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Posthumous Reputation and Posthumous Privacy in China: The Dead, the Law, and Social Transition

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POSTHUMOUS REPUTATION AND POSTHUMOUS PRIVACY IN CHINA: THE DEAD, THE LAW, AND THE SOCIAL TRANSITION

*Dr. Bo Zhao**

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*All tradition, perhaps, is based upon respect for the dead.*¹

Joseph Dean

*If the dead are not to be censured, it is only pronouncing history a libel, and the annals of Britain should grow as civil things as the sermons at St James's.*²

Horace Walpole

INTRODUCTION

In 2001, two Chinese-English litigants battled against each other over posthumous reputation in China. The case involved a successful novel called “K: The Art of Love,” which was published in Taiwan, mainland China, and other countries in many languages. The book is a fictional portrayal of a love affair between the characters K and Bell in 1936 China.³ The two characters are based on Bloomsbury Poet Julian Bell, a nephew of Virginia Woolf, and the celebrated Chinese writer and painter Ling Shuhua.⁴ Chen Xiaoying, daughter of Ling, sued the author Hong Yi and her publishers for defamation of her dead

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1. JOSEPH DEAN, *HATRED, RIDICULE OR CONTEMPT: A BOOK OF LIBEL CASES* 88 (1954).

2. HORACE WALPOLE, *MEMOIRS OF THE LAST TEN YEARS OF THE REIGN OF GEORGE THE SECOND* 329 (1822).

3. The book was considered China’s *Lady Chatterley’s Lover*. See Kevin Toolis, *China’s Lady Chatterley Stirs Passions over Censorship*, *GUARDIAN* (June 17, 2002), <http://www.guardian.co.uk/world/2002/jun/16/books.arts>.

4. Joy Jacobson, *Of Love and Defamation in China*, *POETS & WRITERS* (Feb. 2003), http://www.pw.org/content/love_and_defamation_china.

mother.⁵ For Chen, the highly erotic and offensive nature of the novel's depiction of K's relationship with Bell has "damaged the reputations of her mother and father and caused her mental anguish."⁶

The case was first rejected by the Beijing Haidian Basic People's Court on the ground that the defendant and plaintiff are both British citizens, and later rejected by the Beijing Intermediate People's Court for lack of jurisdiction.⁷ However, it was accepted by the Changchun Intermediate People's Court in Jilin Province after Chen added the Changchun-based magazines, Chinese Writers and Sichuan Youth Daily, as codefendants who published parts of Hong's book.⁸ The court ruled that the defendants defamed the dead, and ordered that Hong must stop calumny, and that the author should apologize openly and pay emotional damages.⁹ The court also granted an injunction to prevent the book from being further published, copied, or distributed in any form.¹⁰ After the defendant appealed to the High People's Court of Jilin Province, the parties agreed to a pre-trial settlement under the guidance of the High Court that was comprised of lower damages, an apology from the author, and the possibility to publish the novel under other titles after revision.¹¹

The case attracted a lot of attention, not only from Chinese media, but also from the international community.¹² Regarded as a landmark case, the decision has considerable impacts on the free speech rights of Chinese writers because it set up a

5. Chen Xiaoying Yu Chen Hongying Qinfan Mingyuquan An (陈小滢与陈红英侵犯名誉权案) [Chen Xiaoying v. Chen Hongying] (Jilin High Ct. July 16, 2003) (China) [hereinafter *Chen Xiaoying v. Chen Hongying*].

6. *Novelist Loses Out in Libel Case*, SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA (Dec. 10, 2002), <http://en.chinacourt.org/public/detail.php?id=1393>.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* See also Jacobson, *supra* note 4.

11. *Libel Case Ends with Conciliation*, CHINA DAILY (July 31, 2003), <http://www.china.org.cn/english/culture/71233.htm>.

12. The case was commented on by international journals and writers. See, e.g., *Erotic Fiction? Pornographic Fact, Court Rules*, THE AGE (Jan. 27, 2003), <http://www.theage.com.au/articles/2003/01/26/1043533952898.html>. See also Toolis, *supra* note 3; Jacobson, *supra* note 4.

benchmark for fictional novel writing, as well as other forms of writing regarding the dead in Chinese law. Furthermore, the judgment attracted criticisms from the international community in the context of ongoing suppression of free speech by the Chinese Party-state. For foreign critics, it is another example of the infamous censorship in China,¹³ despite the fact that this sort of censorship has more or less been justified under the protection of posthumous reputation.¹⁴

This case showcases the certain overlap between defamation and privacy in China, in particular where graphic sexual depictions are under consideration. Sexuality was still taboo when this case went to court in the late 1990s and is part of the reason why the book attracted wide attention.¹⁵ Even in 2013, fabrication and publication of the dead's past sexual adventures can still induce accusations of privacy invasion and defamation among most Chinese.¹⁶

This case also highlights the strong protection of posthumous reputation in Chinese law, contrasted with the unlikelihood of similar claims being pursued in common law jurisdictions. As the plaintiff Chen declared openly, she filed the suit in China in particular because in that year the Chinese Supreme People's Court ("Sup. People's Ct.") issued a legal interpretation supporting her claim.¹⁷ This interpretation concerning the liability for emotional distress affirms the legal protection of the dead's close relatives who suffer from the violation of posthumous in-

13. Jacobson, *supra* note 4.

14. *Id.*

15. A telling example is a 1997 poll in Shanghai—one of the more progressive cities in China—indicating that “40% of the people had not hugged or kissed prior to marriage.” Michael Newton-McLaughlin, *A Chinese Sexual Revolution: Is It In or Out?*, TAKING IT GLOBAL (Feb. 29, 2004), <http://www.tigweb.org/youth-media/panorama/article.html?ContentID=2920>.

16. See, e.g., Xie Jin Yishuang Gao Song Zude An (谢晋遗孀告宋祖德案 [Widow of Xie Jin v. Song Zude] (Shanghai Jingan Dist. People's Ct. Dec. 25, 2009) (China), <http://sh.xinmin.cn/minsheng/2009/12/25/3161321.html> (last visited Oct. 6, 2013) [hereinafter *Widow of Xie Jin v. Song Zude*].

17. See Zuigao Renmin Fayuan Guanyu Queding Minshi Qinquan Jingshen Peichang Zeren Ruogan Wenti De Jieshi (最高人民法院关于确定民事侵权精神损害赔偿责任若干问题的解释) [Interpretation of the Supreme People's Court on Problems Regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts] (promulgated by the Sup. People's Ct., Mar. 8, 2001, effective Mar. 1, 2001) (Lawinfochina) (China) [hereinafter *Compensation Liability Interpretation*].

terests, such as the deceased's reputation, honor, privacy, name, likeness, and body.¹⁸

The above case does not stand alone, and, on the whole, Chinese law is characterized by a strong protection of posthumous interests under the rubric of personality and dignity.¹⁹ The law, as will be explained in Part III below, is very plaintiff-friendly and protects a wide range of interests of the dead. As the 2001 Sup. People's Ct. Interpretation dictates, these protections extend to the dead's reputation, name, honor, privacy, publicity rights, remains and even their resting place.²⁰ Though there is no statutory law governing these interests, strong protection has been established gradually through a series of cases in the past two decades and under the guidance of the Sup. People's Ct.²¹

The legal development is best understood as a dramatic social-political transition in China, in which people's attitudes towards privacy and reputation—both of the living and the dead, and of the present and the past—have undergone significant changes. The ways these changes have affected Chinese society are best expressed in the following four points. The first is that in the past few decades, Chinese law has gained a secure position in society as an institution capable of resolving disputes of largely diversified social interests. Although constantly encountering political hindrance and harassment,²² law has be-

18. *Id.*

19. In China, personality right includes the rights to reputation and privacy, as well as other rights that are personal. The 2001 Supreme People's Court Interpretation prescribes that the dead's personality interests, including their reputation, privacy, honor, name, likeness, remains, etc., shall be protected. *Id.* See generally HAO WANG, PROTECTING PRIVACY IN CHINA: A RESEARCH ON CHINA'S PRIVACY STANDARDS AND THE POSSIBILITY OF ESTABLISHING THE RIGHT TO PRIVACY AND THE INFORMATION PRIVACY PROTECTION LEGISLATION IN MODERN CHINA 33–76 (2011); Liu Daoyun, *Woguo Rengequan Baohu De Xiandu* (我国人格权保护的限度), 3 DONG FANG FAXUE (东方法学) (2011).

20. Compensation Liability Interpretation, *supra* note 17.

21. For the development of the law in the field, see discussion *infra* Part I.C.

22. A recent example is that new lawyers, and those renewing their licenses, are required by the Chinese Ministry of Justice to take an oath of loyalty to the Communist Party. Edward Wong, *Chinese Lawyers Chafe at New Oath to Communist Party*, N.Y. TIMES (Mar. 23, 2012), <http://www.nytimes.com/2012/03/23/world/asia/chinese-lawyers-chafe-at-new-oath-to-communist-party.html>.

come an important way for individuals to address their need for justice, rather than serving as a mere instrument of Party-state control. This is especially true in the context of posthumous reputation and posthumous privacy cases, which can reveal, from a unique angle, the ongoing social-legal changes and the law-state relationships.

Second, it is important to observe how Chinese law deals with the reputation of the deceased when politically-sensitive history is involved in defamation cases. In many cases, posthumous defamation can lead to potential challenges to official history in China.²³ Since the communist party is still the dominant political force, and history an important source of its legitimacy, no serious challenges are allowed to certain parts of history.²⁴

A third point is that one can test the real boundaries of free speech rights in China by analyzing posthumous reputation and privacy cases. Though free speech is recognized as a fundamental right by the Chinese Constitution, there is still a big gap between reality and the constitutional promise under China's present legal-political regime.²⁵ Posthumous reputation and privacy cases are certainly the minority of defamation cases and privacy invasion cases, but it is these marginal cases that present a clearer view of how the free speech of Chinese authors and publishers is under threat, especially when speech causes harm to the interests of the dead and their surviving families.²⁶

As a final point, an explanation of this body of law is also important for foreign lawyers who wish to protect the interests of dead westerners in China. Like what the plaintiff Chen has

23. See *infra* Part IV.

24. For example, no free discussion is allowed of China's Cultural Revolution, the millions of starvation deaths that occurred during the 1959–1960 Great Leap Forward Movement, and the 1989 Student Movement. In He's words, the true history of events since the foundation of the Chinese Communist Party is still a closely guarded official secret. See HE QINGLIAN, *THE FOG OF CENSORSHIP: MEDIA CONTROL IN CHINA*, xvii, 1, 28, 30, 196, 200 (2008) (discussing censorship and media control in China to highlight the abuse and misuse of history by the Chinese government).

25. Article 35 prescribes that “[c]itizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.” XIANFA art. 35, § 2 (1982) (China).

26. In sharp contrast, reputation and privacy of the living, not to mention the dead, usually yield to free speech rights, which are regarded as fundamental in most Western democracies.

done in *Chen Xiaoying v. Chen Hongying*, there is a good chance for close family members of Western celebrities to protect the dead's interests in reputation and publicity in China. For example, when a Chinese company planned to produce and took pre-orders for an authorized replica of Apple founder Steve Jobs, Apple threatened the company with legal action on the ground that Jobs is protected under the California Celebrities Rights Act, which extends his publicity right to seventy years after his death.²⁷ Instead of this legal threat, Apple's lawyers could simply have initiated an action in China, where China's strong protection of the dead's interests would give them a strong chance of success.

The principal aims of this Article are to study the legal protection of posthumous privacy and reputation in Chinese law, and to analyze the political and social backgrounds behind such legal practices. This will be achieved through an analysis of thirty-seven cases, collected from 1989 to 2010, on posthumous reputation and posthumous privacy. These cases are found and selected from various sources, including the Gazettes of the Sup. People's Ct., Chinese professional law websites, court verdicts, and media reports. The details of the most important cases from these thirty-seven examples will be discussed below.

Starting with a discussion of the above K case, this Article will first give a brief introduction to the concept of posthumous reputation and privacy, and the legal treatment of the two interests in other jurisdictions, for an overview of the issue. Next, it will discuss the Chinese legal framework governing defamation and privacy, so that readers may better understand how Chinese law has developed a unique path in protecting the two interests. It then goes on to analyze these cases from different perspectives: justifications and characteristics of the protection, plaintiffs and defamees, goals and aims of suits, defendants and defenses, as well as court approaches and verdicts. After this, the Article will turn to the cases that relate to China's official history and analyze how the cases are handled by Chinese courts when politics are involved. This will be followed by a discussion of the possibility of censorship in history-relevant

27. Tecca, *Apple May File Lawsuit Against the Makers of Disturbingly Realistic Steve Jobs Doll*, YAHOO! NEWS (Jan. 6, 2012), <http://news.yahoo.com/blogs/technology-blog/apple-may-file-lawsuit-against-makers-disturbingly-realistic-020637702.html>.

cases when protection of the dead's interests becomes a possible justification of censorship.

Note that it is possible to discuss posthumous defamation cases and posthumous privacy cases in China together in this article for two reasons. First, privacy has been mostly protected by Chinese law under the rubric of reputation, as it only became an independent civil right in 2010.²⁸ Second, as further analysis will show, in most of the collected cases, invasion of the privacy of the dead has been treated by plaintiffs as the defamation of the dead.²⁹

28. Since 1988, privacy litigation was generally subsumed by reputation cases. See Cao Jingchun, *Protecting the Right to Privacy in China*, 36 VICTORIA U. WELLINGTON L. REV. 645, 657 (2005); Hilary K. Josephs, *Defamation, Invasion of Privacy, and the Press in the People's Republic of China*, 11 UCLA PAC. BASIN L.J. 191, 196–99 (1992). See also *infra* Part III.

29. *Chen Xiaoying v. Chen Hongying*, *supra* note 6; Peng Jiahui Su Zhongguogushi Zazhishe (彭家惠诉《中国故事》杂志社) [*Peng Jiahui v. China Story Journal*] 2002 SUP. PEOPLE'S CT. GAZ. 6 (Shichuan High Ct. 2002) (China) [hereinafter *Peng Jiahui v. China Story Journal*]; Tao Yuyun Yu Ouyangyouhui He Huachengchubanshe Qinheimingyuquan An (陶玉云与欧阳友徽和花城出版侵害名誉权案) [Tao Yuyun v. Ouyang Youhui & Huacheng Publishing House] (Hunan High Ct. July 31, 2002) (China) [hereinafter *Tao Yuyun v. Ouyang Youhui*]; Wang Haicheng Yu Li Ying, Lei Jinqian Qingfan Wang Luobin Mingyu Quanan (王海成与李颖, 雷进乾侵犯王洛宾名誉权案) [Wang Haicheng v. Li Ying & Lui Jinqian] (Xiangjiang High Ct. Nov. 11, 2001) (China) [hereinafter *Wang Haicheng v. Li Ying*]; Tang Min Feibang An (唐敏诽谤案) [Tang Min's Criminal Defamation Case], 1990 SUP. PEOPLE'S CT. GAZ. 2 (Xiamen Interm. People's Ct. 1990) (China) [hereinafter *Tang Min's Criminal Defamation Case*]; Chen Xiuqin Su Weixilin, Jin Wanbao (陈秀琴诉魏锡林) [Chen Xiuqin v. Wei Xilin & Jin Wanbao] (Tianjin Interm. People's Ct. 1989) (China) [hereinafter *Chen Xiuqin v. Wei Xilin*]; Chen Hong Su Shi Gengli Yiji Shanghai Wenhui Chubanshe Deng Qinfan Renge Zunyan An (陈红诉石耿立以及上海文汇出版社等侵犯人格尊严案) [Chen Hong v. Shi Gengli] (Beijing Dongcheng Dist. Ct. Dec. 7, 2010) (China) [hereinafter *Chen Hong v. Shi Gengli*]; *Widow of Xie Jin v. Song Zude*, *supra* note 16; Chen Hong, Xiao Mou Su Beijing Chuangxinyingshi Wenhua Fazhan Youxian Gongshi, Beijing Zhongchengxin Yingshi Wenhua Chuanbo Youxiangongsi (陈红, 肖某诉北京创信影视文化发展有限公司、北京宗诚信影视文化传播有限公司侵犯人格尊严, 名誉权案) [Chen Hong & Xiao Mou v. Beijing Film & Culture Development Ltd.] (Beijing Haidian Dist. Ct. Nov. 14, 2009) (China) [hereinafter *Chen Hong v. Beijing Film*]; Yang Kewu Yu Jiefangjun Zongzheng Huajutuan Qinheimingyuquan An (杨克武与总政话剧团侵权案) [Yang Kewu v. Center Theater of Political Bureau of PLA] (Beijing Haidian Dist. Ct. Aug. 13, 2005) (China) [hereinafter *Yang Kewu v. Center Theater*]; Li Moumou Su Kong Qingde Deng Qin Hai Mingyuquan (李迎希子女诉孔庆德、屈德蹇、郑珠滨和解放军出版社损害名誉权) [Li Moumou v. Kong Qingde] (Wuhan Wuchang Dist. Ct. May 30,

I. POSTHUMOUS REPUTATION AND PRIVACY IN GENERAL

Posthumous reputation is the continuity of one's reputation after death.³⁰ In other words, it is the evaluation of the past activities, behavior, and achievements of the deceased. What distinguishes ante-mortem reputation from post-mortem reputation is that after death, the dead can no longer defend their reputation any longer. Moreover, the events that make up a person's life cease to accrue, such that no more of the source material that exists is added after death. In general, the lives of the dead are best assessed in a larger social context, and it is through this context that their reputation becomes increasingly objective post-mortem. This objectivity is justified by the various stakeholders in the dead's reputation, and means that posthumous reputation is not an open target for criticism.

For instance, relatives of the dead will keep an eye on the reputation of their family members to ensure that the dead are not tarnished and humiliated. Posthumous defamation can cause mental distress, emotional and economic loss, and defamation of the surviving family of the dead. If a dead person is a public figure, his or her supporters and those who may have been involved in the same enterprises with the dead, may often fight defamation attempts based on the understanding that such remarks could sully their common enterprises. Finally, the reputations of many public figures are important components of collective memory and social identity.³¹ This is particularly true when parts of history related to a posthumous reputation are used for political ends, to justify political order, collective memory, or national identity.³² In most communities, posthumous reputation is protected by morality under the rubric of

2005] (China) [hereinafter *Li Moumou v. Kong Qingde*]; Ling Li, Ling Fei Su Renmin Chubanshe Zuojia Chubanshe, Cao Jisan Mingyujquan An (凌丽、凌飞诉人民出版社、作家出版社、曹积三名誉权案) [Ling Li & Ling Fei v. Cao Jisan & Renmin Publisher] (Beijing Dongcheng Dist. Ct. Sept. 20, 2002) (China) [hereinafter *Ling Li v. Cao Jisan*].

30. In this Article I only discuss reputations of individuals; however the same argument applies to institutions and organizations after insolvency or dissolution.

31. In many communities, heroes and founders are representative figures who give their communities identity to a considerable extent.

32. See ANTOON DE BAETS, RESPONSIBLE HISTORY 77 (2009).

human dignity and personality.³³ However, if a community sees posthumous reputation as a collective issue with high social-political significance, it may protect posthumous reputation not only by morality, but also by law.³⁴

In comparison to reputation, posthumous privacy attracts less attention. Following De Baets's approach, it is helpful to apply Prosser's four privacy torts to the situation of the dead.³⁵ This includes that the resting places of the dead shall not be violated; their names, portraits, and likeness shall not be illegally appropriated; their private facts shall not be disclosed after death when they are highly offensive or humiliating; and the personal details of the dead shall not be falsely publicized.³⁶ In a way, the dead's interests in privacy has a lot to do with the living: graveyards in many communities are sanctified and sacred places; disclosure of the dead's private matters may offend a lot of people, and not just family members, such as publicizing the lives of the dead in a false light; and appropriation of the dead's likeness and name is of direct concern to surviving families.

It is well known that common law countries do not recognize and protect the reputation and privacy of the dead³⁷ based on the understanding that the dead cannot be harmed and thus

33. See, e.g., Hannes Rösler, *Dignitarian Posthumous Personality Rights—An Analysis of U.S. and German Constitutional and Tort Law*, 26 BERKELEY J. INT'L L. 153 (2008) (discussing German protection of posthumous reputation under dignity).

34. Besides China, a case from Taiwan indicates the collective nature of posthumous reputation. See YANG RENSHOU (杨仁寿), *FAXUE FANGFA LUN (法学方法论)* 1–8 (1st ed. 1999). Another telling example is the protection of Mustafa Kemal Atatürk under Turkish law. DE BAETS, *supra* note 32, at 77.

35. Prosser's four torts of privacy are (1) intrusion upon an individual's seclusion, solitude, or private affairs; (2) public disclosure of private facts; (3) publicity putting an individual in a false light; and (4) appropriation of an individual's likeness. See generally William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

36. *Id.*

37. While this is the general rule, Joel Feinberg has set off a long-standing philosophical debate as to whether the dead can be harmed, based on the argument that the dead can be defamed after death. See generally Joel Feinberg, *The Rights of Animals and Future Generations*, in PHILOSOPHY AND ENVIRONMENTAL CRISIS 140, 43–68 (William Blackstone ed., 1974); Joel Feinberg, *Harm and Self-Interest*, in LAW, MORALITY AND SOCIETY 285 (1977).

have no rights under law.³⁸ In contrast, many continental law countries protect reputation and privacy of the dead under human dignity and personality provisions. For example, German law emphasizes human dignity and protects the dead's reputation.³⁹ In Italy, Princess Diana's posthumous privacy has been protected from the publicity of the photos taken at the scene of her death by the Italian magazine *Chi*.⁴⁰ A similar example is the recognition of posthumous reputation by the Israeli Supreme Court in the 1999 Szenes case.⁴¹ In a recent Maltese case, a defendant was ordered by the court to pay civil damages for posthumous defamation, although in Maltese law Section 28 of the Press Act concerning civil actions does not allow relatives of a dead person to institute proceedings.⁴² How-

38. For a more detailed discussion, see Lisa Brown, *Dead but Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX. L. REV. 1525 (1989); Kirsten Rabe Smolensky, *Defining Life from the Perspective of Death: An Introduction to the Forced Symmetry Approach*, 2006 U. CHI. LEGAL F. 39 (2006); Raymond Iryami, *Give the Dead Their Day in Court: Implying a Private Cause of Action for Defamation of the Dead from Criminal Libel Statutes*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1083; DANIEL SPERLING, *POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES* (2008); Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 ETHICS 243 (1981).

39. For the *Mephisto* case, judged in 1976, and other similar German cases, see Rösler, *supra* note 33.

40. The Italian court ordered that no further dissemination of such information is allowed. RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* 128 (2010).

41. Hannah Szenes, the Jewish heroine who committed her life to save other Jews under Nazi occupation, was captured by the Nazis, tortured, and killed. She is regarded as a national symbol for courage and self-sacrifice, and is considered part of the national identity in Israel where places and streets are named in her remembrance. When her good name was questioned in collective memory, the case went before the Supreme Court of Israel. The Court rejected the claim, though recognized the importance of the interests of a good name, both to the dead and the living. See generally HCJ 6126/94, 6143/94 Giora Szenes v. Broadcasting Authority, 53(3) PD 817 [1999] (Isr.), available at http://www.concernedhistorians.org/content_files/file/le/131.pdf. For the political and social impacts of the case, see generally Amit M. Schejter, *The Pillar of Fire by Night, to Show Them Light': Israeli Broadcasting, the Supreme Court and the Zionist Narrative*, 29 MEDIA CULTURE SOC'Y 916 (2007).

