.

b. Overconfidence

Overconfidence—i.e. the belief that one is more likely to succeed than is justified by the relevant data²¹⁹—is manifested in

214. See Chen, *supra* note 2, at 658.

215. *Id.* at 659.

216. Tversky & Kahneman, *supra* note 17, at 1047.

217. See Chen, *supra* note 2, at 659.

218. Christoph Engel, *The Behaviour of Corporate Actors: How Much Can We Learn from the Experimental Literature?*, 6 J. INSTITUTIONAL ECON. 445, 450 (2010) (concluding that there is evidence of loss aversion in corporate actors). Other scholars conclude that experienced decision-makers are far less prone to loss aversion than the populations studied in experiments. Emilie M. Hafner-Burton et al., *The Cognitive Revolution and the Political Psychology of Elite Decision Making*, 11 PERSP. ON POL. 368, 370 (2013).

219. Overconfidence has been defined differently throughout the academic literature. Philipp Koellinger et al., “*I Think I Can, I Think I Can*”: *Overconfidence and Entrepreneurial Behavior*, 28 J. ECON. PSYCHOL. 502, 505 (2007) (“It has been defined as an overestimation of one’s own ability to make accurate forecasts, or, alternatively, as an

myriad ways. Two primary ways that people demonstrate overconfidence relevant to the decision-making of States are: (1) they believe that they have greater control over external events than they actually do or (2) they believe that the future will be more favorable to them than current states of affairs justify.²²⁰ Studies show that these tendencies to hold unjustified beliefs are exacerbated in elite decision-makers²²¹ such as CCP officials.

Applying these insights to the decision to crack down on rights-protection lawyers, it is plausible that leadership in China believed it had greater control over the outcome of the crackdown than was actually the case. State-controlled media attempted to discredit the detained lawyers.²²² A plausible explanation for this negative media campaign is that Party-State leaders believed that they could control the narrative in order to prevent the crackdown from generating further instability. Even though the State controls much of the media in China, the crackdown resulted in public outcry and protest,²²³ suggesting that CCP officials may have overestimated their degree of control in this situation. It remains to be seen whether the crackdown will have any further consequences for the regime's stability. Alternatively, CCP leadership's overconfident attitudes may have blinded them to the fact that detaining these lawyers was a serious human rights violation. They may have incorrectly believed that they were promoting the rule of law and rooting out illegal activity by cracking down on rights lawyers. Either explanation provides a plausible account of the ways in which overconfidence may have affected the decision to crack down on rights-protection lawyers.

c. Emotion-Based Decision-Making

Emotion-based decision-making studies show that when making decisions quickly under time constraints and when the decision addresses an issue in which the decision-maker has prior experience, individuals will assess the alternative expected outcomes based on that prior experience and are also subject to choosing a path

overestimation of one's own ability relative to others (often referred to as the 'better-than-average' effect) or relative to one's actual ability.") (citation omitted).

220. For an overview of the research on overconfidence, *see generally* Chen, *supra* note 2.

221. Hafner-Burton et al., *supra* note 218, at 372.

222. *See supra* notes 76–80 and accompanying text.

223. *See supra* note 202 and accompanying text.

that best implements a prior decision.²²⁴ More specifically, when comparing possible outcomes and operating under time pressure, people will draw on prior experience that triggered an emotional response and will use remembered patterns generated during such an experience to make decisions.²²⁵ After the crisis abates and time permits, emotion-based decision-making can still play a role in using rational analysis instrumentally to justify the selection of the course of action that fits best with the remembered pattern. The effects of emotion-based decision-making do not always cause individuals to make suboptimal decisions, but they do distort available options under certain circumstances.²²⁶

China previously detained rights lawyers and has a history of using arrests and detention to fight potential causes of instability.²²⁷ It is possible that leaders recognized rights-protection lawyers' increasing use of thick rights-based language and decided to act according to emotion-based pattern recognition. Put simply, similar threats to China's stability in the past were successfully managed by detaining the lawyers causing the trouble. CCP officials may have an emotional reaction when threatened by claims to civil and political rights stretching back to the Tiananmen Square protests in 1989. Some of the detained rights lawyers organized or participated in events commemorating the Tiananmen Square protests.²²⁸ It is possible that party officials recalled the events of 1989 when deciding what to do in response to the rights lawyers' growing movement and acted according to that pattern of authoritarian suppression.