42. The case was rebutted by the European Court of Human Rights on the ground of breaching Article 10 of the European Convention on Human Rights. *Mizzi v. Malta*, App. No. 17320/10, Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107530>.

ever, Article 255 and Article 256 of the Criminal Code of Malta allow posthumous defamation complaints.⁴³ As in Malta, many jurisdictions make defamation of the dead a criminal offense.⁴⁴ For example, in Taiwan, a historian was punished as a criminal for defamation of a Chinese poet who died more than a thousand years ago.⁴⁵ In India, Section 499 of the Penal Code recognizes defamation of the dead as a crime.⁴⁶

II. LEGAL FRAMEWORK

Like German law, Chinese law protects the dead's reputation and privacy under personality and dignity provisions. Defamation of the dead is both a criminal and civil offense and the dead's privacy has been protected under reputation in legal practice for certain reasons.⁴⁷ There is no statutory law prescribing such protection directly. Since the 1989 Hehua Girl case (civil case) and the 1989 Tang Min case (criminal case), Chinese courts began to consider the protection of the dead's reputation and privacy, and the interests of their close family members.⁴⁸ This body of law has been developed gradually from China's defamation law under the guidance of the Chinese Supreme People's Court.⁴⁹ The main characteristics of the gov-

43. In particular, Article 255 prescribed that "where the party aggrieved dies before having made the complaint, or where the offence is committed against the memory of a deceased person, it shall be lawful for the husband or wife, the ascendants, descendants, brothers and sisters, and for the immediate heirs, to make the complaint." *Id.* ¶ 17.

44. Jane Kirtley, *Criminal Defamation: "An Instrument of Destruction,"* in *ENDING THE CHILLING EFFECT: WORKING TO REPEAL CRIMINAL LIBEL AND INSULT LAWS* 89, 89, 93–94, 96 (1st ed. 2004).

45. YANG RENSHOU (杨仁寿), *supra* note 34, at 1–8.

46. No. 45 of 1860, § 499, PEN. CODE (2012) (India).

47. *See infra* Part II.B.

48. The first is well known in China as the *Hehua Girl* case. *See Chen Xiuqin v. Wei Xilin*, *supra* note 29; *Tang Min's Criminal Defamation Case*, *supra* note 29.

49. Zhang Hong, *Posthumous Personality Rights Protection in China: Cases and Judge Made Law*, 138 *FASHANG YANJIU* (法商研究) 143 (2010). Unlike other jurisdictions, the Chinese Supreme People's Court ("Sup. People's Ct.") usually issues general directions or interpretations regarding specific legal issues to lower courts for guidance in judicial decision making. It also sends the so-called communications to reply to lower courts' inquiries concerning the implementation of law, which are regarded as formal legal interpretations. This legal practice has been criticized by many scholars as against judicial

erning law are to be discussed in the analysis of the collected cases in Part III. For background, Chinese defamation law and privacy law will first be briefly introduced.

A. Defamation Law

Defamation law in China has “certain Chinese characteristics” that make its application unique from other jurisdictions.⁵⁰ Above all, Article 38 of the Chinese Constitution Law protects the reputation of the Chinese. It stipulates, “[T]he personal dignity of citizens of the People’s Republic of China is inviolable. Insult, libel, false charge or frame-up directed against citizens by any means is prohibited.”⁵¹ Defamation is a criminal offense in China and can be punished severely. Article 246 of Chinese Criminal Law prescribes that:

Whoever, by violence or other methods, publicly humiliates another person or invent stories to defame him, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights; The crime mentioned in the preceding paragraph shall be handled only upon complaint, except where serious harm is done to public order or to the interests of the State.⁵²

Though the law does not explicitly mention protection of privacy in this text, it implies the ability to punish the invasion of privacy by criminal defamation law. This is because in many

independence and the spirit of the rule of law. *See, e.g.*, NANPING LIU, OPINIONS OF THE SUPREME PEOPLE’S COURT: JUDICIAL INTERPRETATION IN CHINA (1997); R.C. Keith & Zhiqiu Lin, *Judicial Interpretation of China’s Supreme People’s Court as “Secondary Law” with Special Reference to Criminal Law*, 23 CHINA INFO. 223, 228–29 (2009); Chenguang Wang, *Law-Making Functions of the Chinese Courts: Judicial Activism in a Country of Rapid Social Changes*, 1 FRONTIERS L. CHINA 524 (2006).

50. *See* Hualing Fu & Richard Cullen, *Defamation Law in the People’s Republic of China*, 11 TRANSNAT’L L. 1, 1 (1998). For discussion of Chinese defamation law, see also Xiaoyan Chen & Peng Hwa Ang, *Defamation Litigation and the Press in China*, INT’L J. COMM. L. & POL’Y 53 (2008); Josephs, *supra* note 28; Benjamin L. Liebman, *Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 HARV. INT’L L.J. 33 (2006).

51. XIANFA art. 38 (1982) (China).

52. Zhonghua Renmin Gongheguo Xingfa (刑法) [Chinese Penal Code] (promulgated by the Nat’l People’s Cong., Mar. 14, 1997, effective Oct. 1, 1997) (China).

cases, disclosure of private facts and invention of stories also lead to defamation in the Chinese community.⁵³ As Josephs pointed out earlier, "both criminal and civil liability may be imposed for defamation or invasion of privacy."⁵⁴

In addition, Article 105(2) treats certain types of defamation as political offenses and allows the state to curb incitement to subversion under the rubric of defamation, stipulating that:

Whoever incites others by spreading rumors or slanders or any other means to subvert the state power or overthrow the socialist system shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention, public surveillance or deprivation of political rights; and the ringleaders and the others who commit major crimes shall be sentenced to fixed-term imprisonment of not less than five years.⁵⁵

Defamation is also a civil offense in China. Article 101 of the General Principles of the Civil Law of China stipulates that citizens and legal persons shall enjoy the right of reputation;⁵⁶ the personality of citizens shall be protected by law; and the use of insults, libel, or other means to damage the reputation of citizens or legal persons shall be prohibited.⁵⁷ Article 120 prescribes that if a citizen's right of personal name, portrait, reputation, or honor is infringed upon, he shall have the right to demand that the infringement be stopped, his reputation rehabilitated, the ill effects eliminated, and an apology made; he may also demand compensation for incurred loss.⁵⁸

This protection has been further enhanced by two legal interpretations by the Sup. People's Ct.⁵⁹ The 1993 Judicial Interpretation provides three general circumstances to define defamation, instructs the choice of courts, and states the possi-

53. This can be clearly observed in the criminal defamation case concerning a deceased local leader. *Tang Min's Criminal Defamation Case*, *supra* note 29.

54. Josephs, *supra* note 28, at 198.

55. Chinese Penal Code, *supra* note 52.

56. Zhonghua Renmin Gongheguo Minfa Tongze (民法通则) [General Principles of the Civil Law of China] (promulgated by the Nat'l People's Cong., Apr. 14, 1986, effective Jan. 1, 1987) (China).

57. *Id.*

58. *Id.*

59. See Liebman, *supra* note 50, at 40-43.

ble legal remedies.⁶⁰ The 1998 Judicial Interpretation resolved several specific legal problems brought up by lower courts, and includes: allowing plaintiffs to sue at their own domicile, if they are affected by such torts there, or at the place such tortious acts are committed; disallowing acceptance of allegations of defamation in confidential reports or other materials prepared for leadership departments; liability of source in defamation materials; no liability of news media for disclosing information from public official documents and functional acts of the state on the condition of objective and accurate reports; and liability for disclosure of information concerning certain diseases, such as AIDS, by employees of public health authorities acting on their own, etc.⁶¹

In addition, defamation can incur lesser administrative punishment if it is not serious. Article 41 of the Public Security Administration Punishment Law allows police to detain and fine defamers.⁶² This happens in three circumstances: first, when insulting any other person openly or making up stories to defame any other person; second, when attempting to make any other person subject to criminal punishment or public security administration punishment by making up stories and bringing a false charge against any other person; and, third, when inter-

60. According to Article 7, there are three general circumstances of defamation where defamatory facts are recognized: (1) defamation or insult to others in either oral or written form; (2) without the other's consent, the dissemination or publicization of materials regarding privacy, or that reveal or advocate the other's private matters in either oral or written form; and (3) in the case of news report, where the reported content is largely false. Zuigao Renmin Fayuan Guanyu Shenli Mingyuquan Anjian Ruogan Wenti De Jieda (最高人民法院关于审理名誉权案件若干问题的解答) [A Reply to Certain Issues Concerning Judging Defamation Cases by the Sup. People's Ct.] (promulgated by the Sup. People's Ct., Aug. 7, 1993, effective Aug. 7, 1993) (China) [hereinafter Reply Concerning Judging Defamation Cases], *available at* <http://www.civillaw.com.cn/qf/fgcontent.asp?no=19197>.

61. Zuigao Renmin Fayuan Guanyu Shenli Mingyuquan Anjian Ruogan Wenti De Jieshi (最高人民法院关于审理名誉权案件若干问题的解释) [Interpretation of the Sup. People's Ct. on Several Issues about the Trial of Cases Concerning the Right of Reputation] (promulgated by the Sup. People's Ct., July 14, 1998, effective July 15, 1998) (Lawinfochina) (China).

62. Zhonghua Renmin Gongheguo Zhianguanli Chufa Fa (中华人民共和国治安管理处罚法) [Public Security Administration Punishments Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Mar. 1, 2006) (Lawinfochina) (China).

fering with the normal life of any other person by repeatedly sending any obscene, insulting, threatening, or other information.⁶³

B. Privacy Law

Privacy is a new right in Chinese law and several meanings of the concept of privacy in Western law are foreign to Chinese society.⁶⁴ Before the promulgation of the Chinese Tort Liability Law in 2009, Chinese law—including the Chinese Constitution Law and the General Principles of Civil Law—had not recognized privacy as an independent right.⁶⁵ However, there are other laws protecting individual privacy and other privacy-related interests indirectly. For example, Articles 38, 39, and 40 of the Chinese Constitution Law protect the right of personal dignity, the right of residency, and the right of confidentiality in correspondence.⁶⁶ Article 253 of the Chinese Criminal Code protects individual citizens from illegal disclosure of their private information by staffs working in governmental bureaus and certain enterprises concerning finance, hospitals, transportation, telecommunication, and education.⁶⁷

Chinese Civil Procedural Law and Criminal Procedural Law protect privacy in legal procedures.⁶⁸ Article 22 of the Police Law forbids police agents to illegally search and detain citizens.⁶⁹ Article 39 of the Law of the People's Republic of China

63. *Id.*

64. See *China: The Long March to Privacy*, *ECONOMIST* (Jan. 12, 2006), <http://www.economist.com/node/5389362>. See also HAO WANG, *supra* note 19, at v (“[T]he general population of China does not know what the concept of privacy is.”).

65. HAO WANG, *supra* note 19, at 137.

66. XIANFA arts. 38–40 (1982) (China).

67. Chinese Penal Code, *supra* note 52.

68. Zhonghua Renmin Gongheguo Minshi Susong Fa (2007 Xiuzheng) (中华人民共和国民事诉讼法(2007 修正)) [Civil Procedure Law of the People's Republic of China (2007 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective April 1, 2008), arts. 66, 120 (China). Zhonghua Renmin Gongheguo Xinshi Sushong Fa 2012 Xiuzheng (中华人民共和国刑事诉讼法(2012 修正)) [Criminal Procedure Law of the People's Republic of China (2012 Amendment)] (promulgated Mar. 14, 2012, effective Jan. 1, 2013), arts. 52, 150, 183 (China).

69. Zhonghua Renmin Gongheguo Jingcha Fa (中华人民共和国人民警察法) [People's Police Law of the People's Republic of China] (promulgated by the

on the Protection of Minors (2006 Revision) in particular protects certain privacy interests of adolescents.⁷⁰ Article 41 of the Public Security Administration Punishment Law forbids and punishes anyone who spies on, takes photos without permission, wiretaps, or spreads the private information of any other person.⁷¹

Before 2009, privacy was only protected indirectly under the rubric of reputation. In the 1988 Sup. People's Ct. interpretation, "Opinions on Several Issues Concerning the Implementation of the General Principles of the Civil Law," Article 140, for the first time, established a legal basis to claim remedy for privacy invasion. In this interpretation, the Sup. People's Ct. took an indirect approach to privacy protection, prescribing that "oral or written disclosures of other's privacy with substantial effects can be determined as acts of defamation."⁷² After this, privacy litigation could be filed as infringements of reputation.

In 1993, the Sup. People's Ct. issued another judicial interpretation, "A Reply to Certain Issues Concerning Judging Defamation Cases," confirming that without consent, any activities to disclose another's private materials or reveal another's privacy in oral or written forms, which causes damage to another's reputation, shall be treated by law as defamation.⁷³ Eight years later, the Sup. People's Ct. reaffirmed the rule in a 2001 Judicial Interpretation. This judicial interpretation grants plaintiffs a right to claim emotional damages from invasions of

Standing Comm. Nat'l People's Cong., Feb. 28, 1995, effective Feb. 28, 1995) (China) [hereinafter People's Police Law].

70. Zhonghua Renmin Gongheguo Weichengnianren Baohu Fa (中华人民共和国未成年人保护法 (2006 修订)) [Law of the People's Republic of China on the Protection of Minors (2006 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2006, effective June 1, 2007) (China), available at <http://en.pkulaw.cn/display.aspx?cgid=82812&lib=law>.

71. See People's Police Law, *supra* note 69.

72. Opinions of the Supreme People's Court on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation) (promulgated by the Sup. People's Ct., Jan. 26, 1988, effective Jan. 26, 1988) (Lawinfochina) (China). See also Jingchun, *supra* note 28, at 657; HAO WANG, *supra* note 19, at 152.

73. Reply Concerning Judging Defamation Cases, *supra* note 60.

privacy and other personality rights that are violated by activities against public interest and social morality.⁷⁴

Liebman's study on defamation cases has shown that in legal practice, the remedy of privacy rights is one of the four main categories of defamation cases brought by ordinary persons.⁷⁵ The strong tendency to subsume privacy under reputation rights in Chinese law can be understood in the context of China's long tradition of maintaining an inclusive concept of reputation, in contrast to a narrow and weak concept of privacy.⁷⁶ Chinese people view privacy from a much narrower perspective and with less importance than most Westerners do, which in turn determines the legal policies adopted by Chinese legislators and judges.⁷⁷

The interests protected under reputation and privacy are different, although they overlap with each other to a large extent.⁷⁸ In China, reputation is an important issue representing an individual's social standing, honor, dignity, credibility, and social networks, which are represented by the concept of "face" ("Mianzi").⁷⁹ Face is an important concern of ordinary Chinese and

74. Compensation Liability Interpretation, *supra* note 17. Note also that the same judicial interpretation grants close relatives of the dead a right to claim emotional damages for defamation of the dead.

75. See Liebman, *supra* note 50, at 72–75.

76. In the past, privacy has been traditionally viewed as being associated with shameful personal matters or secrets in China, but has been broadened in recent years by the introduction of Western law and ideas of privacy. For the Chinese approach to privacy in general, see generally Jingchun, *supra* note 28; Guobin Zhu, *The Right to Privacy: An Emerging Right in Chinese Law*, 18 STATUTE L. REV. 208 (1997); Lü Yao-Huai, *Privacy and Data Privacy Issues in Contemporary China*, 7 ETHICS & INFO. TECH. 7 (2005).

77. Privacy is also a relatively new right in common law countries, whose recognition is owed largely to Warren and Brandeis' article. See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

78. In common law history, privacy was first protected, like in the present Chinese situation, under reputation. Prosser pointed out their overlaps. See Prosser, *supra* note 35, at 398–401; see also Richard A. Posner, *Privacy, Secrecy, and Reputation*, 28 BUFF. L. REV. 1 (1978). The central issue of reputation and privacy is about information control and boundary management. See V.J. Derlega & A.L. Chaikin, *Privacy and Self-Disclosure in Social Relationships*, 33 J. SOC. ISSUES 102 (1977).

79. See, e.g., Hsien Chin Hu, *The Chinese Concept of Face*, 46 AM. ANTHROPOLOGY 45 (1944); David Yau-fai Ho, *On the Concept of Face*, 81 AM. J. SOC. 867 (1976); Jingchun, *supra* note 28. See discussion *infra* Part II.B.

can more or less be understood as meaning an individual's social existence. But privacy in traditional Chinese society is conceived as related to issues improper for disclosure, issues that are secret, and issues that are shameful.⁸⁰ Once such information is exposed, the person concerned is likely to be embarrassed and shamed by the public, causing him to be looked down upon and disrespected. A good example of this public shaming pertains to rape victims. Even now, in most areas of China, being a rape victim, and especially losing one's virginity in this manner, is a devastating issue that brings shame and contempt to the victim and her family.⁸¹ As a secondary consequence, given the traditional male preference for virgin brides that persists today, rape victims usually have difficulties in finding future husbands, despite their innocence.⁸² The subordination of privacy to reputation in China will be further discussed in the collected posthumous cases.⁸³

The Chinese approach of protecting privacy via reputation has many drawbacks in practice. First, privacy invasion does not provide an independent cause of action, and thus cannot offer full protection.⁸⁴ Second, as Yang pointed out, the two judicial interpretations of the Sup. People's Ct. above do not offer a coherent definition of civil liability.⁸⁵ For instance, it is not clear if

80. See Jingchun, *supra* note 28, at 646.

81. For instance, see the story told by Ms. Li Ying and Ms. Guo Jianmei, the directors of the Women's Legal Consultancy Center in Beijing. See Sharon Lafraniere, *Rape Case Is a Rarity in Chinese Justice System*, N.Y. TIMES (Sept. 22, 2011), <http://www.nytimes.com/2011/09/23/world/asia/rape-case-is-a-rarity-in-chinese-justice-system.html>.

82. Even if rape victims can find husbands, the marriages may be brief in view of Chinese men's constant pursuit for their wives' virginity. Yang Wanli, Jiang Xueqing & He Na, *Men in China Still Want Virgin Brides*, ASIAONE (Mar. 8, 2012), <http://www.asiaone.com/News/AsiaOne%2BNews/Asia/Story/A1Story20120308-332238.html>.

83. It is notable that in common law countries, similar to China, the concept of privacy first stressed keeping secrets and guarding life's darkness, then recently switched to another concept focusing on free choice of individuals. LAWRENCE FRIEDMAN, *GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY* (1st ed. 2007).

84. Jianyuan Yang, *Media Disclosure of Individual Privacy: A Proposed Framework for China*, 3 E. ASIA L. REV. 59, 61–62 (2008).

85. *Id.*

damage to reputation is a necessary element of an actionable privacy invasion. This leaves Chinese judges with a large amount of discretion and leaves parties of privacy litigation with much uncertainty.⁸⁶ In an authoritative article published by the Sup. People's Ct. in 2008, the court clearly showed the problems inherent in the indirect approach to privacy protection.⁸⁷ The article tried to interpret the 1993 Judicial Interpretation—"A Reply to Certain Issues Concerning Judging Defamation Cases"—so that it only regulates defamatory disclosure of privacy-related issues, without any intention to protect privacy as a sub-category right in the shadow of reputation.⁸⁸

The lack of an independent civil right of privacy changed in 2009 with the promulgation of the Chinese Tort Liability Law.⁸⁹ Article 2 of this law recognizes privacy as an independent right and prescribes tort liability for privacy invasion.⁹⁰ Article 15 stipulates possible liabilities and remedies for privacy invasion.⁹¹ Articles 20 and 22 grant monetary damages for property loss and compensation for mental distress.⁹² It is also noteworthy that Article 6 has shifted the burden of proof from plaintiffs to defendants, making it easier and less costly for plaintiffs to bring a privacy tort suit.⁹³ However, the law does

86. *Id.* For other differences between the two torts under Chinese law, see, e.g., Zhu, *supra* note 76, at 212–13.

87. Han Mei (韩玫), *Zuigao Renmin Fayuan Guanyu Shenli Mingyuguan Anjian Ruogan Wenti De Lijie He Shiyong* (《最高人民法院关于审理名誉权案件若干问题的解答》的理解与适用) [Interpretation and Application of the 1993 Sup. People's Ct.'s Reply to Certain Issues Concerning Judging Defamation Cases], Official Website of the Nat'l People's Cong. (Dec. 21, 2008), http://www.npc.gov.cn/huiyi/lfzt/qzrfca/2008-12/21/content_1462861.htm (last visited Aug. 10, 2012) [hereinafter Interpretation of Sup. People's Ct.'s Reply].

88. *Id.*

89. *Zhonghua Renmin Gongheguo Qinquan Zerenfa* (中华人民共和国侵权责任法) [Tort Law of the People's Republic of China], promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) (China). See generally Mo Zhang, *Tort Liabilities and Torts Law: The New Frontier of Chinese Legal Horizon*, 10 RICH. J. GLOBAL L. & BUS. 417.

90. Tort Law of the People's Republic of China, *supra* note 89, art. 2.

91. *Id.* art. 15.

92. *Id.* arts. 20, 22.

93. *Id.* art. 6.

not provide further details of the new right and its protection,⁹⁴ and as such, courts can still interpret the rule in a way that reflects the strong influence of the old doctrine of protecting privacy under reputation.

C. Protections of Posthumous Reputation and Privacy by Tort

The lack of statutory ground to protect posthumous reputation and privacy does not block Chinese courts from making their own decisions when the needs of the dead's family have arisen. Since 1989, the Sup. People's Ct. has issued seven judicial interpretations to resolve the legal problems brought up by lower courts.⁹⁵ These judicial interpretations were made in the form of explanations, replies, opinions, and formal interpretations.⁹⁶ The Sup. People's Ct. also published three representative cases in its gazettes to set up authoritative references for lower courts.⁹⁷ Following these guidelines, Chinese courts have gradually developed a judge-made law to protect the reputation and privacy of the dead. The following is an introduction to the legal interpretations and published cases that create the basic framework laws protecting posthumous reputation and privacy.

The case concerning the Hehua Girl in 1989 is a landmark case published by the Sup. People's Ct.⁹⁸ Hehua Girl is the stage name of Ji Wenzhen, a very famous artist in Tianjin who died in 1944 at age nineteen.⁹⁹ A novel based on her life, which used the same stage name, was published as a series in a local newspaper.¹⁰⁰ The novel contained many dubious depictions of her private life, and stated that she had been raped, that she died from a sexually transmitted disease, that she had three

94. See *New Chinese Tort Liability Law Contains Provisions Affecting Personal Data*, HUNTON & WILLIAMS (Jan. 2010), http://www.hunton.com/files/News/4bfa5361-4d8f-4c7e-af03-75055a82202c/Presentation/NewsAttachment/7d2612ba-40d6-4884-83de-c01965341d41/new_chinese_tort_liability_law.pdf.

95. See Part II.C.

96. See generally the discussion of the Court's jurisdiction in LIU, OPINIONS OF THE SUPREME PEOPLE'S COURT, *supra* note 49; RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 304, 317, 326 (2002).

97. See Part II.C.

98. See *Chen Xiugin v. Wei Xilin*, *supra* note 29.

99. *Id.*

100. *Id.*

fiancées, and that she was once willing to be a mistress.¹⁰¹ There were also defamatory graphic illustrations accompanying the series.¹⁰² Chen Xiuqin, Ji Wenzhen's mother, filed the case in 1989 in the Tianjing Intermediate People's Court, alleging defamation and illegal appropriation of the likeness of her daughter, as well as of invasion of her own reputation.¹⁰³

The trial court, after establishing relevant facts, referred the case to the Tanjing High People's Court for judicial guidance, which in turn reported the case to the Sup. People's Ct. for further authoritative opinion; neither had been able to find law to protect the reputation of the dead. In a reply to the Tianjin High People's Court in 1989, the Sup. People's Ct. for the first time openly recognized that "the posthumous reputation right" of the Hehua Girl should be protected, that her mother had a right to sue, and that there is civil liability involved to be further decided.¹⁰⁴ The defendants were ordered to make a public apology and pay compensation for reputational loss, and the publication of the book was banned in any form.¹⁰⁵

In 1990, the Sup. People's Ct. re-affirmed this new protection in a reply to the Sichuan High People's Court regarding certain procedural matters in a case of posthumous reputation.¹⁰⁶ The dead defamee was Hai Deng, a very famous Kung Fu master from the Shaolin Temple. The Sup. People's Ct. confirmed that Hai Deng's reputation should be protected, and Fan Yinglian,

101. *Id.*

102. *Id.*

103. *Id.*

104. Zuigao Renmin Fayuan Guanyu Siwang Ren De Mingyuquan Yingshou Baohu De Han (最高人民法院关于死亡人的名誉权应受法律保护的函) [Communication of the Sup. People's Ct. Regarding the Protection of the Reputation of the Dead] (promulgated by the Sup. People's Ct., Apr. 12, 1989, effective Apr. 1989) (China).

105. See *Chen Xiuqin v. Wei Xilin*, *supra* note 29. This is the first time that a book was banned for non-political reasons and by means of law.

106. Zuigao Renmin Fayuan Guanyu Fan Yinglian Su Jing Yongxiang Deng Qin Hai Hai Deng Fashi Mingyuquan Yian Youguan Susongchengxu Wenti De Fuhuan (最高人民法院关于范应莲诉敬永祥等侵害海灯法师名誉权一案有关诉讼程序问题的复函) [Reply of the Sup. People's Ct. Concerning the Procedural Issues in the Defamation Case of *Fan Yinglian v. Jing Yongxiang*] (promulgated by the Sup. People's Ct., Dec. 27, 1990, effective Dec. 27, 1990) (China), available at http://www.law-lib.com/law/law_view.asp?id=7240.

the plaintiff and adopted son of Hai Deng, had a right to sue.¹⁰⁷ Then in 1993, in another reply to the Sichuan High People's Court regarding the same case, the Sup. People's Ct. said that the defendant's speeches and publications amounted not only to defamation of Hai Deng, but also defamed the plaintiff's reputation to a lesser extent. At this time, the Sup. People's Ct. used the term "reputation of the dead," instead of "reputation right of the dead," which had been used in the previous two legal interpretations, indicating that the Sup. People's Ct. was aware of the unsuitability of the term "reputation rights of the dead."¹⁰⁸

This semantic change remained throughout the rest of the legal interpretations of the Sup. People's Ct. Paragraph 5 of the 1993 Sup. People's Ct. Explanations of Several Issues in Judging Defamation Cases goes one step further and defines the scope of claims potential plaintiffs can bring for posthumous defamation litigation.¹⁰⁹ The explanation employs the legal term "close relatives" as defined in the Chinese civil law, which includes spouses, parents, children, brothers and sisters, grandparents, and grandchildren of the dead.¹¹⁰ In addition, paragraph 9 in particular offers instructions on how to judge defamation cases involving literature.¹¹¹ It creates liability for defamation and privacy invasion when works describe real people and their real life events, as well as works that target particular persons without using their exact names.¹¹²

Then there came the Li Lin case in 1996.¹¹³ Li sued Xinhengjie Journal and an author called He Jianming for maligning her dead father Li Siguang, a leading geologist, by publication of a documentary novel (Jishi wenxue in Chinese)¹¹⁴ called

107. The Sup. People's Ct. opined, "After the death of Hai Deng, his reputation right should be protected; as the adopted son of the dead, Fan Yinglian has a legal standing to sue." *Id.*

108. *Id.*

109. Reply Concerning Judging Defamation Cases, *supra* note 60.

110. *Id.*

111. *Id.*

112. *Id.*

113. Li Lin Su Xinhengjie Zazishe he Hejianming (李林诉《新生界》杂志社、何建明) [Li Lin v. Xinhengjie Journal & He Jianming], 1998 SUP. PEOPLE'S CT. GAZ. 1 (Beijing High People's Ct. 1997) (China) [hereinafter *Li Lin v. Xinhengjie Journal*].

114. Documentary novels or docu-fictions in China are the type of literature in which authors will make up stories in historical contexts. While authors

Vanity Fair of a Scientist. The novel talked about Li's political activities during China's notorious Cultural Revolution and was seen as defamatory by the plaintiff.¹¹⁵ Upon appeal, the Beijing High People's Court ruled that the dead should not be defamed and their close relatives had the right to sue.¹¹⁶ It declared that the novel had negative effects on people's evaluation of Li Siguang and thus defamed him and caused mental distress to his daughter.¹¹⁷ The journal was held liable for defamation since it did not fulfill the duty to further check the controversial facts before publishing a work with respect to an important historical figure.¹¹⁸ Li Lin was awarded 10,000 RMB in compensation and 5,000 RMB in damages.¹¹⁹

In 1998, the Sup. People's Ct. issued another legal interpretation regarding protection of the dead's interests in likeness.¹²⁰ The decision was a reply to the Zhejiang High People's Court concerning the appropriation of a dead person's portrait and his likeness by a jewelry store.¹²¹ The court prescribed that a person's interests in their name and likeness after death should be protected, and enabled close relatives of the dead to sue in the event of any tortious infringement of the dead's likeness, or in the event that the likeness of the dead is used for profit.¹²² The

claim they have full liberty to imagine and fabricate stories, the trouble with this category of literature is that readers cannot tell what aspects of the stories are true, and which are fictionalized. This type of literature is one of the major sources of defamation cases in China. For a discussion of the problem, see Josephs, *supra* note 28, at 207-09.

115. *Li Lin v. Xinshengjie Journal*, *supra* note 113.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* The damages mentioned in this article are all in Chinese currency (RMB).

120. Zuigao Renmin Fayuan Guanyu Zhou Haiying Su Shaoxing Yuewang-zhubaohang Qinfan Luxunxiaoxiangquan Yi'an Yingfou Shouli De Dafuyijian (最高人民法院关于周海婴诉绍兴越王珠宝金行侵犯鲁迅肖像权一案应否受理的答复意见) [Reply of the Sup. People's Ct. Concerning the Jurisdiction of the Case of Zhou Haiying v. Shaoxing Yuewang Zhubaohang Qinfan Luxun Xiaoxiangquan] (promulgated by the Sup. People's Ct., June 26, 2000, effective June 26, 2000) (China) [hereinafter Reply Concerning Jurisdiction], available at <http://www.chinabaike.com/law/zy/sf/fy/1337859.html>.

121. *Id.*

122. *Id.*

upper court also pointed out that the local court should accept the case and that mediation is preferred.¹²³

In 2001, the Sup. People's Ct. issued a legal interpretation called Explanation of Several Issues Concerning Determination of Liability for Compensation of Emotional Damages in Civil Torts.¹²⁴ Article 3 stipulates that Chinese courts should hear complaints brought by close relatives after a natural person's death to claim mental damages consequent to any of the following tortious acts: (1) harm to the dead's name, likeness, reputation, or honor by insulting, slandering, disparaging, vilifying, or other means of violating public interests, social morality, or otherwise; (2) illegally disclosing and appropriating the deceased's privacy, or violating privacy by other means against public interests and public morality; and (3) illegally utilizing or damaging corpses and remains, or behaving in other ways against public interests and social morality.¹²⁵ These articles thus grant the close relatives of the dead a right to sue when there is a violation of the dead's privacy and reputation interests.¹²⁶

Shortly after this, there came the Peng Jiahui case.¹²⁷ Ms. Peng accused *Jingushi* Journal for defamation of her brother, Peng Jiazhen, a hero of China's Xinhai Revolution in 1912.¹²⁸ Though her brother died in an assassination in 1912, the novel published by the Journal claimed that he escaped the killing, and then proceeded to denigrate the dead's character with stories depicting him as a salacious devil, engaging in immoral relationships with various women.¹²⁹ The trial court affirmed the defamation charge on behalf of the dead and his sister who was still alive, and awarded 50,000 RMB in mental damages.¹³⁰ But while the appellate court awarded 50,000 RMB in damages (抚慰金, Fuweijin) to the plaintiff, it dismissed the accusation of the defamation of the plaintiff Ms. Peng herself.¹³¹ More im-

123. *Id.*

124. Compensation Liability Interpretation, *supra* note 17.

125. *Id.*

126. *Id.*

127. *Peng Jiahui v. China Story Journal*, *supra* note 29.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

portantly, when Peng died during the appeal, her children were allowed to continue the appeal and inherited the damages.¹³² This set a precedent for future cases where older plaintiffs died while awaiting judgment, yet heirs of the plaintiff were able to continue with litigation.

D. Protection by Criminal Law

As discussed above, defamation can be punished by criminal law as incitement by slander (Article 105), or as criminal defamation (Article 246).¹³³ Like Chinese civil law, there is no particular statute with regard to defamation of the dead. In legal practice, there are only two cases reported under each category.¹³⁴ They were both decided in 1989, and since then no such case has been published or reported.¹³⁵ So on the whole, criminal defamation of the dead can be regarded as a law that exists largely on paper.

Tang Min was the first Chinese writer imprisoned for defamation since the legal reform.¹³⁶ She was accused of libeling three private plaintiffs and their dead relatives by putting malicious fabrications and rumors in her documentary novel.¹³⁷ She not only used the real names of the dead, but disclosed the dead's relationships to the three plaintiffs, so that the latter were easily identified by people familiar with the local community.¹³⁸ The plaintiffs requested that Tang be held liable for criminal defamation and claimed compensation for economic loss.¹³⁹ The court found that the controversial texts had had great influences upon the plaintiffs' lives and caused economic loss due to the litigation.¹⁴⁰ Refusing to confess her crime in the court-directed pre-trial settlement, Tang was sentenced to one year's jail and ordered to pay compensation.¹⁴¹

132. *Id.*

133. Chinese Penal Code, *supra* note 52.

134. *Id.*

135. At least to the author's knowledge, with available literature and cases at hand.

136. See *Tang Min's Criminal Defamation Case*, *supra* note 29.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

The other case was politically charged. It was adjudicated two months after the crackdown of the 1989 Student Protest at Tiananmen Square.¹⁴² Three young people threw eggs filled with ink at the great Mao's portrait at Tiananmen Gate in order to challenge the autocratic state.¹⁴³ Mao's portrait was and still is a significant political symbol of the communist state, and thus was inviolable to most Chinese at the time of the incident.¹⁴⁴ Accused of counter-revolutionary sabotage and incitement, the three were sentenced to life imprisonment, imprisonment for twenty years, and imprisonment for sixteen years, respectively.¹⁴⁵ In China, defamation is not limited to libeling and slandering with words, but can also be done by defacing the likeness of others and humiliating their bodies, so that the dead are exposed to contempt and ridicule.¹⁴⁶

The fact that these are the only two posthumous criminal defamation cases from 1989 until the present indicates that criminal charges of defamation of the dead are very rare in China. The law is of more symbolic significance, as witnessed in the recent story of Mao Yushi, a micro-economist, who was confronted by unsuccessful accusations of criminal defamation

142. Yu Zhijian, Yu Dongyue & Lu Decheng Fangeming Zui he Fangeming Xuanchuan An (余志坚、喻东岳、鲁德成反革命和反革命宣传案) [Yu Zhijian, Yu Dongyue & Lu Decheng Counter-Revolution & Sedition Case] (Beijing Interm. People's Ct. Aug. 11, 1989) (China) [hereinafter *Counter-Revolution & Sedition Case*]; Xiao Rong & Luisetta Mudie, *Mao Portrait Protesters Reunited*, RADIO FREE ASIA (June 21, 2010), <http://www.rfa.org/english/news/china/portrait-06212010110340.html>.

143. See generally DENISE CHONG, *EGG ON MAO: THE STORY OF AN ORDINARY MAN WHO DEFACTED AN ICON AND UNMASKED A DICTATORSHIP* (2009).

144. *Id.*

145. *Id.*

146. For example, see Xiao Xinnan Xiao Xiaying Su Yan Yuewen Mingyuquan An (肖喜南、肖夏英与被告颜跃文名誉权纠纷一案) [Xiao Xinnan v. Yan Yuewen] (Chaling County Dist. Ct. Feb. 26, 2009), http://www.110.com/panli/panli_233673.html (China) [hereinafter *Xiao Xinnan v. Yan Yuewen*]; Li Zhaoping Su Anyang Bingyiguan Cuofenshi Qin Hai Mingyuquan An (李兆平诉安阳市殡仪馆错焚尸侵害名誉案) [Li Zhaoping v. Anyang Funeral Home] (Anyang Tiexi Dist. Ct. May 1993), <http://www.fsou.com/html/text/fnl/1176770/117677051.html> (China) [hereinafter *Li Zhaoping v. Anyang Funeral Home*]; Chen Mou Liu Xiongdi Su Wangmou Qinfan Wangmu Xiaoxiang Quan An (陈某六兄弟诉王某侵犯亡母肖像权案) [Chen Mou et al. v. Wangmou] (Zhejiang Xianju Dist. Ct. 2000) (China) [hereinafter *Chen Mou v. Wangmou*].

of Mao Zedong by many of Mao's supporters.¹⁴⁷ In general, protection of posthumous reputation through criminal law is not a significant threat to Chinese authors, although defamation of the living can be severely punished.¹⁴⁸

E. Other Protections

Reputation of the living is protected under the rights to personality and dignity in China.¹⁴⁹ The reputation of the dead is also protected by their interests in personality and dignity.¹⁵⁰ However, there are other categories of posthumous interests that are important to the dead's personality and dignity, and their violation can lead to defamation charges in China.

The first category is copyrights. For many artists, as Madoff expressed, their creations and works are part of their identity and there are reputational interests in their creations.¹⁵¹ In countries such as Japan, Mexico, Canada, Nigeria, and France, their laws recognize not only copyright, but also special moral rights of authors, including the right of paternity, and the right of integrity of artistic works.¹⁵² Chinese law takes a similar approach and includes the moral rights in copyright protection. Article 10 of the Chinese Copyrights Law grants an author the rights to publication, authorship, revision, integrity, reproduction, alternation, distribution, lease, exhibition, and projection,

147. See Peh Shing Huei, *China's Maoists, Liberals Clash*, STATESMAN (June 12, 2011), http://www.thestatesman.net/index.php?option=com_content&view=article&show=archive&id=372760&catid=39&year=2011&month=6&day=12&Itemid=66; *Mao Yushi, CHINA STORY*, <http://www.thechinastory.org/intellectuals/mao-yushi-%E8%8C%85%E4%BA%8E%E8%BD%BC/> (last visited Mar. 10, 2013).

148. If defamation is serious, according to Article 246 of the Chinese Penal Code, violators can be "sentenced to three years or fewer in prison, put under criminal detention or surveillance, or deprived of their political rights." Chinese Penal Code, *supra* note 52.

149. Compensation Liability Interpretation, *supra* note 17, art. 1. For a discussion of the issue, see Liu Daoyun, *supra* note 19.

150. Yang Lixin, *Sizhe Rengeliyi Baohu De Jutineirong* (死者人格利益保护的具体内容), YANG LIXIN MINSHANG FAWANG (杨立新民商法网) (Dec. 14, 2008), <http://www.yanglx.com/disnews.asp?id=771>.

151. See MADOFF, *supra* note 40, at 148.

152. *Id.* at 149–50.

amongst others.¹⁵³ Article 20 prescribes that the protection term of the rights of authorship, alteration, and integrity of an author shall be *unlimited*.¹⁵⁴ Article 21 provides protection of publication rights for an author for his whole life, plus fifty years after death.¹⁵⁵

The second type of interest important to person's personality and dignity is the publicity interest that originates from privacy and protects the economic interest in an individual's name and likeness. This category of posthumous interest is well protected by the present Chinese law. Clauses 1 and 2 of Article 3 of the Sup. People's Ct. Explanation of Several Issues Concerning Determination of Tort Liability of Mental Damages (2001) grant close relatives of the dead the right to seek remedy (1) for mental distress resulting from harm to the dead's names, likeness, honor, and reputation; and (2) for illegal disclosure and use of privacy of the dead, and other forms of invasion of privacy that are against public interests and social morality.¹⁵⁶ In another Sup. People's Ct. interpretation regarding the use of the deceased's likeness for commercial purposes, the Sup. People's Ct. asked the adjudicating courts to take a lawsuit filed on the ground of unauthorized use of a dead writer's likeness for commercial purposes.¹⁵⁷ The Sup. People's Ct. dictated that likeness of the dead should be protected, and that close relatives of the dead have a right to sue the tortfeasor for appropriation of the dead's likeness for commercial purpose, defacement, and smear.¹⁵⁸ There are also cases regarding the un-consented commercial use of the dead's name, which is also taken by many plaintiffs as an offense of posthumous reputation. For example, the son of Lu Xun, China's most famous classic writer, lodged a case against the unauthorized use of his father's name.¹⁵⁹ In

153. Zhonghua Renmin Gongheguo Zhuzuoquan Fa 2010 Xiuzheng (中华人民共和国著作权法(2010 修正)) [Copyright Law of the People's Republic of China (2010 Amendment)] (promulgated by the Standing Comm. Nat'l Cong., Feb. 26, 2010, effective Jan. 6, 1991) (China).

154. *Id.* (emphasis added).

155. *Id.*

156. Compensation Liability Interpretation, *supra* note 17.

157. Reply Concerning Jurisdiction, *supra* note 120.

158. *Id.*

159. Zhou Haiying Yu Luxun Waiyu Xuexiao Qin Hai Xingmingquan An (周海婴与鲁迅外国语学校侵害鲁迅姓名权一案) [Zhou Haiying v. Luxun Foreign

another case, the plaintiff accused the defendant author of defamation and insult for improper use of his dead father's name.¹⁶⁰

In China's social-cultural context, many posthumous interests are seen as relevant to the dead's reputation and, by extension, relevant to the reputation of their surviving family and close relatives. As observed in practice, the indecent treatment of dead bodies, the dead's personal clothes, coffins, and graveyards is deemed to be relevant to a person's posthumous reputation.¹⁶¹ Chinese will treat violations of such "posthumous belongings" as a violation of the dead's dignity and personality. For instance, the abovementioned 2001 Sup. People's Ct. Interpretation allows close relatives of the dead to sue for emotional damages when anyone illegally makes use of or ruins the dead's remains or bones, or does such things in forms that are against public interest and social morality.¹⁶²

In 1993, at a Chinese family funeral and farewell ceremony, which was attended by hundreds of family members, relatives, friends, colleagues, and acquaintances of the family, the mourning daughter suddenly found that the person lying in the coffin was not her dead father, but someone else.¹⁶³ Her father's body had been mistakenly cremated many days earlier and the Funeral Home tried to hide the mistake by putting another corpse in the coffin.¹⁶⁴ Feeling deeply humiliated by the mistreatment in front of so many people, the daughter went to court seeking damages and an apology.¹⁶⁵

Language School] (Zhejiang High Ct. Dec. 18, 2001) (China) [hereinafter *Zhou Haiying v. Luxun Foreign Language School*].

160. Chen Qiejia Su Chen Liming Qinhai Mingyuquan An (陈且加诉陈利明侵害名誉权) [Chen Qiejia v. Chen Liming] (Changsha Yuhua Dist. Ct. 2003) (China), *available at* http://www.lawyee.net/Case/Case_Display.asp?RID=101341 [hereinafter *Chen Qiejia v. Chen Liming*].

161. Please see discussion in the following two cases, as well as the findings of Xiao Zesheng (肖泽晟), *Mudi Shang De Xianfa Quanli* (墓地上的宪法权利), 7 FAXUE (法学) 70 (2011).

162. Compensation Liability Interpretation, *supra* note 17.

163. *Li Zhaoping v. Anyang Funeral Home*, *supra* note 146.

164. *Id.*

165. *Id.*

A 2008 case involved the destruction of the tombstone and graveyard of a plaintiff's mother.¹⁶⁶ In most rural Chinese communities, the integrity of graveyards and tombstones is important to the dignity of the dead, and the defendants' activities are seen as causing deep humiliation—and therefore defamation—to the dead and her family. If the family was not afforded a proper defense, the family would be looked down upon and degraded in social standing in the small community. The plaintiffs were awarded an apology and damages for economic loss that resulted from the defamation, although the claim for emotional damages was denied.¹⁶⁷

These are not defamation cases strictly speaking from the Western point of view. But in the Chinese community, damages to the dead's remains, belongings, and other intangible properties have been deemed a form of defamation not only of the dead, but also of their family.¹⁶⁸ In reality, the living family's passive response to this sort of defamation may further lead to degradation of their social standing and subject the whole family to ridicule and contempt, such that failing to take action against such defamation may be more harmful than the defamation itself.

II. AN ANALYSIS OF THE SELECTED CASES

Thirty-seven cases have been collected for analysis below. They are the most representative cases of posthumous defamation and privacy law, and have attracted much attention from Chinese media and lawyers. Posthumous defamation and privacy invasion cases are only a small part of all defamation cases

166. *Xiao Xinan v. Yan Yuewen*, *supra* note 146.

167. For a better illustration of reactions towards destruction of tombstones, see how the Chinese local government in Henan province has provoked anger and wrath among rural residents when the tombs of their dead family members were forced to be razed to the ground. Adam Minter, *Hungry China Turns to Grave Robbery*, BLOOMBERG (Nov. 28, 2012), <http://www.bloomberg.com/news/2012-11-28/hungry-china-turns-to-grave-robbery.html>.

168. Article 65 of the Law of the People's Republic of China on Public Security Administration Punishments prescribes that anyone intentionally destroying or damaging the grave of another person, or damaging or discarding the remains or ashes of another person, shall be fined or detained according to the seriousness of the damages. Public Security Administration Punishments Law, *supra* note 62.

and privacy cases of the past two decades, as can be observed in past studies. In the 223 defamation cases collected by Liebman from 1995 to 2004, there are only nine cases concerning posthumous defamation.¹⁶⁹ In a separate study, Chen and Ang have collected about 145 defamation cases from the court dockets in Chengdu City from 1987 to 2005, and there are only six cases relevant to defamation of the dead.¹⁷⁰

Most of the collected cases clutter together in peaks. The first such group is between 1999 and 2002, with three, three, four, and five cases in each year, respectively. The other peak is between 2007 and 2010, with two, three, two, and two cases, respectively. Outside of these groupings, 1989 had four cases, and 1997 had five cases. There was only one case reported in years 1993, 2003, 2004, and 2006.¹⁷¹ As mentioned above, there are only two posthumous criminal defamation cases reported in the past two decades.¹⁷²

Among the collected cases, seventeen are from Beijing and five from Zhejiang Province. The rest are from eleven different provinces, in which Sichuan, Hubei, Hunan, and Jilin each have two cases. Beijing has high frequencies of cases at least because it is the residence of many big publishers and close family members of dead celebrities.