D. Strategies to Reduce Human Rights Abuses

The rational choice and behavioral frameworks imply different approaches that human rights advocates can use to reduce the risk that similar abuses will occur in the future. Rational choice analysis show that conventional strategies to improve human rights can have positive effects when they alter the State's expected utility

224. STEPHEN PETER ROSEN, WAR AND HUMAN NATURE 29 (2005).

225. *Id.*

226. See Chen, *supra* note 2, at 668.

227. See generally HUMAN RIGHTS WATCH, *supra* note 167.

228. Pu Zhiqiang, the lawyer convicted in December 2015 of "picking quarrels" and "inciting ethnic hatred," attended a commemoration of the events at Tiananmen Square shortly before he was arrested. Wong, *supra* note 66.

calculation.²²⁹ Traditional strategies include coercion, which involves introducing additional costs or benefits in the form of sanctions or aid conditioned on improved human rights conditions,²³⁰ and persuasion, which involves altering the underlying preferences of a State's leaders.²³¹ The behavioral framework introduces several innovative strategies for removing barriers to rational decision-making. First, human rights advocates can utilize loss aversion to promote human rights by identifying and communicating concrete losses, such as a decline in reputation and credibility, both domestically and internationally, that will follow if the State violates human rights norms. Second, human rights advocates can promote specific action plans and operational steps with benchmarks that allow for progress to be effectively measured, which allow decision-makers at the State level to counteract negative effects of overconfidence.²³² Third, human rights advocates can empower State decision-makers to combat the effects of emotion-based decision-making by shifting the State leader's focus from review of past behavior to advance planning.²³³

Ultimately, these strategies rely on convincing China's leaders that the detention of human rights lawyers is suboptimal, i.e. not in the Party's interest. The international human rights community can attempt to show Chinese leadership the instrumental value of respecting human rights norms, as doing so will increase regime legitimacy and voluntary compliance with the law. Given the limited resources the Party has to suppress the population,²³⁴ any inexpensive way to maintain the State's authority should be welcome. Party leadership's fears of independent legal institutions are unfounded given that judges are appointed by the Party and that courts are generally subject to Party control. The CCP can continue to emphasize "rules consciousness" over "rights consciousness" as well as socialist rule of law with Chinese characteristics. The Party-State would reap benefits in the form of increased behavioral legitimacy by allowing rights lawyers to represent those making rules-based claims and would not incur an elevated risk of instability.

229. See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 646–56 (2004).

230. *Id.* at 633–34.

231. *Id.* at 635–38.

232. See DOMINIC D.P. JOHNSON, OVERCONFIDENCE AND WAR: THE HAVOC AND GLORY OF POSITIVE ILLUSIONS 40–45 (2004).

233. See ROSEN, *supra* note 224, at 55.

234. See *supra* notes 147–48 and accompanying text.

CONCLUSION

CCP officials rationally decided that it was in the regime's best interest to allow rights-protection lawyers to develop alongside the Chinese legal system in the late twentieth century. The existence of rights-protection lawyers enhanced regime legitimacy while also allowing the CCP to efficiently monitor citizens' grievances. The decision to crack down on rights-protection lawyers, however, likely resulted from certain predictable cognitive lapses in rationality described by empirical research in behavioral law & economics. Allowing rights-protection lawyers to continue practicing would not threaten regime stability so long as CCP officials were able to control outcomes in court. In addition, taking control of the rhetoric used in rights-based claims could likely prevent the rules consciousness fostered by the current legal system from rising to the level of rights consciousness. This analysis shows that detaining rights lawyers was an unnecessary move given the CCP's goal to remain in power. In light of the irrationality of this decision, the international community can undertake unique and cost-effective action to discourage future human rights abuses of this kind.

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