In the following sections, this Article will first discuss the uneasiness of Chinese law in establishing the protection of posthumous reputation and privacy, evidenced by the law's constant back-and-forth swaying among three different approaches. Next, it will explain why posthumous privacy is protected under the rubric of posthumous reputation. Third, the Article will present the collected cases from the perspectives of defamees and plaintiffs, plaintiff's motivations and goals in litigation, defendants and their defenses, and court approaches and verdicts. After this, it will analyze the social-political backgrounds against which all of these cases arise, which is characterized by a considerable social transition. Last, it will test if there is censorship of history involved in many history-related cases before some brief concluding remarks.

169. See Liebman, *supra* note 50, at 79.

170. See Chen & Ang, *supra* note 50.

171. This figure was determined by considering cases in first-instance only, and not those on appeal.

172. See *infra* Part II.D.

A. Whose Protection?

While trying to protect the dead's reputation, Chinese law has been zigzagging over three different approaches; namely, (1) direct protection of the dead, (2) protection of the interests of the living, and (3) a combination of the two. We can observe this from the Sup. People's Ct.'s interpretations and its three published cases, as well as other posthumous defamation cases.

The first two legal interpretations of the Sup. People's Ct., from 1989 and 1990, each took a direct approach, granting legal protection of the dead's "rights to reputation."¹⁷³ But the appellate court of the 1989 Hehua Girl case did not follow the guidance strictly. The court opined in mediation that defamation of the dead could do harm to the living family relatives and that the author violated the reputation rights both of the dead and the living, thus actually taking the third approach. Then in the 1993 Sup. People's Ct. Interpretation with regard to the Fan Yinglian case, the Sup. People's Ct. did not use the term "the dead's right to reputation," but instead mentioned the "reputation of the dead."¹⁷⁴ In doing so, it recognized that posthumous defamation was protection afforded not only to the dead, but also to the adopted son. As such, the court took this third approach in holding the author liable for defamation in relation to the adopted son.

173. From the report of Tianjing High People's Court, sent to the Sup. People's Ct. on this case, we can infer how such protection was justified at that moment by legal analogy. First, the court reasoned that the dead only lose their civil capacity, and that the rights (interests) they acquired before death should be protected. The court argued that for those wronged and killed in past political events, the official restitution and vindication of their reputation was a form of protection of their reputation. The court argued that another similar situation was that criminals sentenced to the death penalty could be deprived of political rights after death by criminal law. Last, the court said that this situation was very similar to the authorship right that is inviolable and inheritable in Chinese law. See Communication of the Sup. People's Ct. Regarding the Protection of the Reputation of the Dead, *supra* note 104.

174. 1993 Zuigao Renmin Fayuan Guanyu Fanyinglian Su Jingyongxian Qin Hai Haideng Mingyuquan Yian Ruhe Chuli De Fuhan (1993 关于范应莲诉敬永祥侵害海灯名誉一案如何处理的复函) [1993 Reply of the Sup. People's Ct. Concerning the Posthumous Defamation Case of Haideng] (promulgated by the Sup. People's Ct., Feb. 1993) (China), *available at* <http://www.qinquan.info/106v9.html>.

This approach was not followed in a case published by the Sup. People's Ct.'s Gazette regarding a defamation of the dead claim involving the leading archaeologist, Li Siguang.¹⁷⁵ In this case, both the trial court and the appellate court affirmed the defamatory liability of the defendant, but did not mention defamation of the living daughter.¹⁷⁶ Instead, they grounded her remedy on the fact that the plaintiff suffered mental distress from defamation of her dead father, reflecting the court's decision to implement the second approach. After this case, other Chinese courts all followed a similar approach, granting damages based on emotional distress to plaintiffs, while avoiding mentioning the cognate defamation of the living. In the 2001 Sup. People's Ct. Interpretation regarding remedy for mental distress in torts, Article 3 directly awards the dead's surviving close relatives a right to seek remedy for emotional damages, thus affirming the favorability of the second approach.

The court partially deviated from this doctrine in the 2002 Peng Jiahui case, published by the Sup. People's Ct.¹⁷⁷ The appellate court ruled that the plaintiff's suit protected the dead's reputation, but not the reputation of the plaintiff, which, to the court, had not been under threat.¹⁷⁸ In doing so, the court overruled the judgment of the trial court, which found that defamation of the dead constitutes tortious infringement to the surviving close relatives. While it is not clear what the court meant by "tortious infringement of the close relatives," the appellate court still affirmed the emotional damages granted to the dead plaintiff by the trial court; although it denied the accompanying result of the defamation of the living close relatives.¹⁷⁹ Given this uncertainty, the appellate court has created a rather dubious decision that may reflect the court's uneasiness in taking sides. However, if we take into account the award of the emotional damages, it is still fair to say that the court took the third approach to protect the interests of both the dead and the living.

Later, in 2008, the Sup. People's Ct. expressed its strong willingness to adopt the second approach of providing protection

175. *Li Lin v. Xinshengjie Journal*, *supra* note 113.

176. *Id.*

177. *See Peng Jiahui v. China Story Journal*, *supra* note 29.

178. *Id.*

179. *Id.*

to the interests of the family in an important, authoritative article published by a judge from the Sup. People's Ct. The article explained the legal policies in judging defamation cases.¹⁸⁰ The article summarized the past legal practices in reputation protection since the 1993 Sup. People's Ct. Interpretation, and provided guidance for further application of defamation law. First, the reputation of the dead is well recognized in Chinese society, protected by Chinese law, and such protection of reputation persists for a certain period of time after death.¹⁸¹ Second, the purpose of the legal protection is *in essence* to protect the interests of the close living relatives of the dead, acknowledging the fact that defamation of the dead can have significant effects on the reputation and interests of those still living.¹⁸² Finally, because the close relatives of the dead have the legal standing to sue, the protection of posthumous reputation has a determined term.¹⁸³ This Article has thus laid out the favorability of the second approach to the Sup. People's Ct.

B. Big Reputation and Small Privacy

A prominent characteristic of the collected posthumous cases is the close affiliation of privacy to reputation, as already observed in the previous discussion. Historically, privacy has been protected under the umbrella of reputation rights in Chinese law.¹⁸⁴ However, it was not until 2009 that privacy became an independent right protected by Chinese law.¹⁸⁵ Despite the fact that privacy is now an independent right, it is the reality in China that reputation is an important concept that is pervasive in Chinese culture, while privacy, as it is conceived of in the West, is relatively new.

180. Interpretation of Sup. People's Ct.'s Reply, *supra* note 87.

181. *Id.*

182. *Id.*

183. *Id.*

184. *See supra* Part II.B.

185. The situation has been changed by the promulgation of the new Chinese Tort liability law, as discussed in Part II.B. Tort Law of the People's Republic of China, *supra* note 89. Before 2009, many Chinese scholars argued for privacy to be an independent right for better protection. *See* HAO WANG, *supra* note 19, at 145–64.

The social significance of reputation in China is tied to the concept of “face” (Mingyu or Mianzi).¹⁸⁶ While there is no exact corresponding term in English, it is similar in meaning to dignity, self-esteem, prestige, fame, and honor.¹⁸⁷ This concept of “face” plays out in Chinese society as the importance placed on the goal of social advancement and prosperity in social networks.¹⁸⁸ If we adopt the terminology used by Robert Post, reputation is understood as honor, perceived through the lens of social standing, as well as the respect commanded in a hierarchical society.¹⁸⁹ As indicated by Ho, one can lose or gain face as a result of the behavior of someone else, and this logic applies equally to both the living and the dead.¹⁹⁰ Any activities that may degrade the dead can be seen by society as direct or indirect defamation in a broad sense, and as has been repeatedly established, defamation does not only affect individuals, but the collective to which the defamed is affiliated.¹⁹¹ In China, an individual’s face and the reputation of his family are inextricably linked.¹⁹² This explains why in many cases humiliation, insult and degradation of the dead result directly in defamation of the surviving family.¹⁹³ In the collected cases, acts that bring about

186. For a detailed discussion of the Chinese concept of face, see Hu, *supra* note 79, at 45–64. Regarding the two aspects of the Chinese concept of face, the author thinks that Lien is a more personal trait resembling dignity and self-esteem, while Mianzi is more related to one’s social evaluation and interaction with others and thus much closer to the concept of reputation in Western law. See also Ho’s article proposing another account of “face” and relevant critics of Hu’s distinction. Ho, *supra* note 79, at 867–68.

187. *Id.* See also Akio Yabuuchi, *Face in Chinese, Japanese, and U.S. American Cultures*, 14 J. ASIAN PAC. COMM. 261, 263 (2004).

188. The manipulation of personal relationships in order to achieve these goals is called Guanxi (关系). See Michael Harris Bond & Kwang-kuo Hwang, *The Social Psychology of Chinese People*, in THE PSYCHOLOGY OF THE CHINESE PEOPLE 213, 223–26 (1990).

189. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 693 (1986).

190. See Ho, *supra* note 79, at 880.

191. As illustrated above, defamation of the dead, destruction of the dead’s graves, and abuse of the dead’s likeness all lead to defamation and disrespect to the dead and their family in China. See *infra* Part II.B.

192. Ho, *supra* note 79, at 880.

193. Ge Yunshong, *Civil Protection of Posthumous Personality Rights*, CHINESE COMPARATIVE LAW (BIJIAFA YANJIU) (2002). See also Hong, *supra* note 49, at 148–49.

this shame in the living include the destruction of a grave,¹⁹⁴ improper treatment of dead bodies,¹⁹⁵ abuse and illegal appropriation of likeness,¹⁹⁶ etc., in addition to ordinary libel and slander.

While privacy is an important part of reputation in China, the concept of privacy, as perceived by the West—namely the right to be let alone, freedom from government intervention, personal information control, intimacy, personhood, autonomy, etc.—are new to the Chinese.¹⁹⁷ For Chinese people, privacy denotes mostly secret, negative, and embarrassing information that creates a social imperative in an individual to hide, lest shame be brought upon the individual.¹⁹⁸ Disclosure of an individual's personal secrets is seen as weakening one's public image and reputation. Of the four concepts of privacy defined by Prosser, only disclosure of private affairs is familiar in China, while the

194. *Xiao Xinan v. Yan Yuewen*, *supra* note 146.

195. *Li Zhaoping v. Anyang Funeral Home*, *supra* note 146.

196. Zhou Haiying Yu Zhejiang Sheng Youpiaoju, Shaoxing Shi Youdianju Ji Suoshu Youpiao Gongsì Qinfan Luxun Xiaoxiang Quan An (周海婴与浙江省邮票局、绍兴市邮电局及所属邮票公司侵犯鲁迅肖像权案) [Zhou Haiying v. Zhejiang Stamp Bureau, Shaoxing Post Office et al.] (Hangzhou Interm. Ct. 1998) (China) [hereinafter *Zhou Haiying v. Zhejiang Stamp Bureau*]; Zhou Haiying Su Shaoxing Yuewang Zhubao Jinhang Qinfan Luxun Xiaoxiang Quan An (周海婴诉绍兴越王珠宝金行侵犯鲁迅肖像权一案) [Zhou Haiying v. Shaoxing Yuewang Jewelry] (Shaoxing Dist. Ct. Dec. 6, 2000) (China) [hereinafter *Zhou Haiying v. Shaoxing Yuewang Jewelry*]; *Chen Mou v. Wangmou*, *supra* note 147; Du Hui, Guo Xiaolin Deng Su He Fanzhen He Jilin Ribaoshe Deng Qinfan Mingyuquan Xiaoxiangquan An (杜惠、郭小林、郭岭梅、郭晓惠诉贺方钊、幸福杂志社、湖南省作家协会、四川日报社、吉林日报社、购物导报社侵犯名誉权、肖像权案) [Du Hui et al. v. Jilin Daily News, Xinfu Magazine et al.] (Beijing No. 1 Dist. Ct. Nov. 17, 2000) (China) [hereinafter *Du Hui v. Jilin Daily News*]; Wang Xiuzhen Jiemei Su Beijing Songtang Yiyuan Qinfan Xiaoxiangquan An (王秀珍姐妹诉北京松堂医院侵犯其母肖像权) [Wang Xiuzhen et al. v. Beijing Songtang Hospital] (Beijing Chongwen Dist. Ct. Nov. 29, 1999) (China), available at <http://sifaku.com/falvanjian/2/zapcza9e9163.html> [hereinafter *Wang Xiuzhen v. Beijing Songtang Hospital*]; Zhou Haiying su Beijing Quansheng Ji bi Gongsì Qinfan Luxun Xiaoxiang Quan An (周海婴诉北京泉生集币公司侵犯鲁迅肖像权案) [Zhou Haiying v. Beijing Quansheng Ltd.] (1998 Mediation) (China) [hereinafter *Zhou Haiying v. Beijing Quansheng Ltd.*].

197. See Zhu, *supra* note 76, at 208; HAO WANG, *supra* note 19, at v.

198. This is reflected in Posner's approach to take privacy as personal secrecy that is hidden from others for personal good. Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1977); Posner, *supra* note 78.

other three, let alone the concept of constitutional privacy, are completely foreign concepts.

In this regard, sexuality-related issues are always the central concern of the Chinese. Even speaking about sex in public is a shameful thing in Chinese culture.¹⁹⁹ While the situation is changing in recent years, sexuality is still taboo, and activities like extra-marital sex, homosexual orientation, sodomy, and prostitution are all behaviors that go against prevailing public morals and therefore bring about shame and bad reputation.²⁰⁰ Given this sensitivity to sexuality, an effective way to disparage individuals in China is to expose their sex-related secrets. In fifteen of the collected cases, plaintiffs claimed that the defamation of their dead relatives through publication of their private sexual affairs was not true.²⁰¹ When sexually graphic depictions are involved, such publications become all the more humiliating and insulting to the dead and their surviving family.

To summarize, the indifference of the Chinese towards the modern legal concept of privacy, together with the overarching concept of reputation, can account for China's weak privacy law practice in the past decades. When privacy is deemed a reputation-related issue, and when there is no compelling demand to

199. In China, sex and related issues are not public subjects and are considered a shameful thing for most Chinese according to tradition. One aspect of privacy is the "shameful secret," defined as a hidden bad thing, usually relating to "sexual affairs." Zhu, *supra* note 76, at 208–09.

200. *Id.*

201. See, e.g., *Tang Min's Criminal Defamation Case*, *supra* note 29; *Chen Xiuqin v. Wei Xilin*, *supra* note 29. See also *Hou Shoujin Yu Zhongguodianying Jituan Gongshi Deng Qinheimingyuquan An* (霍寿金与中国电影集团公司等侵害名誉权案) [*Huo Shoujin v. China Film Group et al.*] (Beijing High Ct. July 24, 2007) (China) [hereinafter *Huo Shoujin v. China Film Group*], available at <http://www.fsou.com/html/text/fnl/1176753/117675388.html>; *Chen Xiaoying v. Chen Hongying*, *supra* note 5; *Peng Jiahui v. China Story Journal*, *supra* note 29; *Tao Yuyun v. Ouyang Youhui*, *supra* note 29; *Wang Haicheng v. Li Ying*, *supra* note 29; *Chen Hong v. Shi Gengli*, *supra* note 29; *Widow of Xie Jin v. Song Zude*, *supra* note 16; *Chen Hong v. Beijing Film*, *supra* note 29; *Yang Kewu v. Center Theater*, *supra* note 29; *Ling Li v. Cao Jisan*, *supra* note 30; *Fan Zhiyi, Fan Zhibi Su Liu Deyi, Shichuan Tianhong Yingshi Zhizuo Gongsi, Emei Diangying Zhipianchang Yinxiang Chubanshe Mingyuquan An* (范之懿、范之碧诉刘德一、四川天虹影视制作公司、峨嵋电影制片厂音像出版社名誉侵权案) [*Fan Zhiyi & Fan Zhibi v. Liu Deyi et al.*] (Chongqing Yuzhong Dist. Ct. 2001) (China) [hereinafter *Fan Zhiyi v. Liu Deyi*].

protect privacy interests other than secrecy, the Chinese law stays silent on the issue.

Furthermore, as explained above, an individual's reputation is not limited to his or her own self. Just as the reputation of an individual's family reflects on them, so too do their actions reflect on their family. As such Chinese reputation is more affiliated with the collective: family, affiliated institutions and associations, and communities which once belonged to the dead. As the Sup. People's Ct. put it, "Under China's present social circumstances, an individual's family backgrounds, social origins and social relations have certain effects on one's work, personal life and social life; Defamation of the dead always directly influences the reputation of close relatives and their other interests."²⁰² For instance, in a case involving the defamation of military hero, Dong Cunrui, who died in China's Civil War in 1949,²⁰³ Dong's former comrades in arms and a representative from the military force in which he served, joined the plaintiff as third parties because they had substantive interests in the trial.²⁰⁴ Because of Dong's fame, defamation aimed at him undoubtedly harmed those parties and institutions most closely associated with him. In a sense, their honor and privilege in the community tracks the honor and privilege accorded to Dong, and as such they are given a right to protect their interest in him.

Because of Chinese society's hierarchical nature, reputation as honor, which works as a proxy for social status, is still central to Chinese society.²⁰⁵ This is because individuals receive substan-

202. Interpretation of Sup. People's Ct.'s Reply, *supra* note 87.

203. Dong Cunmei Su Guowei Ji Dazhongdianying Deng Qinfan Mingyuquan An (董存梅诉郭维、大众电影杂志社、某电视台侵犯英雄董存瑞名誉权一案) [Dong Cunmei v. Guo Wei, Dazhong Film Magazine et al.] (Beijing Chaoyang Dist. Nov. 9, 2009) (China) [hereinafter *Dong Cunmei v. Guo Wei*].

204. Article 56 of the Chinese Civil Procedure Law allows a third party to join a litigation when its legal interests are affected (whether it has an independent claim to the subject matter of action or not) or when that party's civil liability is involved. See Civil Procedure Law of the People's Republic of China (2007 Amendment), *supra* note 68.

205. Strong collectivism and hierarchy are deeply rooted in Chinese Confucian tradition and strengthened by the communist regime, of which "face" (repute and honor) in "Guanxi" (social network) is highly important for all individuals. The hierarchical nature is also seen in corporate governance and conflict resolution studies. See, e.g., Irene Hau-Siu Chow & Ignace Ng, *The*

tive economic interests and other social benefits through collective institutions, on the condition that they become a part of the “systems or institutions” (体制 Tizhi) that pervade all aspects of Chinese culture, and include families, government bureaus, companies, or the like.²⁰⁶ Because a person’s place in Chinese society is based on their interaction with collective groups, and interaction with these collective groups is based on reputation, individuals must be able to defend their reputations. This is in contrast to western societies, especially American society, where individualism is prized and one is less likely to inherit their reputation from the dead.²⁰⁷

C. Defamees and Plaintiffs

In the collected defamation cases, which are representative of wider trends in Chinese defamation law, most defamees are dead public figures and celebrities. Such celebrities include a scientist,²⁰⁸ a professor,²⁰⁹ military heroes or martyrs,²¹⁰ mili-

Characteristics of Chinese Personal Ties (Guanxi): Evidence from Hong Kong, 25 ORG. STUD. 1075, 1080 (2004); GUO-MING CHEN & RINGO MA, CHINESE CONFLICT MANAGEMENT AND RESOLUTION 11–14 (2002). Regarding the collective nature of China, see generally P. Christopher Earley, *Social Loafing and Collectivism: A Comparison of the United States and the People’s Republic of China*, 34 ADMIN. SCI. Q. 565 (1989).

206. An important instantiation of such institutions is the highly criticized “Hukou” institution, which divides the rural and urban residents into two social groups, providing them with very different social welfare, as well as legal and political status. See generally Kam Wing Chan & Will Buckingham, *Is China Abolishing the Hukou System?*, 195 CHINA Q. 82 (2008); Tiejun Cheng & Mark Selden, *The Origins and Social Consequences of China’s Hukou System*, 139 CHINA Q. 644 (1994).

207. See Post, *supra* note 190, at 736.

208. *Li Lin v. Xinshengjie Journal*, *supra* note 113.

209. Long Yunsha Yu Lujiandong Ji Sanlian Shudian Qin Hai Mingyuquan An (龙云莎与陆键东、三联书店侵害名誉权案) [*Long Yunsha v. Lu Jiandong & Sanlian Book Store*] (Beijing No. 1 Interm. Ct. Sept. 29, 1999) (China) [hereinafter *Long Yunsha v. Lu Jiandong*].

210. *Peng Jiahui v. China Story Journal*, *supra* note 29; *Chen Hong v. Shi Gengli*, *supra* note 29; *Chen Hong v. Beijing Film*, *supra* note 29; *Dong Cunmei v. Guo Wei*, *supra* note 203; Gao Quanting He Gao Ruiting Yu Zongzhengzhibu Huajutuan Deng Qin Hai Mingyuquan An (高泉亭和高瑞亭将总政治部话剧团等三方侵犯誉权案) [*Gao Quanting & Gao Ruiting v. Central Theater of Political Bureau of PLA*] (Beijing Haidi Dist. Ct. 2005) (China) [hereinafter *Gao Quanting v. Central Theater*]; *Yang Kewu v. Center Theater*, *supra* note 29.

tary generals,²¹¹ leading musicians and artists,²¹² political leaders,²¹³ Kung Fu Masters,²¹⁴ famous writers,²¹⁵ film directors,²¹⁶ etc., who died between the 1920s and 2009. The most famous politician of the dead defamees is the former Chinese Vice Prime Minister Chen Yonggui, who entered the Chinese political stage during the Cultural Revolution with support from Mao. In a recent biography by Wu Si,²¹⁷ a famous historian,

211. Chen Lin Deng Yu Wu Dongfeng Mingyu Qinquan An (陈琳、陈婧媛、陈延滴与吴东峰名誉权案) [Chen Lin et al. v. Wu Dongfeng] (Beijing No. 1 Interim Ct. Sept. 10, 2008) (China) [hereinafter *Chen Lin v. Wu Dongfeng*]; Shi Yi, Wang Amin Yu Wu Dongfeng Mingyuquan Jiufen An (史易、王阿闽与吴东峰名誉权纠纷一案) [Shi Yi & Wang Amin v. Wu Dongfeng] (Nanjing Interim Ct. Aug. 15, 2008) (China) [hereinafter *Shi Yi v. Wu Dongfeng*]; Feng Jining Su Xian Dianying Zhipianchang Mingyu Qinquan An (冯寄宁诉西安电影制片厂名誉侵权) [Feng Jining v. Xi'an Film Enterprise] (Xi'an Beilin Dist. Ct. Aug. 5, 2008) (China) [hereinafter *Feng Jining v. Xi'an Film Enterprise*]; *Li Moumou v. Kong Qingde*, *supra* note 29; *Chen Qiejia v. Chen Liming*, *supra* note 160; *Fan Zhiyi v. Liu Deyi*, *supra* note 201.

212. See generally *Wang Haicheng v. Li Ying*, *supra* note 29; *Chen Xiuqin v. Wei Xilin*, *supra* note 29; *Du Hui v. Jilin Daily News*, *supra* note 196.

213. *Tao Yuyun v. Ouyang Youhui*, *supra* note 29; Chen Mingliang Yu Beijing Qingnianbao He Wu Shi Qianfan Mingyuquan An (陈明亮与北京青年报社、吴思名誉权纠纷案) [Chen Mingliang v. Wu Shi & Beijing Youth Newspaper] (Beijing No. 1 Interim Ct. Dec. 29, 2003) (China) [hereinafter *Chen Mingliang v. Wu Shi*]; *Long Yunsha v. Lu Jiandong*, *supra* note 209; Lu Shan Su Zhang Zhenglong He Renmin Chubanshe Qinfan Mingyuquan An (卢山诉张正隆和人民出版社侵犯名誉权案) [Lu Shan v. Zhang Zhenglong & Renmin Publishing House] (Beijing Dongcheng Dist. Ct. Dec. 27, 2009) (China) [hereinafter *Lu Shan v. Zhang Zhenglong*].

214. *Huo Shoujin v. China Film Group*, *supra* note 201; Fan Yinglian Yu Jing Yongxiang Qin Hai Deng Mingyu Quan An (范应莲与敬永祥侵害海灯名誉权案) [Fan Yinglian v. Jing Yongxiang] (Shichuan High Ct. Aug. 17, 1998) (China) [hereinafter *Fan Yinglian v. Jing Yongxiang*], available at <http://www.qinquan.info/106v9.html>.

215. *Zhou Haiying v. Shaoxing Yuewang Jewellery*, *supra* note 196; *Chen Xiaoying v. Chen Hongying*, *supra* note 5; *Zhou Haiying v. Luxun Foreign Language School*, *supra* note 159; *Zhou Haiying v. Zhejiang Stamp Bureau*, *supra* note 196; *Du Hui v. Jilin Daily News*, *supra* note 196; *Zhou Haiying v. Beijing Quansheng Ltd.*, *supra* note 196; Zhou Haiying Su Luxun Meishu Xueyuan Qinfan Luxun Xingmingquan An (周海婴鲁迅美术学院侵犯鲁迅的姓名权) [Zhou Haiying v. Luxun Art School] (Trademark Office of the State Administration for Industry & Commerce of China 2001) (China) [hereinafter *Zhou Haiying v. Luxun Art School*].

216. *Widow of Xie Jin v. Song Zude*, *supra* note 16; *Ling Li v. Cao Jisan*, *supra* note 29.

217. *Chen Mingliang v. Wu Shi*, *supra* note 213.

Chen was depicted as “a good peasant of Mao.”²¹⁸ The author disclosed many unknown stories of Chen from the Sino-Japanese War and Cultural Revolution that consequently had a negative impact on his national reputation.²¹⁹ The book was serialized in the famous Beijing Youth Newspaper, which commands a large audience in the country. The author was accused of defamation by Chen’s son and wife in Beijing, and the appellate court ordered 20,000 RMBs in damages and a public apology.²²⁰

Like Chen’s case, an interesting category of defamee is the dead public figure that is closely affiliated to official Chinese history.²²¹ In such a context, stories that effect personal reputation will be treated as defamatory if they put forward a challenge to the related official history.²²² Usually, Chinese courts will refer to official history in a posthumous defamation case and adopt decisions accordingly.²²³ However, Chinese courts are more relaxed when cases are not politically-charged and therefore will have less impact on sensitive history.²²⁴ For example, in contrast to cases that might affect the official version of history, in the above-mentioned Hehua Girl case, the adjudicating Court was rather neutral and delivered very persuasive argumentation to justify the protection of posthumous reputation.²²⁵

In the collected cases, following Chinese law, plaintiffs are all close family members of the dead that decide to stand up to the defamation of their beloved and attempt to defend the honor of their family. However, sometimes a plaintiff’s relationship to the dead is called into question by the defendants, and not all plaintiffs are recognized by court as qualified to sue. As such, plaintiffs have to provide solid evidence to prove that they are qualified litigants. For example, Huo Zhizeng’s litigation right was questioned by the ten defendants—including the international film star Jet Li and Jet Li’s film director, film producer, distributor, etc.—when he went to court to defend the posthu-

218. *Id.*

219. *Id.*

220. *Id.*

221. *See infra* Part IV.

222. *Id.*

223. *Id.*

224. *Id.*

225. *See Chen Xiuqin v. Wei Xilin, supra* note 29.

mous reputation of his grandfather, Huo Yuanjia, one of China's most famous Kung Fu masters.²²⁶ The trial court in Beijing accepted this case and made it clear that, (a) when a household registration record (Hukou Dengji in Chinese) is not available, a family genealogy book is valid proof, since any change must be approved by the whole family; (b) the plaintiff's reservation in the family graveyard can be considered a valid evidence of kinship; and (c) the testimony of witnesses from the hometown of the dead Kung Fu master are acceptable to the court.²²⁷ In so ruling, the court recognized the validity of Chinese conventions and customs on the matter of kinship relation.

However, despite this ruling, family genealogy is not always accepted by Chinese courts. In another case, Yang Kewu protested against the distorted image in a TV drama series of his adoptive father, Yang Zirong, a dead military hero and martyr.²²⁸ Both the trial court and the appellate court rejected his litigation right on the ground that the law does not recognize him as the dead's adopted son, given that the hero died before the plaintiff's birth and had not expressed the intention for his adoption. Though the dead's wife may have done so, there was never an agreement on the issue between the couple. In so ruling, the court even ignored a suspicious change in the genealogy book provided by the plaintiff.²²⁹

Among other things, the economic and physical conditions of plaintiffs are significant matters to be considered. Usually, when potential plaintiffs are poor, they will not opt for legal action and thus no case will be reported. A good example is what happened to Sun Guoxuan, an elderly man whose legal battle was only possible when local lawyers offered him free legal ser-

226. *Huo Shoujin v. China Film Group*, *supra* note 201.

227. *Id.*

228. *Yang Kewu v. Center Theater*, *supra* note 29.

229. Though there was no consensus between Yang and his wife on the adoption issue, and no expression of intention by the hero himself, the adoption should have been accepted had the courts taken the Chinese tradition into consideration. In China, the worst situation for a family is to have no male descendant. This can be made up for by adoption of children of the same surname from close family members. Though Yang's wife had never seen Yang after his departure, she was his official wife and should have the right to make the adoption. This is a well-recognized practice, even nowadays in most Chinese rural areas. *Id.*

vice.²³⁰ His original claim was struck down by the court of first instance, although he eventually was vindicated on some of his claims after appeal.²³¹ Like Sun, many plaintiffs are very old—especially when they are the brothers or sisters of the deceased.

In the cases where a plaintiff dies during a trial, however, the case may still continue on the condition that his or her heir(s) will not waive the right of litigation.²³² Such was the case when Peng Jiahui died during her appeal regarding the defamation of her dead brother, and the case was reopened after her five children agreed to step in, ultimately winning and inheriting the damages awarded to their dead mother.²³³

A final observation worth noting is that Chinese law allows third parties to join the plaintiffs, on the condition that they have substantial interests involved, or the outcome may have significant influences on their interests.²³⁴ As mentioned above, in the case regarding the defamation of a Chinese military hero and martyr that died in the Chinese Domestic War in 1949, two third parties, namely the dead's previous comrades in arms and the military force which they once served, joined the plaintiff to defend the dead's reputation.²³⁵

D. Motivations and Goals

Defamation of the dead and invasion of their privacy in the collected cases has brought close family members together before courts to defend their interests and rights in general. Yet, a more detailed discussion of the motivations and goals behind

230. Sun Guoxuan Yu Henan Wenyichubanshe, Hou Hongxu Qin Hai Mingyuquan An (孙国焯与河南文艺出版社、侯鸿绪侵害名誉权案) [Sun Guoxuan v. Hou Hongxu et al.] (Hangzhou Interm. Ct. Dec. 15, 2000) (China) [hereinafter *Sun Guoxuan v. Hou Hongxu*].

231. *Id.*

232. Chinese law allows the continuation of the legal proceedings in which the plaintiff died and his lawful heirs explicitly want to continue the case.

233. *Peng Jiahui v. China Story Journal*, *supra* note 29. One may doubt the verdict because if the dead mother can suffer mental distress from defamation of her brother and be awarded damages, it is not clear how her children can suffer. Because Ms. Peng died during appeal, her children should not have been awarded damages.

234. *See* Civil Procedure Law of the People's Republic of China (2007 Amendment), *supra* note 68, art. 56.

235. *Dong Cunmei v. Guo Wei*, *supra* note 203.

these lawsuits is needed to enhance our understanding of the general situation in China, as well as what sorts of particular issues present the greatest threat to the surviving families.

The primary offense that agitated many plaintiffs was the fabrication and publication of the dead's private life, in particular sensational matters related to sexuality or extra-marital affairs. For most family members and children in China, publicity of sexual activity and sensational private matters are embarrassing and libelous *per se*, harming not only the deceased's reputation, but also their family's honor.²³⁶ The chief culprits include novelists, autobiography writers, or film directors who sought to attract larger audiences by intentionally adding fictional, romantic stories and sensational sexual episodes to satiate the public's curiosity and taste. This kind of fabrication is directly defamatory to surviving family members. Of the thirty-seven collected cases, fifteen were brought to court for this particular reason.²³⁷

A telling example is the detailed description, in a book, of a national heroine's physical conditions—in particular her wounded sexual organs—after brutal electrical torture by the Japanese special forces during the Sino-Japanese War.²³⁸ The author said that his intention was to demonstrate her bravery, sacrifice, and determination not to betray others while facing the severest torture, but the plaintiff argued that the graphic nature of the description was not necessary for the story.²³⁹ Instead, the details were offensive and insulting, and violated the dignity of the dead.²⁴⁰ Moreover, the plaintiff's consultation with many experts found no evidence to suggest that the author's claims for the depictions were factually supported.²⁴¹

A second significant category of posthumous defamation pertains to the dead's official reputation ante-mortem, such as in cases where the dead is part of official history, as discussed

236. See *supra* Part II.B, ¶ 4.

237. See cases cited *supra* note 201.

238. *Chen Hong v. Shi Gengli*, *supra* note 29.

239. *Id.*

240. *Id.*

241. Wang Shouquan & Wang Di, *Lishi Sanwen "Zhebi Yujiyi Zhaoyiman" Yinfa Qinquan De Falu Fanshi* (历史散文《遮蔽与记忆：赵一曼》引发侵权案的法律反思), ZHENGYIWANG (正义网) (Mar. 26, 2010), http://news.jrb.com/xwjj/201003/t20100326_336729.html.

above in the case concerning China's previous Vice Premier Minister Cheng Yonggui. The publication of false facts, or facts harmful to the dead's official good reputation, will injure the dead's family and warrant litigation.²⁴² In a sense, protection of the dead's reputation is equal to the protection of the official history. This will be discussed at greater length in the following section.

There are two forms of defamation in this category. First, in some cases, new narratives can be completely contrary to the official reputation or identity, and, therefore, the involved families have a very strong claim. For example, there is a case concerning the famous Shaolin Temple Kung Fu master Hai Deng, who had acquired a high political status and was praised by the state authority upon his death.²⁴³ In the case, an author published several articles in different magazines claiming that the dead's special Kung Fu techniques were a form of cheating.²⁴⁴ Given that Hai Deng's reputation is founded on his skill at Kung Fu, this was a devastating attack on the dead.²⁴⁵ Such claims were unacceptable to the plaintiff, the adopted son of the dead, who as a Kung Fu master himself, stood to lose much in the way of reputational capital. The appellate court's opinion was vague on whether or not the Kung Fu Master's martial skill was real or not, but instead grounded the judgment of alleged issues on official documents and the dead's personal achievements to rebut the author's publication.²⁴⁶

Another example of this first form is the defamation case regarding Peng Jiazhen.²⁴⁷ Peng's real name and historical background was used in a novel, but was attached to a totally fictional, defamatory narrative.²⁴⁸ Peng was viewed by the state authority as a hero who dedicated his life to the Xinhai Revolution, and a positive influence. The novel failed to reflect this in any sense, and instead violated the dead's personality and dignity according to both the trial and appellate courts.²⁴⁹

242. *Chen Mingliang v. Wu Shi*, *supra* note 213.

243. *Fan Yinglian v. Jing Yongxiang*, *supra* note 214.

244. *Id.*

245. *Id.*

246. *Id.*

247. *See Peng Jiahui v. China Story Journal*, *supra* note 29.

248. *Id.*

249. *Id.*

The second form of defamation of political or quasi-political figures is when defamation concerns trivial issues of the dead, and will not change the dead's good reputation on the whole. Still, even trivial issues can humiliate or insult the surviving family. For instance, when a film told the story of a dead military hero with his real name, he was portrayed as an orphan without a sister and brother, and was labeled with the wrong birthplace.²⁵⁰ This agitated the local community where the hero was born and grew up, whose residents were proud of the dead and enjoyed the benefits of his fame.²⁵¹ For this reason, the dead's brother and sister sued for defamation of the dead and claimed damages for mental distress.²⁵²

In cases like the above, even if the involved family is not motivated to bring a case, the local community or other institutions may encourage or push the family to sue, highlighting the collective nature of reputation in China. This puts families in the awkward position of bringing a claim they do not wish to bring, or cannot afford to bring, in order to maintain their status in the community.²⁵³ To defend the reputation of the dead, and thus the reputation of the family, is a strong motivating factor behind much posthumous defamation litigation.

A third category of defamation of the dead claims is comprised of cases of illegal appropriation of the dead's likeness for advertisement or other similar purposes, which are seen as disrespectful to the dead and their family. As an example, a dead father's body was accidentally cremated and his casket was filled with someone else's body at the family's funeral.²⁵⁴ This was seen as a serious humiliation (and thus defamation) of both the dead and his family, causing them to lose face before funeral attendants.²⁵⁵

In another case where a dead mother's portraits were put on tombstones for commercial advertisements, the plaintiffs sued the advertiser for appropriation of the dead's likeness and

250. *Gao Quanting v. Central Theater*, *supra* note 210.

251. *Id.*

252. The two plaintiffs eventually withdrew the case for various reasons. *Id.*

253. Hu wrote in 1944 that "[p]ublic disgrace or ridicule of a serious nature is bound to have an effect on the reputation of the family." However, the situation largely remains the same, even today. Hu, *supra* note 79, at 50.

254. *Li Zhaoping v. Anyang Funeral Home*, *supra* note 146.

255. *Id.*

sought emotional damages.²⁵⁶ According to the plaintiffs, their father died from insult and anger as a result of seeing the advertisements and hearing rumors circulating in the local community.²⁵⁷ Placing his wife's portraits on the tombstone advertisement was seriously offensive to the family, and made the family the laughingstock of the local community.²⁵⁸ While the act was offensive, taking legal action was necessary to avoid the risk of being perceived as cowardly had the family not sought reparations, a risk that is especially real in rural areas.

A fourth category is comprised of the significant humiliation of the dead and their family caused by the destruction of the tombs and graves of the dead. This kind of offense is also taken especially seriously in rural areas, due to the sanctity of such places under Chinese tradition.²⁵⁹ It is offensive not only as an analog to the intrusion of the homes of the living, but also as an insult to the dead's family, who are perceived as unable to protect the resting place of their kin.²⁶⁰

Fifth, we have to pay attention to the economic interests involved in posthumous defamation and privacy torts. In addition to appropriation of the dead's likeness and names, protection of the copyrights of the dead in books and artistic works is an important cause of action in defamation-related cases in China. For instance, beginning in the late 1990s Zhou Haiying—son of Luxun, who was defined by the state authority as the leading writer of China's New Culture Movement—initiated a series of cases to protect his father's publicity rights and copyrights.²⁶¹

As the above cases indicate, the principal goal of plaintiffs is to protect the reputation of the dead and the family's reputational interests (social standing and status, face, or other economic interest). Many of the dead defamees are public figures with

256. *Chen Mou v. Wangmou*, *supra* note 146. In another similar case, the portrait of the plaintiff's mother appeared on a hospital advertisement advertised on shuttles on Beijing streets. *Wang Xiuzhen v. Beijing Songtang Hospital*, *supra* note 196.

257. *Id.*

258. *Id.*

259. *Xiao Xinan v. Yan Yuewen*, *supra* note 146.

260. *See* *Xiao Zesheng*, *supra* note 161.

261. *Zhou Haiying v. Shaoxing Yuewang Jewellery*, *supra* note 196; *Zhou Haiying v. Luxun Foreign Language School*, *supra* note 159; *Zhou Haiying v. Zhejiang Stamp Bureau*, *supra* note 196; *Zhou Haiying v. Luxun Art School*, *supra* note 215; *Zhou Haiying v. Beijing Quansheng Ltd.*, *supra* note 196.

local or national reputations that bring honor and prestige to their families. Plaintiffs believe it is wrong for defendants to profit through defaming the dead, and accordingly seek justice from the law. Because of how Chinese react to these breaches of their honor, nearly all seek an apology from defendants—public or private, court-approved or not—and restoration of posthumous reputation. Their claims also typically include cessation of tortious activities, such as further publication and dissemination, and further newspaper coverage.²⁶²

Furthermore, most plaintiffs seek money damages, either for mental distress or substantive damages incurred. Under different circumstances, the claims range from a low of about 400 RMB (about 60 USD) in 1989,²⁶³ to a high of 1,000,000 RMB (about 154,000 USD) in 1997 and 1999.²⁶⁴ As the income of Chinese people has largely increased in the past two decades, so too has the amount of damages for defamation and privacy invasion claims. In a sense, people have become more aware of the economic value of reputation and their emotional damages than they have been previously.²⁶⁵ However, not all plaintiffs seek monetary damages. In these cases, plaintiffs openly declared that they only sought to defend the reputation of the dead and their family honor, and as such only needed an apology.²⁶⁶

Besides these private goals, a plaintiff in a 2010 case even proclaimed their motivation was to protect the dignity and identity of the Chinese nation and people via law.²⁶⁷ This makes sense in the context of the dead, who as national heroes or

262. These are observed in most of the collected posthumous reputation and privacy cases, which echoes Liebman's findings. Liebman, *supra* note 50, at 83–93.

263. See *Chen Xiuqin v. Wei Xilin*, *supra* note 29.

264. *Li Lin v. Xinchengjie Journal*, *supra* note 113; *Du Hui v. Jinlin Daily News*, *supra* note 196.

265. For example, ordinary plaintiffs in Chinese defamation cases, although they do not receive large awards, still bring cases just for being famous. Businesses also bring cases to enlarge their commercial reputation by media coverage and free advertising. See, e.g., Liebman, *supra* note 50, at 87.

266. *Chen Hong v. Shi Gengli*, *supra* note 29; *Feng Jining v. Xi'an Film Enterprise*, *supra* note 211.

267. The plaintiff's goals of the lawsuit were "to protect his grandma's rights, and more than that, to defend the national image and dignity." *Chen Hong v. Beijing Film*, *supra* note 29. For the story, see GUANJIE (关捷), *Zhaoyiman Sunnu: Wo Hanwei De Shi Guojia Xingxiang* (赵一曼孙女: 我捍卫的是国家形象), HUANQIU SHIYE (环球视野) (Apr. 24, 2010).

martyrs are recognized as an indispensable part of national identity. Defamation of the dead at its most extreme can therefore lead to the destruction of the national identity. For instance, when Dong Cunmei and others sued for defamation of the dead military hero Dong Cunrui, what they had in mind was not only to protect the dead's reputation, but also to defend his identity and character, which was put down in school textbooks and widely learned by students as part of national character.²⁶⁸ With such motivations, Chinese courts cannot ignore such compelling calls.

E. Defendants

In the collected thirty-seven cases, most defendants are authors of biographies, documentary literature, novels, and journal or newspaper articles, or are TV or film directors, producers, or actors. Many of them bear national or international reputations. For example, Hong Ying, who was accused in the K Case, is an internationally-known author, Wu Si is a famous liberal historian, and Li Lianjie is the international film star Jet Li.²⁶⁹ Given their fame, their defamation cases always attract more attention than others. There are also official educational institutions and companies involved in publicity cases that made use of the dead's names, images, or likeness without the consent of the dead's family. For example, one commercial company in Beijing and another foreign language school in Zhejiang were accused of illegal use of the dead writer Lu Xun's name and likeness.²⁷⁰

In recent years, internet commentators and bloggers are also listed as defendants in relation to their online speech.²⁷¹ In a

268. *Dong Cunmei v. Guo Wei*, *supra* note 203. The story of hero Dong Cunrui has been put in Chinese history textbooks and regarded as the model of self-sacrifice for the collective good. See, e.g., *Army Joins Lawsuit to Save Hero Fame*, CHINA DAILY (Apr. 22, 2007), http://www.chinadaily.com.cn/china/2007-04/22/content_856549.htm. For a real story of the influences of such stories on school education, see ZHIYONG ZHU, STATE SCHOOLING AND ETHNIC IDENTITY: THE POLITICS OF A TIBETAN NEIDI SECONDARY SCHOOL IN CHINA 193 (2007).

269. *Huo Shoujin v. China Film Group*, *supra* note 201.

270. *Zhou Haiying v. Luxun Foreign Language School*, *supra* note 159; *Zhou Haiying v. Beijing Quansheng Ltd.*, *supra* note 196.

271. *Chen Lin v. Wu Dongfeng*, *supra* note 211; *Shi Yi v. Wu Dongfeng*, *supra* note 211; *Widow of Xie Jin v. Song Zude*, *supra* note 16.

2009 case, two popular online commentators, Song Zude and Liu Xinda, were accused of defamation by the wife of the most famous Chinese film director, Xie Jin, for publishing stories that Xie died from overindulging in sex with young prostitutes at a hotel, and that he had an extra-marital son with a famous actress living abroad.²⁷²

Individual defendants are joined by the mass media: book publishers, newspapers, journals, film companies, tabloids, magazines, and sometimes even distributors are also listed as defendants. Many of them are state-owned enterprises at different administrative levels.²⁷³ However, since commercial reform started in the early 1990s, they have become more critical and aggressive to compete for audience and profits.²⁷⁴ The price of such competition is an increase in defamation accusations. This is especially true as people become more aware of their rights consequent to China's deepening legal reforms.²⁷⁵

Most of the media and publishing companies involved in the collected cases are from the provincial level, but there are also some national companies involved, such as Zhuojia Magazine, Renmin Publishing House, and Zhuojia Publishers. Moreover, two famous film companies—China Film Group Cooperation and Beijing Film—and even the state-owned propaganda en-

272. *Widow of Xie Jin v. Song Zude*, *supra* note 16.

273. See the following cases in which state-owned media were involved: *Chen Xiaoying v. Chen Hongying*, *supra* note 5; *Chen Mingliang v. Wu Shi*, *supra* note 213; *Sun Guoxuan v. Hou Hongxu*, *supra* note 230; *Long Yunsha v. Lu Jiandong*, *supra* note 209; *Lu Shan v. Zhang Zhenglong*, *supra* note 213; *Li Moumou v. Kong Qingde*, *supra* note 29; *Ling Li v. Cao Jisan*, *supra* note 29; *Du Hui v. Jilin Daily News*, *supra* note 196.

274. See Liebman, *supra* note 50, at 46. For a description of Chinese media reform and its influences, see Daniela Stockmann & Mary E. Gallagher, *Remote Control: How the Media Sustain Authoritarian Rule in China*, 44 COMP. POL. STUD. 436, 440–42 (2011); Roya Akhavan-Majid, *Mass Media Reform in China: Toward a New Analytical Framework*, 66 GAZETTE 553 (2004).

275. See, e.g., Peter Lorentzen & Suzanne Scoggins, *Rising Rights Consciousness: Undermining or Undergirding China's Stability?* (Sept. 1, 2011) (unpublished manuscript), available at <http://papers.ssrn.com/abstract=1722352>; Li Liangjiang, *Rights Consciousness and Rules Consciousness in Contemporary China*, 64 CHINA J. 47 (2010); Elizabeth J. Perry, *A New Rights Consciousness?*, 20 J. DEMOCRACY 17 (2009).

terprise China Central Television ("CCTV") have been sued for defamation of the dead.²⁷⁶

Given their previous affiliations with the state authorities, these plaintiffs could be treated very differently by Chinese courts. It is notable that when defendants have a close connection with a state authority, their cases are likely to be judged in their favor.²⁷⁷ This is because in China, when law is dependent on politics, Chinese judges are working under political power that controls their career and life. If a case involves someone who has a close connection to state power, there is no such thing as independent judgment and a neutral verdict.²⁷⁸ An extreme case involves a defendant with a military background. When three plaintiffs accused General Kong Qingde and People's Liberation Army Publishing House of defamation of their dead father, Li Yingxi, they encountered enormous difficulties.²⁷⁹ The two generals involved in the defamation case worked together during China's Cultural Revolution, but General Kong's recent autobiography depicted his old colleague as a bad figure, which angered his three children.²⁸⁰ The trial court first refused to accept the case, and sent it to the Intermediate People's Court of Wuhan, which after an unsuccessful mediation filed a report to the People's High Court of Hubei for further guidance.²⁸¹ Finally, the case was directed back to the trial court, and in a secret trial, the court rejected the plaintiffs' claim after another unsuccessful mediation effort.²⁸²

Obviously, the military background of the defendant, to which local politicians have to yield, put the trial court in a difficult situation with no alternative. In two similar cases, defendants with strong military backgrounds also demonstrated no fear of

276. *Huo Shoujin v. China Film Group*, *supra* note 201; *Chen Xiaoying v. Chen Hongying*, *supra* note 5; *Lu Shan v. Zhang Zhenglong*, *supra* note 213; *Dong Cunmei v. Guo Wei*, *supra* note 203; *Ling Li v. Cao Jisan*, *supra* note 29.

277. See Liebman, *supra* note 50, at 51–54.

278. For a brief discussion of the dependence of Chinese courts on political power, see RONALD C. BROWN, UNDERSTANDING CHINESE COURTS AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS 127–30 (1997).

279. *Li Moumou v. Kong Qingde*, *supra* note 29.

280. *Id.*

281. 3Ku, *Wuhan Junqu De Yibi Wenge Jiuzhang* (武汉军区的一笔文革旧帐), ZHONGGUO WENGE YANJIU WANG (中国文革研究网) (June 2, 2006), <http://www.wengewang.org/read.php?tid=31873>.

282. *Id.*

defamation accusations while confronting ordinary plaintiffs.²⁸³ The accusation of the adopted son against the defamer was dismissed on the ground that he had no right to sue, despite being contrary to Chinese tradition and in contrast to another case previously judged in Shichuan.²⁸⁴

Likewise, when national media are parties to a claim, they usually have more connections with the central government and various political-social networks to influence the court's decision-making process both at the central and local level. In view of the dependence of Chinese courts on politics and the magic power of social networks, when media are involved as defendants, they are in an advantageous position. Especially when they are sued in Beijing by ordinary people who lack such social capital, defendants with media background rarely lose.²⁸⁵ Even if plaintiffs managed to win, damages granted could be reduced due to strong local protectionism in Chinese law.²⁸⁶ Given this reality, the dead's family is unlikely to sue national media companies, as they know there is very little chance for them to win. As an illustration of this, in the collected cases, the People's Publishing House, which is one of the most powerful and influential publishers in China, was sued twice. In the first case it won, and in the second case it lost, but with the emotional damages reduced from 160,000 RMB to 30,000 RMB (about 5,000 USD).²⁸⁷

F. Defenses

Chinese defamation law lacks any legal doctrines regarding defense at the national level.²⁸⁸ While defendants may use

283. *Yang Kewu v. Center Theater*, *supra* note 29.

284. *Id.* Compare this case with a similar case in which the Kung Fu Master's "adopted" son won. *Huo Shoujin v. China Film Group*, *supra* note 201.

285. See, e.g., *Huo Shoujin v. China Film Group*, *supra* note 201; *Chen Hong v. Beijing Film*, *supra* note 29; *Ling Li v. Cao Jisan*, *supra* note 29.

286. Local protectionism has been a big obstacle to legal justice in China. See PEERENBOOM, *supra* note 96, at 311–12.

287. *Ling Li v. Cao Jisan*, *supra* note 29; *Lu Shan v. Zhang Zhenglong*, *supra* note 213.

288. In defamation cases, Western law generally allows the defenses of truth, privilege, opinion, public interest, innocent dissemination, consent, lack of actual injury, and the public figure doctrine. See Wei Yongzheng (魏永征), *Zhuguo Dalu Xinwen Qinquanfa De Fazhan Jiyu Taigang Feibangfa Zhi Bijiao* (祖国大陆新闻侵权法的发展及与台港诽谤法之比较), ZHONGGUO JIANCHA

Western defenses, their arguments are not often accepted by Chinese courts. The major issue is that Chinese law has not firmly and clearly established any systematic defenses in favor of free speech.²⁸⁹ Nevertheless, many of these Western-style defenses were used in the selected cases. Most author defendants commonly claimed that what they wrote is true and based on solid sources, that there is no degradation of the dead's reputation, that there is no bad intention, and that their works are fictions that allow considerable freedom of creation and imagination. Meanwhile, media defendants argued that they had fulfilled the duty to check statements and sources properly, and that upon notification of the dead's family, suitable steps had been taken to vindicate the dead's reputation, in addition to the publication of apologies.²⁹⁰ The defenses the accused may have chosen in practice depends on the nature of their alleged activities, and the particular contexts in which the defamation accusations arose.

For historians, biographers, and documentary writers, truth is the strongest defense. Unfortunately, in Chinese law, truth is not an absolute defense.²⁹¹ As mentioned above, the 1993 Sup. People's Ct. Interpretation has made it clear that defamation can be the result of true but insulting comments, or of the sole revelation of private details.²⁹² Article 8 of the 1993 Interpretation stipulates that authors of commentary and opinion articles are liable if the majority of contents of an article are untrue and the subject's reputation is harmed, or the majority of the contents of an article are true, but it also contains humiliating content.²⁹³ This opinion has been reaffirmed by the authoritative article of the Sup. People's Ct. in 2008, and makes two

RIBAOSHE ZHENGYIWANG (中国检察日报社正义网) (Jan. 9, 2001), <http://review.jrb.com.cn/ournews/asp/readNews.asp?id=19302>. For a recent general discussion of the defenses in Chinese defamation law, see Yik Chan Chin, Truth, Fair Comments, Immunity and Public Opinion Supervision: Defenses of Freedom of Expression in Chinese Right to Reputation Lawsuits (unpublished manuscript) (Feb. 27, 2013), available at <http://papers.ssrn.com/abstract=2225735>.

289. See generally Liebman, *supra* note 50, at 40–43.

290. See *Peng Jiahui v. China Story Journal*, *supra* note 29; *Du Hui v. Jilin Daily News*, *supra* note 196.

291. Chin, *supra* note 288, at 25.

292. Reply Concerning Judging Defamation Cases, *supra* note 60.

293. *Id.*

points clear. First, disclosure of private facts, though true, can still distort and lower an individual's social standing.²⁹⁴ The justification of the policy is that people's evaluation of a person shall change over time according to continuous changes in personal behavior; such that, to only evaluate a person's present reputation by his past deeds is unfair.²⁹⁵ Second, it confirms that in looking at alleged defamation, courts will consider whether the description singles out a particular person in real life; whether there are humiliating or privacy disclosing elements; and whether there are negative reputational consequences to the subject.²⁹⁶ These facts are considered in relation to posthumous defamation cases.

To establish truth, in general authors must provide solid evidence before the court to show that their writings are true. However, one important problem before Chinese courts when dealing with writings regarding the dead is which references and historical materials are authoritative, and which are not. Historian Wu Si lost his case as he was accused of defamation of the dead Vice Premier Minister Chen Yonggui.²⁹⁷ Both the court of first instance and the appellate courts held that the memoirs on which he based his controversial statements were not authoritative sources, although the archives he cited were accepted as such.²⁹⁸ The appellate court ruled that when citing memoirs, the author should further check and verify the recalled facts that may not be true, and as Wu failed to fulfill this duty, he lost the case.²⁹⁹ Under such circumstances, to succeed with truth as a defense is very difficult, if not impossible. With regards to memoirs as a primary source, Beijing's courts stood in stark contrast to a Jiangshu local court. The latter court recently ruled that a published memoir is an authoritative primary source, with which both plaintiffs and defendant agreed.³⁰⁰

294. Interpretation of Sup. People's Ct.'s Reply, *supra* note 87.

295. The publication of private facts is protected under reputation. It seems that the court has recognized the importance of giving a person a second chance in life, which is similar to the American approach to privacy. See *Melvin v. Reid*, 112 Cal. App. 285, 291–92 (1931).

296. See Interpretation of Sup. People's Ct.'s Reply, *supra* note 87.

297. *Chen Mingliang v. Wu Shi*, *supra* note 213.

298. *Id.*

299. *Id.*

300. *Shi Yi v. Wu Dongfeng*, *supra* note 211.

Another closely related issue is the validity of interviews in history articles. At least in one case, the court doubted the validity of such personal interviews conducted by a historian, and even ruled that the author has a duty to further verify the details with the dead's family.³⁰¹ In this regard, one may doubt whether Chinese courts have asked too much from historians, given that memoirs and interviews as primary sources may now in effect be censored by surviving family members at will. Many historians protested against the Beijing court's approach, complaining that they could not write about the dead and related history if they were threatened by defamation accusations.³⁰²

In view of the situation, the truth defense turns on the ability to tell whether or not sources are, or are not, authoritative. In this sense, Chinese courts step into a field for which they lack sufficient knowledge and expertise. The collected cases contain no examples of historians summoned to testify about the authority of the cited sources or the working attitudes of defendants. Instead, Chinese courts decide the issue themselves, in contrast to Western courts.³⁰³ This situation, however, is changing gradually, as evidenced by a 2006 case that held the court's role was not to establish "historical truth" via law.³⁰⁴ This, the court said, is the work of historians and regardless of whether the defamatory statements are good artistic works or not, the determination of whether writing is historical truth shall be left to open discussion.³⁰⁵

In the collected cases, the use of archives is also a source of controversy. Though Chinese courts normally accepted archives as a valid, authoritative source for writing about the dead, not

301. For a case regarding the use of an interview as a primary source, see *Chen Hong v. Shi Gengli*, *supra* note 29.

302. After Wu Dongfeng lost his case, many historians protested against the court's decision. See Xu Lina (许黎娜), *Ershi Mingzhuojia Shengyuan Wu Dongfeng* (二十名家声援吴东峰), AOYIWANG (奥一网) (Oct. 19, 2008), <http://gz.oeeee.com/a/20081019/654392.html>.

303. Antoon De Baets pointed out that European courts, in cases regarding posthumous defamation, generally avoid seeking the truth of the controversial facts and instead consider whether the accused historians have fulfilled their duties to act in good faith, take reasonable care, display intellectual honesty, and apply their professional methods carefully and objectively. Antoon De Baets, *Defamation Cases Against Historians*, 41 HIST. THEORY 346, 356 (2002).

304. *Huo Shoujin v. China Film Group*, *supra* note 201.

305. *Id.*

every single use of the archives was permitted by Chinese courts. Chinese courts emphasized that the authors must follow related laws and state (or party) policies for using archives. For example, in a defamation case involving a university president in South China,³⁰⁶ the president of the collegial panel later said in an interview that the author's quotations of university archives concerning the defamee's conduct during China's Anti-rightist Movement was inappropriate and forbidden by the related Chinese archive law and applicable party policy.³⁰⁷

For historical authors and their publishers, a plausible defense is to claim they acted with due care and checked all available sources, such that there was no negligence or malice involved.³⁰⁸ Another defense is to argue that on the whole, there was no evidence that the dead's reputation was degraded or downplayed as a result of their work.³⁰⁹ One defendant even argued that the dead had in fact acquired a better reputation by means of his work, despite some minor issues.³¹⁰

For authors of fiction and novels, and directors and producers in the film and television industry, a popular defense is to argue that they write or broadcast fictional, not historical or documentary works that should be in accordance with facts.³¹¹ Given the nature of such works, defendants are free to base fiction on true historical contexts. However, this defense may not always help defendants to escape liability, as the 1993 Sup. People's Ct. Interpretation has a particular article governing this issue.³¹² Article 9 points to literature in particular, prescribing that if a literary work does not refer to a specific living person, but only bears similarities with real life, it should not be regarded as defamatory; but, if a literary work depicts real life and persons, and humiliates, slanders, or reveals private issues

306. *Long Yunsha v. Lu Jiandong*, *supra* note 209.

307. Feng Boqun (冯伯群), *Yinyong Dangan Rechu De Yichang Guansi* (引用档案惹出的一场官司), *DANGAN CHUNQIU* (档案春秋) (2003).

308. *Long Yunsha v. Lu Jiandong*, *supra* note 209.

309. See, e.g., *Chen Xiaoying v. Chen Hongying*, *supra* note 5. See also *Hong Ying Fating Zi Bian Ci* (虹影法庭自辩词) [*Hong Ying's Self Defense*], <http://www.xys.org/xys/ebooks/literature/essays/k.txt> (last visited May 21, 2013); *Tao Yuyun v. Ouyang Youhui*, *supra* note 29; *Chen Lin v. Wu Dongfeng*, *supra* note 211.

310. See *Chen Xiuqin v. Wei Xilin*, *supra* note 29.

311. *Id.*

312. Reply Concerning Judging Defamation Cases, *supra* note 60.

of a specific person, the author should be held liable.³¹³ Additionally, if there is no real name or address mentioned in a literary work, but it refers to a particular person or his or her acts with humiliating, defamatory, and privacy-disclosing remarks that harm the subject's reputation, the author should be held liable.³¹⁴ Ultimately it does not matter which form the product of an author's, director's, or producer's work takes, as the law is strict in defending the dead's reputation and privacy if the contested contents can be used to identify the dead.

Though the language of the law is clear, in practice Chinese courts are given a lot of discretion, as there is no coherent criterion to gauge what are, or are not, defamatory remarks. As such, Chinese courts may make divergent decisions on very similar issues.³¹⁵ A telling example is the sharp contrast between court decisions on film and TV series, and those of novels and fictions.

The film depiction of famous Kung Fu master Huo Yuanjia, as a former gangster with no descendants (because his family was killed by his rival), was held by the court in Beijing as non-defamatory.³¹⁶ Despite this ruling, the court acknowledged the film resulted in the heavy mental distress of the dead's descendants and described such a storyline as "improper."³¹⁷ It is worth noting that under Chinese tradition, to say that someone has no offspring is one of the most humiliating curses.³¹⁸ It is notable that in the selected cases, defendants sued for defamation in the film and TV industry have a better chance of winning, or at least to escape large damages with court supported pre-trial mediations.³¹⁹

313. *Id.*

314. *Id.*

315. See generally Margaret Y.K. Woo, *Law and Discretion in the Contemporary Chinese Courts*, 8 PAC. RIM L. & POL'Y J. 581 (1999).

316. *Huo Shoujin v. China Film Group*, *supra* note 201.

317. *Id.*

318. The first instance court's decision that there is no defamatory, humiliating content in the film is not persuasive if one considers the above social convention. The appellate court cleverly avoided making its own judgment on the content by referring to the administrative advice given by competent state authorities, claiming that after their professional advice was followed, the film had excluded defamatory elements. *Id.*

319. In the seven collected cases concerning films and TV programs, defendants won three cases, lost two, had one case end in pre-trial mediation,

This is in contrast to cases where writers and publishers are defendants. Consider once again the above mentioned 2002 K case. Here, the fictional depiction of the private life and love affairs of the dead, based on a real life story, are no worse than the allegations in the film cases from the viewpoint of distortion and ridicule. By their very nature, novel and fiction writings allow authors to use imagination and invention, which is not different from films and TV dramas, and should at least be treated in similar ways.³²⁰ Unfortunately, for whatever reason, courts look at print media defendants less favorably than their film and television counterparts.

Some general defenses are suitable for all defendants. One such defense is to argue that publication or publicity caused no defamatory consequences. Some defendants have even argued that after the publication of the accused works, the dead's reputation suffered no harm in third party's eyes, which is more objective and different from the sensitive perspectives of the dead's relatives.³²¹ Others even argue that due to the dissemination of their works, defamees gained a better reputation than before.³²² A similar argument would be that though the alleged contents are somehow defamatory to the plaintiffs, the accused authors in general promoted the dead's reputation.³²³ In addi-

and one result unknown. *Fan Zhiyi v. Liu Deyi*, *supra* note 201; *Yang Kewu v. Center Theater*, *supra* note 29; *Gao Quanting v. Central Theater*, *supra* note 210; *Huo Shoujin v. China Film Group*, *supra* note 201; *Dong Cunmei v. Guo Wei*, *supra* note 203; *Feng Jining v. Xi'an Film Enterprise*, *supra* note 211; *Chen Hong v. Beijing Film*, *supra* note 29.

320. Or as De Baets argued, they should be treated even more leniently because the number of readers of books is usually less than the number of viewers of films. Oral communication with Antoon De Baets at University of Groningen, Netherlands (Dec. 2011).

321. *Huo Shoujin v. China Film Group*, *supra* note 201.

322. See *Huo Shoujin v. China Film Group*, *supra* note 201; *Tao Yuyun v. Ouyang Youhui*, *supra* note 29; *Chen Xiuqin v. Wei Xilin*, *supra* note 29.

323. Though the argument is not always accepted by judges. See *Huo Shoujin v. China Film Group*, *supra* note 201; *Tao Yuyun v. Ouyang Youhui*, *supra* note 29; *Chen Xiuqin v. Wei Xilin*, *supra* note 29. Note that in *Huo Shoujin* and *Tao Yuyun*, such an argument was accepted by the adjudicating courts. *Tao Yuyun's* case is exceptional; the adjudicating court accepted this defense and rejected the defamation claim. *Tao Yuyun v. Ouyang Youhui*, *supra* note 29.

tion, many of them would argue that there is no ill intention to defame the dead in their writings.³²⁴

The last category of cases concerns whether the dead's likeness shall be protected when they are public figures before death.³²⁵ In these cases, defendants claimed that because the defamees were public figures before death, the protection of their reputation should be restricted to a certain extent.³²⁶ As such, they argue that surviving family members should need to display a certain degree of tolerance. In two related cases, Chinese courts have had a different reaction to such an argument. In the first case, both the lower and appeals courts recognized the validity of the argument, saying that the dead's family should not be so sensitive to a film character that is part of an artistic work, that similar artistic works bring the dead's family more fame, and therefore the family should have some tolerance and respect for artists, allowing them some space.³²⁷ However, in the second case, this argument was rejected on the grounds that the alleged issue was not an urgent matter for the public to know, such that the defamed was not considered a present public figure.³²⁸

Before 1993, mass and print media in China could be held liable for defamation on the ground that they published defamatory works.³²⁹ Even when plaintiffs did not accuse publishers, Chinese courts could still list them as co-defendants.³³⁰ The

324. *Chen Xiaoying v. Chen Hongying*, *supra* note 5; *Long Yunsha v. Lu Jiandong*, *supra* note 209. See also *Hong Ying Fating Zibian Ci*, *supra* note 309; *Shi Yi v. Wu Dongfeng*, *supra* note 211; *Ling Li v. Cao Jisan*, *supra* note 29.

325. *Zhou Haiying v. Shaoxing Yuewang Jewellery*, *supra* note 196; *Zhou Haiying v. Luxun Foreign Language School*, *supra* note 159; *Zhou Haiying v. Zhejiang Stamp Bureau*, *supra* note 196; *Zhou Haiying v. Beijing Quansheng Ltd.*, *supra* note 196.

326. *Huo Shoujin v. China Film Group*, *supra* note 201.

327. *Id.*

328. *Chen Lin v. Wu Dongfeng*, *supra* note 211.

329. 1988 Zuigao Renmin Fayuan Guanyu Qin Hai Mingyuquan Anjian Youguan Baokan Yingfou Liewei Beigao He Ruhe Shiyong Guanxia Wenti De Pifu (1988 最高人民法院关于侵害名誉权案件有关报刊社应否列为被告和如何适用管辖问题的批复) [1988 Sup. People's Ct.'s Reply Regarding Whether Journals and Magazines Should Be Listed as Plaintiffs and the Issue of Jurisdiction] (promulgated by the Sup. People's Ct., Jan. 15, 1988, invalidated Jan. 28, 1997) (China).

330. See *Chen Xiuqin v. Wei Xilin*, *supra* note 29.

1993 Sup. People's Ct. Interpretation, however, indicated that plaintiffs decide whom to sue and courts have no active role in the decision.³³¹ Article 9 prescribes that publishers, upon acknowledging defamation, should take reasonable measures such as publishing apologies to dissipate negative influences and the like; if they are unwilling to do so, and continue to publish defamatory works, publishers should be held liable.³³² Under this rule, publishers and editorial boards should not be liable if they take positive measures upon notice by the dead's family. However, in many of the collected cases, publishers were still held liable even if they had taken the prescribed steps to remedy the situation and restore the dead's reputation.³³³

The central issue is *to what extent* such legal duties can be fulfilled so that publishers can avoid liability. In practice, many journals and magazines were held liable because they did not fulfill the obligation to verify the controversial facts that they published.³³⁴ Some publishers were even liable for printing defamatory statements that were found defamatory later, or for reprinting defamatory statements made by others.³³⁵ One popular defense used by publishers is that the accused articles were literary works and that there was no need for further verification on the publisher's side.³³⁶ But, as seen above, this argument did not hold much sway with courts, who may still demand the verification and checking duty to be fulfilled by publishers before publication.³³⁷ According to a 2000 administrative regu-

331. Reply Concerning Judging Defamation Cases, *supra* note 60.

332. *Id.*

333. *Peng Jiahui v. China Story Journal*, *supra* note 29; *Lu Shan v. Zhang Zhenglong*, *supra* note 213; *Du Hui v. Jilin Daily News*, *supra* note 196.

334. *Peng Jiahui v. China Story Journal*, *supra* note 29; *Wang Haicheng v. Li Ying*, *supra* note 29; *Li Lin v. Xinshengjie Journal*, *supra* note 113.

335. For example, the court ruled that journals and publishers that merely reproduce must fulfill the verification duty. *Du Hui v. Jilin Daily News*, *supra* note 196. In another case, the publisher was held liable for its publication of a biography. *Long Yunsha v. Lu Jiandong*, *supra* note 209.

336. See, e.g., *Peng Jiahui v. China Story Journal*, *supra* note 29; *Chen Xiuqin v. Wei Xilin*, *supra* note 29; *Ling Li v. Cao Jisan*, *supra* note 29.

337. In one case, the appellate court ruled that the alleged fiction was based on real history and people, which is different from fictional novels, so that the journal had a duty to verify the veracity of the description, and the duty to check that there was no offense to the dead's reputation. *Peng Jiahui v. China Story Journal*, *supra* note 29.

lation, publishers have to make such verification and checks even if they reprint articles.³³⁸

A rather creative defense proposed by a newspaper defendant was that the dead died long before the promulgation of the present law, and therefore was not protected, since the present law cannot be applied retroactively.³³⁹ This would be a strong argument if the law only took posthumous interests into consideration. However, as Chinese courts stress the interests of the living, this defense fails.

G. Internet and Posthumous Defamation

With China entering the digital era, the Internet has become a public sphere where people read news and articles, entertain themselves, and quickly spread rumors and gossip. In recent years, many authors and celebrities started to publish articles, comments, and opinions on the Internet. Through the Internet, publication becomes easier than ever before, and this opens a new set of issues that traditional defamation did not need to confront. First, it is very hard to control untrue information once uploaded online because of the characteristics of the Internet.³⁴⁰ Once in cyberspace, publicized information can stay there forever, or be archived by someone unknown for future reappearance when needed.³⁴¹ Given this, rumors and gossip spread at an unthinkable speed and can reach anywhere in the world instantaneously. Thus, online defamation has the potential to be very harmful in view of the size of the impact it can have in relation to traditional defamation.

This tendency is reflected in the four online posthumous defamation cases collected. All four defendants are well-known online commentators or bloggers with certain social influences. The first defendant, Wu Dongfeng, is a well-known military

338. 2000 Guanyu Jinyibu Jiaqiang Baokan Zaizhuan Gaojian Guanli De Tongzhi (关于进一步加强报刊摘转稿件管理的通知) [To Further Strengthen the Regulation of Reprintings] (Promulgated by the Gen. Admin. of Press and Publ'n of China, Feb. 25, 2000) (China).

339. See *Chen Xiuqin v. Wei Xilin*, *supra* note 29.

340. For personal data persistence and its influence on individual life, as well as solutions, see generally VIKTOR MAYER-SCHÖNBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* (2009).

341. Therefore, the European initiative to a right to be forgotten. Jeffrey Rosen, *The Right to Be Forgotten*, 64 *STAN. L. REV. ONLINE* 88, 88 (2012).

history writer, famous for his biographies about reputable generals.³⁴² He put two revised articles from his past publications on his blog describing two dead generals and was accused of defamation.³⁴³ The second commentator uploaded a controversial article on his blog regarding a national heroine that died at Japanese hands, which was widely disseminated by China's most influential websites.³⁴⁴ The remaining two bloggers held liable for defamation are very famous online entertainment commentators with a national readership and a reputation for circulating gossip and rumors of celebrities.³⁴⁵

There are a number of issues worthy of our attention in the court verdicts of the four cases. First, in the case that involved the two bloggers, no internet company providing portal services was sued and held liable.³⁴⁶ Secondly, the nature of blogs has been defined by the court as the sphere for publishing information and social communication.³⁴⁷ Also, in creating the definition, it distinguished between private and public blogs.³⁴⁸ A private blog is akin to a private diary for putting down one's emotions and self-reflections, and is unlikely to have an influence on other people.³⁴⁹ However, public blogs are those open and accessible to strangers, and bloggers use them for publication of personal opinions.³⁵⁰ Public blogs are akin to publishing articles in the traditional way, and thus can be used as propaganda.³⁵¹ The court thus demanded that a public blogger has the legal obligation to check the contents in one's blog(s) and verify their truthfulness so that no one will be harmed; this mandate applies even if the content was originally published by others.³⁵² Third, if defendants are held liable for defamation, they will be asked to delete defamatory content and publish an

342. See Xu Lina (许黎娜), *supra* note 302.

343. *Chen Lin v. Wu Dongfeng*, *supra* note 211; *Shi Yi v. Wu Dongfeng*, *supra* note 211.

344. *Chen Hong v. Shi Gengli*, *supra* note 29.

345. *Widow of Xie Jin v. Song Zude*, *supra* note 16.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

apology on their blog, and sometimes even in traditional medias.³⁵³

The above four cases also show the importance of the Internet, which is regarded as an important medium for public apologies and as having significant influence upon public opinion. In three internet-related cases, authors and publishers were asked in particular to publicize their apologies on the Internet.³⁵⁴ Even traditional publisher defendants may be asked by plaintiffs to publish apologies and corrections online to vindicate the dead's reputation and reach a larger audience.³⁵⁵ In some circumstances, parties made live reports of their cases following up each step of their legal procedure.³⁵⁶ For instance, a plaintiff that sued to vindicate his grandfather's reputation published every detail of his lawsuit online, including his petition and court verdict, which gained national attention.³⁵⁷ Likewise, an author defendant said explicitly that he won his lawsuit because of the help of the Internet in motivating more people to display concern about a given issue and pressure the court to act according to law and not bend to political pressure.³⁵⁸

H. Courts and Verdicts

China is a continental law country, meaning that Chinese courts must follow statutory law.³⁵⁹ But since the first post-

353. *Shi Yi v. Wu Dongfeng*, *supra* note 211.

354. *Chen Lin v. Wu Dongfeng*, *supra* note 211; *Chen Hong v. Shi Gengli*, *supra* note 29; Xu Dawen *yu* Song Zude *Deng* Mingyuquan *Jiufen* Shangsu An (徐大雯与宋祖德等名誉权纠纷上诉案) [*Widow of Xie Jin v. Song Zude*] (Shanghai No. 2 Interm. People's Ct. Jan. 1, 2010) (China), <http://www.shezfy.com/view/jpa/detail.html?id=193> (last visited Oct. 26, 2013) [hereinafter *Xu Dawen v. Song Zude*].

355. See, e.g., *Lu Shan v. Zhang Zhenglou*, *supra* note 213.

356. *Shi Yi v. Wu Dongfeng*, *supra* note 211; *Feng Jining v. Xi'an Film Enterprise*, *supra* note 211.

357. "Xian Shibian" *Dianshiju Qin Hai Fengqin zai Mingyuquan An Kaiting* ("西安事变"电视剧侵害冯钦哉名誉权案开庭) [*Defamation Case Regarding Fengqin zai*], BOLIAN SHE (博联社), <http://fengjining.blshe.com/post/4177/220899> (last visited Sept. 8, 2013).

358. The author also publicized his verdict online for public review. *Wu Dongfeng, Wo Yu Wangsheng Jiangjun Jiaren De Guansi Zhongyu Liaojiele* (我与王胜将军家人的官司终于了结了), WU DONGFENG'S BLOG (吴东峰的博客) (Aug. 15, 2008), <http://wudongfeng.blshe.com/post/160/243811>.

359. See J. CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE, AND DEVELOPMENTS 31–55 (1999).

humorous defamation case in 1989, Chinese courts encountered cases to which no governing law would apply. As such, they had to decide on various issues without guidance: whether the law should protect the dead's reputation and privacy; if so, what were the justifications behind the protection; what were legally-recognized defenses and liabilities; and how to define and evaluate damages. In handling these legal issues, Chinese courts demonstrated certain creativity and flexibility under the guidance of the Sup. People's Ct. to meet the social needs of society. Step by step, they found their own way to protect posthumous interests, and to adapt the protections to social reality. In creating this course, several observations can be made from the selected cases.

First and foremost, there are still no well-established coherent standards or legal doctrines in this body of law regarding important issues, such as what is defamatory content and what is not.³⁶⁰ On this issue, the legal interpretations of the Sup. People's Ct. are generally vague. Moreover, there are no refined rules or doctrines defining public figure, absolute or qualified privilege, fair comment on public interest, innocent dissemination, and opinion, etc., that have been well recognized in most Western jurisdictions.³⁶¹ Many defendants, however, have proposed such defenses before courts that should be systematically considered.³⁶² However, taking into account the size and variety of the Chinese judicial system and complexity of social life in China, it is difficult for the Sup. People's Ct. to unify such standards at the national level. As Wilhelm pointed out, in Chinese defamation law, there is lack of detailed, coherent guidance and a clear foundation.³⁶³

Given the lack of a working standard in these defamation cases, some minor issues have been taken as seriously defamatory, and, vice versa, more serious issues are not recognized by

360. Many in the media argue that such "existing legal standards are excessively vague." Liebman, *supra* note 50, at 42.

361. Wei Yongzheng (魏永征), *supra* note 288.

362. For instance, the public figure doctrine has been raised as a defense by defendants in two of the collected cases. See *Huo Shoujin v. China Film Group*, *supra* note 201; *Chen Lin v. Wu Dongfeng*, *supra* note 211.

363. Katherine Wilhelm, *Opportunity for China Courts in War of Words*, WALL ST. JOURNAL MKT. WATCH (Mar. 19, 2012), http://articles.marketwatch.com/2012-03-19/economy/31207968_1_defamation-free-speech-opinions.

courts as defamatory in other cases. In the previous discussion, it has been established that film and TV producers, directors, and distributors enjoyed wider margins of success in posthumous defamation cases than authors of literature and their publishers. In addition, defendants involved with print media could be held liable for defamation, even if what they said was true.³⁶⁴ A relevant point is that there is no clear standard as to what extent redress or remedy made by publishers is sufficient upon notice of defamation by the dead's family, to prevent defamatory liability.³⁶⁵

A second characteristic of these selected cases is that Chinese courts usually judged in favor of plaintiffs, though this tendency is beginning to change in recent years.³⁶⁶ In the collected cases, plaintiffs won twenty cases, two cases ended in withdrawals, four ended with mediations in their favor, and for three cases the results were unknown.³⁶⁷ The plaintiffs only lost seven cases.³⁶⁸ From 1989 to 1999, plaintiffs won nine of twelve cases.³⁶⁹ From 2000 to 2002, plaintiffs only won five cases out of twelve,³⁷⁰ lost three,³⁷¹ had three end in mediation,³⁷² and one

364. *E.g.*, *Chen Mingliang v. Wu Shi*, *supra* note 213; *Long Yunsha v. Lu Jiandong*, *supra* note 209.

365. *E.g.*, *Peng Jiahui v. China Story Journal*, *supra* note 29; *Chen Xiuqin v. Wei Xilin*, *supra* note 29; *Ling Li v. Cao Jisan*, *supra* note 29; *Zhou Haiying v. Beijing Quansheng Ltd.*, *supra* note 196.

366. *See* Liebman, *supra* note 50, § II(C).

367. Except *Xiao Xinan v. Yan Yuewen*, which is special with multiple results and thus excluded. *Xiao Xinan v. Yan Yuewen*, *supra* note 146.

368. *Huo Shoujin v. China Film Group*, *supra* note 201; *Tao Yuyun v. Ouyang Youhui*, *supra* note 29; *Shi Yi v. Wu Dongfeng*, *supra* note 211; *Chen Hong v. Beijing Film*, *supra* note 29; *Li Moumou v. Kong Qingde*, *supra* note 29; *Yang Kewu v. Center Theater*, *supra* note 29; *Ling Li v. Cao Jisan*, *supra* note 29.

369. *Counter-Revolution & Sedition Case*, *supra* note 142; *Tang Min's Criminal Defamation Case*, *supra* note 29; *Fan Yinglian v. Jing Yongxiang*, *supra* note 214; *Li Zhaoping v. Anyang Funeral Home*, *supra* note 146; *Li Lin v. Xinchengjie Journal*, *supra* note 113; *Wang Haicheng v. Li Ying*, *supra* note 29; *Long Yunsha v. Lu Jiandong*, *supra* note 209; *Wang Xiuzhen v. Beijing Songtang Hospital*, *supra* note 196; *Du Hui v. Jilin Daily News*, *supra* note 196.

370. *Zhou Haiying v. Shaoxing Yuewang Jewellery*, *supra* note 196; *Peng Jiahui v. China Story Journal*, *supra* note 29; *Chen Mingliang v. Wu Shi*, *supra* note 213; *Sun Guoxuan v. Hou Hongxu*, *supra* note 230; *Chen Mou v. Wangmou*, *supra* note 146.

result unknown.³⁷³ From 2003 to 2010, plaintiffs won six cases out of thirteen,³⁷⁴ lost four,³⁷⁵ had one case end in withdrawal,³⁷⁶ one in mediation,³⁷⁷ and one result unknown.³⁷⁸ Though the collected cases are a small sample, they suggest that in recent years, a plaintiff's chance of winning is still strong, but weakening.

A third trait that can be gleaned from these cases is that Chinese courts have a strong tendency to mediate before formal trial, and even before appeal.³⁷⁹ Only when court-supported pre-trial mediations or settlements are not successful, will the judge hear a case.³⁸⁰ This echoes the strong mediation tradition in Chinese law that began in the Maoist period, as well as the traditional Confucian ideology of achieving social harmony.³⁸¹ In the collected cases, however, only six cases out of thirty-six ended in mediation. This is unsurprising given that plaintiffs

371. *Tao Yuyun v. Ouyang Youhui*, *supra* note 29; *Li Moumou v. Kong Qingde*, *supra* note 29; *Ling Li v. Cao Jisan*, *supra* note 29.

372. *Zhou Haiying v. Luxun Foreign Language School*, *supra* note 159; *Chen Xiaoying v. Chen Hongying*, *supra* note 5; *Zhou Haiying v. Luxun Art School*, *supra* note 215.

373. *Fan Zhiyi v. Liu Deyi*, *supra* note 201.

374. *Chen Lin v. Wu Dongfeng*, *supra* note 211; *Lu Shan v. Zhang Zhenglong*, *supra* note 212; *Xu Dawen v. Song Zude*, *supra* note 354; *Xiao Xinan v. Yan Yuewen*, *supra* note 146; *Feng Jining v. Xi'an Film Enterprise*, *supra* note 211; *Chen Qiejia v. Chen Liming*, *supra* note 160.

375. *Huo Shoujin v. China Film Group*, *supra* note 201; *Shi Yi v. Wu Dongfeng*, *supra* note 211; *Chen Hong v. Beijing Film*, *supra* note 29; *Yang Kewu v. Center Theater*, *supra* note 29.

376. *Gao Quanting v. Central Theater*, *supra* note 210.

377. *Dong Cunmei v. Guo Wei*, *supra* note 203.

378. *Chen Hong v. Shi Gengli*, *supra* note 29.

379. This kind of formal mediation led by Chinese courts has the binding force of court verdicts. For a discussion of Chinese mediation, see STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 40-70*, 216-49 (1999). For critics of the mediation practice in China, see PEERENBOOM, *supra* note 96, at 163.

380. Preference for mediation has a strong tradition after 1949. See 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, 28, 33 (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011).

381. For the mediation tradition in China, see Philip C.C. Huang, *Court Mediation in China, Past and Present*, 32 *MOD. CHINA* 275, 277, 286, 303 (2006).

have a strong will to fight to the end for justice and restitution of the dead's dignity.³⁸² This determination of the plaintiffs is in and of itself additional proof of the strong value placed on reputation in China.

Fourth, we have to note the large improvements of Chinese courts in delivering reasonable legal reasoning and good arguments. In a 2000 case, the appellate court briefly mentioned that its role was not to find the truth of the disputed facts and that it would not make a comment on that.³⁸³ But in the 2006 case concerning the Kung Fu Master Huo Yuanjia, the appellate court made a clear, detailed analysis of the interests and concepts involved in the case.³⁸⁴ First, the court distinguished different categories of films and judged that the film at stake was a drama-action, characterized by fiction and performance.³⁸⁵ Second, it found there were only a few historical records of the Kung Fu master in existence, which left enough room for artistic creation.³⁸⁶ Though it ruled in favor of the defendants, the court did not forget to pinpoint that the dead's dignity in reputation and respect, as well as the surviving family's interests, should be considered by the film's producers and directors.³⁸⁷ Third, it explicitly expressed that in this case, it was not suitable for the court to make the decision of what was true history, or what was the right description of the dead, and said that such a determination should be in the hands of historians.³⁸⁸ Fourth, it distinguished between the perspective of the dead's family from that of ordinary, reasonable third persons whose opinion should be the standard to evaluate the disputed material.³⁸⁹

382. In total, five of the plaintiffs who were dismissed appealed. *Huo Shoujin v. China Film Group*, *supra* note 201; *Tao Yuyun v. Ouyang Youhui*, *supra* note 29; *Shi Yi v. Wu Dongfeng*, *supra* note 211; *Sun Guoxuan v. Hou Hongxu*, *supra* note 230; *Long Yunsha v. Lu Jiandong*, *supra* note 209. One plaintiff also appealed for dissatisfaction with the verdict. *Peng Jiahui v. China Story Journal*, *supra* note 29.

383. *Sun Guoxuan v. Hou Hongxu*, *supra* note 230.

384. *Huo Shoujin v. China Film Group*, *supra* note 201.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

In a 2008 case, a Xi'an local court made very specific distinctions between different types of alleged defamatory facts.³⁹⁰ It determined that a bribery charge against a dead general by a TV drama was defamatory because it degraded the dead's personality.³⁹¹ However, as to other allegations, depicting the general as killing a military official, destroying mines, and mismanaging troops, the court ruled that they had nothing to do with the dead's personality and morality, and should be left to historians for discussion.³⁹²

The fifth feature is that, on the face of it, the free speech rights of the authors and media are apparently not a big concern for Chinese courts. It is to be lamented that in the collected cases, none of the adjudicating courts has spoken of a strong concern for the free speech rights of the defendants when these rights conflicted with the interests of the dead and their surviving family. In Western democracies, free speech rights generally restrict the protection of reputation and privacy, because of its importance in itself, and to democracy.³⁹³ Focusing on how to balance the two categories of rights, Western laws have established rules and doctrines to secure both rights.³⁹⁴ In contrast, protection of free speech rights has not been a principal goal of Chinese courts in their decision making process for many reasons. Free speech is weakly protected in China due to China's strong communist propaganda and political censorship, which is

390. *Feng Jining v. Xi'an Film Enterprise*, *supra* note 211.

391. *Id.*

392. *Id.*

393. See generally DARIO MILO, DEFAMATION AND FREEDOM OF SPEECH (2008); Frederick Schauer, *Free Speech and the Social Construction of Privacy*, 68 SOC. RES. 221 (2001); RUSSELL WEAVER ET AL., THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION, AND FREE SPEECH (2006); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (1961).

394. See sources cited *supra* note 393. In balancing the two rights, the European Court of Human Rights has overruled some judgments of its contracting states that restricted free speech rights of journalists in order to protect the dead's reputation and privacy. See, e.g., *Mizzi v. Malta*, *supra* note 42; *Editions Plon v. France*, App. No. 58148/00, Eur. Ct. H.R. (2004); *Gutiérrez Suárez v. Spain*, App. No. 16023/07, Eur. Ct. H.R. (2010), translated in *Victory of Spanish Journalist at European Court Is Final; The Court Ruling Now Available in English*, JOSÉLUISGUTIÉRREZ (Apr. 12, 2010), <http://www.joseluisgutierrez.es/cgi-bin/zdoc30/media.pl?refcarpeta=101858&refcontenido=59599094>.

critical for the Communist Party to remain in power.³⁹⁵ Though the Chinese Constitution lists free speech as a fundamental right of the Chinese people, the Chinese Constitution cannot be directly applied in Chinese law.³⁹⁶ The only verdict in the collected cases that mentioned free speech rights, however, merely stressed the negative consequences of the improper exercise of the right.³⁹⁷ Ultimately, there has not been a real balancing of free speech rights with other rights observed in the selected cases.

Finally, when posthumous defamation cases involved public figures, Chinese courts would defer to their official history, or official remarks made by the state or the Communist party. When important public figures die in China, especially those who once made big contributions to Chinese government and the Communist Party, they are awarded official obituaries for final appraisals that are formally published by official media, such as the People's Daily or local daily newspapers.³⁹⁸ Additionally, their past activities or achievements could be later inserted in official or quasi-official histories or school textbooks.³⁹⁹ It is usually the case that Chinese courts judge in favor of plaintiffs when depiction of the dead's past activities or characteristics is negative and against the relevant official version. Even if Chinese courts do not directly defer to the official version of history or to official remarks of the defamees, they still cannot escape these versions as they are accepted by society as the only "right" and acceptable version.⁴⁰⁰ As one plaintiff

395. Consider the American Government's report on media censorship in China. Isabella Bennett, *Media Censorship in China*, COUNCIL ON FOREIGN RELATIONS (Jan. 24, 2013), <http://www.cfr.org/china/media-censorship-china/p11515>.

396. See Guobin Zhu, *Constitutional Review in China: An Unaccomplished Project or a Mirage?*, 43 SUFFOLK U.L. REV. 625, 625–26 (2010).

397. *Huo Shoujin v. China Film Group*, *supra* note 201.

398. See, e.g., Jason Dean, *Chinese Eulogy Bares Party Intrigue*, WALL ST. J. (Apr. 15, 2010), <http://online.wsj.com/article/SB10001424052702304628704575185861979803430.html> (noting where the status of a political figure is honored in Chinese official history).

399. For instance, the dead hero Dong Cunrui and heroine Zhao Yiman were all mentioned in China's past history textbooks and regarded as important figures in Chinese history.

400. Judges may face critics, if judging in favor of the defendants, not from the government, but from the public who admire the heroes or heroines and do

claimed: “how can a hero we have read and learned about for half a century, now turn out to be a person like this?”⁴⁰¹ The judges seem to follow a similar reasoning before delivering their decisions.

Chinese courts can find such official history and official remarks in many sources. One is the memorial speeches or eulogies by the Communist Party published in the People’s Daily. This is the most authoritative official remark on the dead’s past.⁴⁰² Another form is the rehabilitation and redress made by the Party to individuals who were wronged during the Anti-rightist Movement, the Cultural Revolution, or other political moments.⁴⁰³ Other sources include texts extracted and selected from official or quasi-official history books published by state-owned authoritative publishers, such as official military histories or official party histories, or local chronicles edited by local governments. These official remarks and comments have been used as authoritative standards to judge disputed contents.⁴⁰⁴

not bear alternative stories in this regard. This is also observed in the motivations of some plaintiffs who are encouraged by the local residents to defend the honor of their hometown. See *Dong Cunmei v. Guo Wei*, *supra* note 203.

401. *Yang Kewu v. Center Theater*, *supra* note 29.

402. Some Chinese courts based their judgment of truth on such official documents. See *Chen Lin v. Wu Dongfeng*, *supra* note 211; *Chen Mingliang v. Wu Shi*, *supra* note 213. For a discussion of the political impact of the eulogies published by People’s Daily, see Gao Tianding (高天鼎), Daoci Yanjiu: Yi «Renmin Ribao» Fabiao De Daoci Wei Yanjiu Duixiang (悼词研究: 以«人民日报»发表的悼词为研究对象) [A Study of Eulogies Published by the People’s Daily] 10–15, 53 (June 3, 2011), available at <http://vdisk.weibo.com/s/f56nA/1349623730>. For a general analysis of the characters of Chinese obituary writings, their publication in official newspapers, and their underlying cultural-political backgrounds, see generally Ge Zhen (葛贞), Wenhua Shiye Zhong Zhongxi Fugao Xinwen Chayi Tanxi (文化视野中中西讣告新闻差异探析) [A Comparative Study of the Differences Between Western and Eastern Obituary News in Perspective of Culture] 13 (May 11, 2005), available at <http://www.doc88.com/p-490187445998.html>.

403. This is known as Pingfang (平反, rehabilitation), a moral ground that Chinese judges use to justify their protection of the dead’s reputation. See *Chen Xiuqin v. Wei Xilin*, *supra* note 29.

404. *Peng Jiahui v. China Story Journal*, *supra* note 29; *Shi Yi v. Wu Dongfeng*, *supra* note 211; *Chen Mingliang v. Wu Shi*, *supra* note 213; *Chen Hong v. Shi Gengli*, *supra* note 29; *Feng Jining v. Xi’an Film Enterprise*, *supra* note 211; *Yang Kewu v. Center Theater*, *supra* note 29; *Chen Qiejia v. Chen*

III. POLITICS, HISTORY, AND SOCIAL TRANSITION

A striking characteristic of many defamation cases is that they are history-related. Talking about the dead and their past deeds necessarily involves talking about the social-political settings prevalent in the time period in which the dead once lived. The importance of these details takes on even greater significance when the subjects are important historical figures. The controversies over posthumous reputation can, on many occasions, draw the public's attention to a particular period of history, and the disclosed "new stories" of historical figures will invite people to rethink the history associated with them. This can, in many occasions, result in challenges to the official history and is therefore against the interest of the ruling Chinese Communist Party.

The most controversial period of China's modern history after 1949 is the Cultural Revolution, and it is still a politically sensitive time period in China today.⁴⁰⁵ Thus, in cases from this time period, plaintiffs won all cases on different grounds—with the exception of a living general accused of defaming his past colleague—and four of them are politically relevant.⁴⁰⁶ The two most representative cases concerned China's former Vice Premier Chen Yonggui, and a former party secretary of a famous university in South China.⁴⁰⁷ In these two cases, the adjudicating courts set high standards for both autobiographers to meet in defense. In fact, the standard was set so high that university archives recording the defamee's radical conduct during China's Anti-rightist Movement were rejected as a legally-accepted primary source in biography writing.⁴⁰⁸ In the case

Liming, *supra* note 160; *Wang Xiuzhen v. Beijing Songtang Hospital*, *supra* note 196.

405. In the collected cases, five cases involved disclosure of past activities of the dead during the Cultural Revolution and one case concerned the notorious Anti-rightist Movement (1957–1958). *Li Lin v. Xinshengjie Journal*, *supra* note 113; *Long Yunsha v. Lu Jiandong*, *supra* note 209; *Chen Mingliang v. Wu Shi*, *supra* note 213; *Tang Min's Criminal Defamation Case*, *supra* note 29; *Li Moumou v. Kong Qingde*, *supra* note 29; *Chen Mingliang v. Wu Shi*, *supra* note 213.

406. By politically relevant I mean they involved important political figures.

407. *Chen Mingliang v. Wu Shi*, *supra* note 213; *Long Yunsha v. Lu Jiandong*, *supra* note 209.

408. *Long Yunsha v. Lu Jiandong*, *supra* note 209.

concerning Chen Yonggui, oral history and published individual memoirs were rejected as valid sources, and the historian was further required to verify them.⁴⁰⁹ In contrast, the collected cases relevant to China's Civil War from 1945–1949 are much less politically-charged, and the adjudicating courts could sit in a rather comfortable position. In the related six cases, plaintiffs only won two; one was withdrawn, one ended in mediation, and two cases were won by the defendants.⁴¹⁰

Though not all courts in the six cases set up high standards, it is notable that Chinese courts were cautious in handling cases regarding politically-charged history. As the president of a collegial panel said, “to make use of the documents and materials of that period (the Anti-rightist Movement) is improper nowadays.”⁴¹¹ He also said that the court could not open the door for such materials—such as memos containing severe mutual criticisms—to be used in historical writings.⁴¹² It was also said that if the author had not put the dead's name in the book, there would be no problem for him.⁴¹³ However, when someone is readily identifiable, Chinese courts have a strong tendency to defer to official remarks on the dead to decide if the allegedly defamatory statements are really defamatory.⁴¹⁴

Presently, history is still an important justification for China's Party-state.⁴¹⁵ However, this function of history has weakened, largely in the past decades, by China's increasing focus on economic development. The Party-state has quickly rebuilt its legitimacy on fast economic growth and social development.⁴¹⁶ This may signal the gradual decline of the importance placed on

409. *Chen Mingliang v. Wu Shi*, *supra* note 213.

410. See *Yang Kewu v. Center Theater*, *supra* note 29; *Gao Quanting v. Central Theater*, *supra* note 210; *Shi Yi v. Wu Dongfeng*, *supra* note 211; *Dong Cunmei v. Guo Wei*, *supra* note 203; *Feng Jining v. Xi'an Film Enterprise*, *supra* note 211; *Chen Lin v. Wu Dongfeng*, *supra* note 211.

411. The interview with Judge Shao Mingyan, see Feng Boqun (冯伯群), *supra* note 307.

412. *Id.*

413. *Id.*

414. See *supra* Part II.H.

415. Diana Lary, *The Uses of the Past: History and Legitimacy, in THE CHINESE PARTY-STATE IN THE 21ST CENTURY: ADAPTATION AND THE REINVENTION OF LEGITIMACY* 130, 130–32 (Andre Laliberte & Marc Lanteigne eds., 2008).

416. As well as an attempt in borrowing the concept of “the rule of law.” See PEERENBOOM, *supra* note 96, at 169–74.

the official version of history, such that certain deviations might be tolerable, especially when non-political figures are at concern. We can observe this in what happened to some national heroes and military martyrs, who are not as well-protected by Chinese courts as the military generals with high political status.⁴¹⁷

Since the 1980s' Reform and Open Policy, Chinese society has undergone an enormous transition from communism to capitalism and a market-based economy. Decades later, Chinese people have become more individualistic, practical, and concerned with their own economic interests. In this context, the economic aspects of reputation and privacy of both the living and the dead have come into full sight. While defending the dead for justice and family dignity, surviving family members also increasingly seek mental and monetary damages consequent to posthumous defamation, as well as posthumous privacy invasion. This trend can be seen in the increasing claims in substantive damages in the collected cases.⁴¹⁸

As a consequence of China's economic development, Chinese people have grown richer and have encountered an increasingly diverse society.⁴¹⁹ This has led to, among other things, people's increasing demands for knowledge of Chinese history, social science, and literature, and for more entertainment after decades of suppression and censorship. There is also a particularly strong drive to know more about China's dark past, as people want to know what happened to their fathers, grandfathers, and

417. *Chen Hong v. Shi Gengli*, *supra* note 29; *Chen Hong v. Beijing Film*, *supra* note 29; *Dong Cunmei v. Guo Wei*, *supra* note 203; *Gao Quanting v. Central Theater*, *supra* note 210.

418. See discussion regarding monetary remedies *supra* Part II.D.

419. China is in the process of a major transition, which was triggered first by economic reform and then quickly spread into cultural and social spheres. The diversification of economic forms lead to the diversification of individual interests and group interests. The Opening Up policy and the wide-spread use of the Internet bring to China more tolerance to and the greater acceptance of Western ideas. Another tendency is the increasing localism in China's booming economy and eroding politics. See, e.g., Barry Naughton, *The Chinese Economy: Fifty Years into the Transformation*, in CHINA BRIEFING 2000: THE CONTINUING TRANSFORMATION 49 (Tyrene White ed., 2000); BARRY J. NAUGHTON & DALI L. YANG, HOLDING CHINA TOGETHER: DIVERSITY AND NATIONAL INTEGRATION IN THE POST-DENG ERA (2004); CHINESE SOCIETY—CHANGE AND TRANSFORMATION (Li Peilin ed., 2012).

their dead family members who were the victims of China's successive political waves and military conflicts in the past decades.⁴²⁰

Given these circumstances, there is a great desire for historical works, biographies, novels, fictions, and documentaries, as well as films and TV products, and the market has responded to meet the diversified needs and wants of Chinese society. In order to gain a share in a highly competitive market, writers and producers have offered diversified content to attract more consumers. Especially in recent years, film and TV producers are likely to dramatize history or play with history when they have not been allowed to "talk about" the present.⁴²¹ Some entertain with distant history as a safe way to avoid litigation. But when others try to "interpret" more recent history, and speak of the not-far-away dead who have surviving families, they risk repercussions.

Another situation that leads to defamation suits concerns what in China are called "the red classics"; a term that is used to describe TV programs or films re-telling military legends and spy stories of the Chinese Communist Party before 1949.⁴²² This category of movies and TV series, as well as Maoist revolutionary culture in general, is very popular among Chinese today, easily passes state censorship, and is even encouraged by Chinese authorities.⁴²³ Unlike former propaganda movies and TV programs, directors or producers try to humanize and embellish their products by fabricating love stories and other de-

420. This is a reaction against the official tautology of history education for the purposes of communist propaganda. There is increasing readership of history books and biographies narrating the mysterious Chinese history after 1949. For instance, in a 2006 official ban of eight books, five of the books tell the story of the dark side of the Chinese Communist Party rule after seeking power. See Joel Martinsen, *History Books Get the Axe; Another Zhang Yihe Title Falls*, DANWEI (Jan. 19, 2007), http://www.danwei.org/media_regulation/banned_books_zhang_yihe.php.

421. There is a particularly strong tradition in China to criticize the present through historical metaphors, the so-called Jiegu Fengjin (借古讽今).

422. See Kang Liu, *Reinventing the "Red Classics" in the Age of Globalization*, 37 *NEOHELICON* 329 (2009).

423. *Id.* See also Edward Wong, *Repackaging the Revolutionary Classics of China*, N.Y. TIMES (June 29, 2011), <http://www.nytimes.com/2011/06/30/world/asia/30redsong.html>.

tails of the characters.⁴²⁴ These new stories, whether true or false, can lead to defamation litigation if the added stories might damage the dead's shining reputation.⁴²⁵

Currently, the most important social transition in China is its entrance into the digital era. This ushers China into a new stage, allowing more liberal access to and free dissemination of information. This change has been reflected in some of the collected cases in which the dead's families reacted strongly against online libel, worrying about the possibility of permanent online defamation.⁴²⁶

Last, but most important, Chinese law itself is undergoing a big transition. Since the commencement of the legal reforms in the early 1980s, law has become an important social force with an increasing power in Chinese society, and the legal profession is continuously growing—a development that the Party-state cannot ignore.⁴²⁷ Law is increasingly regarded by the public as an important means to address injustice, instead of merely as a tool for the leaders of the Party-state.⁴²⁸ Though the recent Chinese law reform is characterized by a process of importing Western rule-of-law ideals and legal techniques, Chinese judges and lawyers have also tried to adapt the imported Western law to China's social reality. The development of the body of law for

424. For instance, this is observed in the cases of *Chen Hong v. Beijing Film*, *supra* note 29; *Dong Cunmei v. Guo Wei*, *supra* note 203; *Gao Quanting v. Central Theater*, *supra* note 210; *Yang Kewu v. Center Theater*, *supra* note 29.

425. *Chen Hong v. Shi Gengli*, *supra* note 29; *Chen Hong v. Beijing Film*, *supra* note 29; *Gao Quanting v. Central Theater*, *supra* note 210; *Yang Kewu v. Center Theater*, *supra* note 29.

426. *See supra* Part II.G.

427. A more recent example is the Li Zhuang Case. The former Governor of Chongqing had to yield to law eventually before the increasing pressure and criticisms from lawyers, judges, and legal scholars all through the country. *See* Ian Johnson, *Trial in China Tests Limits of Legal System Reform*, N.Y. TIMES (Apr. 19, 2011), <http://www.nytimes.com/2011/04/20/world/asia/20china.html>. *See also* PEERENBOOM, *supra* note 96, at 398–99.

428. As ordinary citizens increasingly ask to be afforded their constitutional rights, lawyers, judges, and professors seek to strengthen the independence of the Chinese judicial system. *See* Joseph Kahn, *Deep Flaws, and Little Justice, in China's Court System*, N.Y. TIMES (Sept. 21, 2005), <http://www.nytimes.com/2005/09/21/international/asia/21confess.html>. *See generally* WEIFANG HE, *IN THE NAME OF JUSTICE: STRIVING FOR THE RULE OF LAW IN CHINA* (2012).

the protection of the reputation of the dead and the interests of the living close family members is such an example.

Of course, there have been numerous occasions for those in political power to use law to achieve political ends in the process. For instance, say that there is at least some level of censorship in the court judgments of the collected cases, since free speech is never a major concern of Chinese courts. However, to be fair, these judgments are based on justified reasons, and at least some of the recent verdicts reflect a shift away from old practice.⁴²⁹ First, law is used less and less as a brutal tool for political interference. This is already a big step when compared to the situation decades ago. Second, if censorship has to be executed by means of law, law becomes a platform and stage to present argumentation from both parties. In this context, the rising importance of legitimate rule of law—when censorship becomes “dominantly pejorative”⁴³⁰—can rein in the political impulse to censor information and soften the state’s capabilities to do so.

IV. HISTORY, CENSORSHIP, AND THE LAW

The formation of Chinese law governing posthumous reputation and privacy bespeaks the development of Chinese law. The legal protection is justified in law first by protection of the dignity of the dead, which is the product of a deeply embedded Chinese tradition to respect the dead,⁴³¹ and to hide sins of oracles, relatives, and sages (为尊者讳, 为亲者讳, 为贤者讳)—a Confucian doctrine that is still popularly accepted by the public.⁴³² Second, it is justified by the interests of the close family members whose lives can be affected by the dead’s reputation.⁴³³ But the strong protection of posthumous reputation in China, in contrast to Western jurisdictions, means that there is only weak protection of free speech.⁴³⁴

429. See *supra* Part II.H.

430. Please see Schauer’s analysis of the concept of censorship. Frederick Schauer, *The Ontology of Censorship*, in CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION 147, 147 (Robert C. Post ed., 1998).

431. Xiao Zesheng, *supra* note 161.

432. This includes not speaking ill of the dead and their past sins. Confucius, *Mingong Yuannian* (闵公元年), CHUNQIU GONGYANG ZHUAN (公羊传).

433. See *supra* Part II.A.

434. See Liebman, *supra* note 50, at 100.

In most of the collected cases, judges did not show a strong will to protect the free speech of defendants.⁴³⁵ They are more likely to look at whether the interests of the dead and their living family are well taken care of, rather than to assure defendant's free speech rights. Most courts in the collected cases, including the appellate courts, involved such as the intermediate people's courts at the municipal level and the high courts at provincial level, only look at the specific legal issues involved, and do not inspect the free speech and liberty rights of the defendants in a more abstract, categorical way.

Given this lack of protection for free speech, one may ask: when many cases are history-related and Chinese law lacks solid legal protection of free speech, is there *systematic censorship of history* by Chinese courts? The answer is both yes and no, if taking the approach that censorship is "the policy of restricting the public expression of ideas, opinions, conceptions and impulses which have or are believed to have the capacity to undermine the governing authority, or the social and moral order which that authority considers itself bound to protect."⁴³⁶

Those who say there is no systematic censorship of history will point out that, as mentioned above, most Chinese courts do not look too much into abstract legal issues. They only try to decide if plaintiffs' claims are justified by law. Even the Sup. People's Ct. interpretations mainly deal with concrete legal matters consulted by lower courts, and never refer to any fundamental principles of Chinese law.⁴³⁷ The above discussion has revealed that legal protection of posthumous reputation and privacy has been developed on a case-by-case basis, and on the whole, the justifications that Chinese judges delivered in court verdicts are acceptable in general and in accordance with the governing laws and public morality.

435. Only in one case did the appellate court rule that the descendants should be more tolerant and allow artists more freedom in artistic creation and activities. The court also pointed out that the law has to balance the liberty of artists and the legal interests of descendants of the historical figures. *Huo Shoujin v. China Film Group*, *supra* note 201.

436. Henry J. Abraham, *Censorship*, in 2 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 356, 356 (David L. Sills ed., 1968) (citing Harold Lasswell, *Censorship*, in ENCYCLOPEDIA OF THE SOCIAL SCIENCES 290 (1930)).

437. See discussion *supra* Part II.C.

A persistent tradition to respect the dead, paired with a weak awareness of free speech among the Chinese people, leaves no real challenge to court decisions strongly protecting posthumous reputation and privacy at the expense of the free speech of the defendants. In most cases, judges are not obviously performing the role of censors on purpose. In a few recent cases, Chinese courts even explicitly expressed ideas similar to Western courts; that to verify what really happened in the past is not the court's task and should be left to historians and critics.⁴³⁸ At the very least, there is no statute or case law that prescribes any form of censorship of history.

However, there are many things that could be interpreted to reflect that, yes, there is systematic censorship of history in China. If judges try to censor certain periods of history, they will not do it bluntly, but with certain justifiable legal grounds.⁴³⁹ When some arguments in court verdicts seem apparently unreasonable, or at odds with professional standards, the question arises as to whether there is the possibility of censorship under the guise of law. In the collected cases that involve the dead's conduct during the Cultural Revolution and the Anti-rightist Movement, or cases regarding important political and military figures, judges act with great caution and sensitivity. They are likely to set higher standards for the authors who use truth and due care as defenses. This sort of behavior was showcased in the collected cases.

For instance, sensitive interviews and memoirs were denied as solid sources in biography writing.⁴⁴⁰ Second, a historian could be required to verify the controversial article with the dead's relatives before publication.⁴⁴¹ Third, certain sensitive archives of politically-sensitive periods were considered improper for autobiographical writing.⁴⁴² Fourth, novel and fiction authors were asked not to use defamatory comments, which because China lacks a coherent standard, gives a huge amount

438. *Huo Shoujin v. China Film Group*, *supra* note 201.

439. For example, by questioning the validity of the resources used by historians (or authors) for their research. See *Chen Lin v. Wu Dongfeng*, *supra* note 211; *Chen Mingliang v. Wu Shi*, *supra* note 213; *Long Yunsha v. Lu Jiandong*, *supra* note 209.

440. For a more detailed discussion, see *supra* Part II.F.

441. *Id.*

442. *Id.*

of discretion to courts.⁴⁴³ Fifth, Chinese courts, upon judging defamation of political figures, are likely to defer to official history or official remarks.⁴⁴⁴ Last, in some cases, authors are required to verify their quotations from other authors.⁴⁴⁵ Though these practical measures can be justified by the purpose to protect the dead's dignity and personality, as well as the living family's interests, they nevertheless amount to strong restrictions on the free speech rights of historians and other authors, leading to a form of indirect censorship. It would seem that if authors are required to meet higher standards by law than the popularly-accepted professional standards in writing, there is possible censorship involved, albeit justified by law.

Notably, this kind of indirect censorship is still restricted by the formality of law, as a determination of defamation needs to be supported by solid evidence to demonstrate that the contested publications are really defamatory in accordance with law. When there is no governing statutory law, case law, especially Sup. People's Ct. interpretations, must be followed. When there is no case law to be followed due to complicated circumstances, courts must deliver strong arguments to justify decisions. When decisions lack statutory authority and precedent in case law, such arguments will be under forthcoming scrutiny from the public, from historians, and from lawyers. As these detractors may argue, case law has made it such that Chinese courts can still invalidate evidence or use other legal tricks to achieve desired goals of censorship.⁴⁴⁶ But this kind of "censorship via law," is traceable in court verdicts and transparent to the public, and it is these formalistic requirements of the rule of law that create a minimum level of accountability.⁴⁴⁷

In sharp contrast, another indirect but more efficient form of censorship deserves our full attention. Though no explicit censorship exists in Chinese law, it can still provide a strong support for censorship in different ways. This type of censorship can

443. *Id.*

444. *See supra* Part IV.

445. *See supra* Part II.G.

446. For instance, the courts can deny the sources used by historians or authors that would be accepted in other jurisdictions, such as archives and previous publications. *See Chen Mingliang v. Wu Shi, supra* note 213; *Long Yunsha v. Lu Jiandong, supra* note 209.

447. *See generally* LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

be conducted via government or party policies that are only circulated among high-profile officials and party members. Ordinary Chinese have no access to these policies,⁴⁴⁸ and they can be classified as state secrets that are protected by criminal law.⁴⁴⁹ A telling example is what happened to the Chinese political dissident and prisoner Shi Tao. In 2004 he emailed an internal “official note” via his personal Yahoo mailbox to an overseas Chinese website. The document, a warning not to report anything about a protest event, was issued by the Chinese governing agency and was only supposed to be circulated among high-level journalists and editors.⁴⁵⁰ After Shi Tao sent the official note overseas, “a notice concerning the work for maintaining stability” was published by an American pro-democracy website, and Shi Tao was prosecuted for disclosure of state secrets and sentenced to imprisonment of ten years.⁴⁵¹

Furthermore, there are more direct party policies and government regulations issued by the Ministry of Propaganda and State Administration of Radio, Film and Television (“SARFT”) to censor sensitive topics that are not allowed to be discussed. Such policies and regulations are indeed better implemented and more effective than formal Chinese laws, and therefore have a chilling effect on free speech. For example, in January 2007 the Central Propaganda Department of the Chinese Communist Party issued new pre-censorship rules requiring the media to have permission to cover significant historical events or sensitive anniversaries involving figures regarded as politi-

448. See Jamie P. Horsley, *China Adopts First Nationwide Open Government Information Regulations*, FREEDOMINFO (May 9, 2007) <http://www.freedominfo.org/2007/05/china-adopts-first-nationwide-open-government-information-regulations/>.

449. See *State Secrets: China's Legal Labyrinth*, HUMAN RIGHTS IN CHINA, 120–24 (2007), available at http://www.hrichina.org/sites/default/files/oldsite/PDFs/State-Secrets-Report/HRIC_StateSecrets-Report.pdf.

450. For the Chinese and English versions of the verdict, see Shi Tao Wei Jingwai Feifa Tigong Guojia Jimi An (师涛为境外非法提供国家机密案) [Shi Tao Illegal Disclosure of State Secret to Foreign Institutes Case] (Changha Interm. Ct. Apr. 27, 2005) (China), available at http://lawprofessors.typepad.com/china_law_prof_blog/files/ShiTao_verdict.pdf.

451. NETWORK OF CONCERNED HISTORIANS, 2005 ANNUAL REPORT 11–12, available at http://www.concernedhistorians.org/content_files/file/ar/05.pdf.

cally sensitive or controversial. This was closely followed by SARFT's order banning reports on twenty issues, including judicial corruption and rights protection campaigns.⁴⁵²

Yet another recent way to achieve censorship by the state authority is to threaten publishers not to publish any works by authors on government black lists, and to punish publishers who defy these instructions from above for reasons *other than* censorship.⁴⁵³ Recently, the deputy director of China's General Administration of Press and Publication reprimanded a publisher at a meeting, menacing openly: "How dare you publish a book by this author?" and "Do you know this is what we called banning authors, not books?", although the official later denied such speech.⁴⁵⁴ Indeed, many publishers or newspapers that overstep or ignore government guidelines will encounter financial penalties and personnel reshuffle.⁴⁵⁵ Such forms of censorship are not traceable, because speeches at meetings and private telephone calls leave no tangible evidence. This is probably one of the reasons that we have not seen many defamation cases regarding biographical writings and historical books in recent years.

All in all, the rise of law in China is a development which may help curtail censorship. As indicated above, the formality of law,

452. See AMNESTY INT'L., CHINA: THE OLYMPICS COUNTDOWN: REPRESSION OF ACTIVITIES OVERSHADOWS DEATH PENALTY AND MEDIA REFORMS 20 (2007), available at <http://www.amnesty.org/en/library/asset/ASA17/015/2007/en/bc173ad7-d3a0-11dd-a329-2f46302a8cc6/asa170152007.en.pdf>.

453. It is a common practice for the Chinese authority to issue harsh laws tightly constraining individuals and companies, so that they have to act illegally to gain interests and benefits that are legal in other countries. The authority thus can implement law selectively against certain targets to achieve other purposes. For example, while most Chinese companies evade the heavy tax in one way or another, the central or local authority may pick up those who are deemed troublesome and prickly. This was seen when the famous Chinese artist Ai Weiwei was accused of tax evasion after he challenged the state authority in various ways. See *China Says Artist Ai WeiWei Can Challenge \$2.4m Tax Bill*, BBC (May 8, 2012), <http://www.bbc.co.uk/news/world-asia-17992674>.

454. Ms. Zhang's two books, which tell the story of China's Anti-rightist Movement, are both banned in different ways. Martinsen, *supra* note 420.

455. A telling example is the recent reshuffle at the top of Nanfang Daily Group, China's most outspoken media group. See David Bandurski, *China's Boldest Media: Losing the Battle?*, CHINA MEDIA PROJECT (May 14, 2012), <http://cmp.hku.hk/2012/08/14/25926>.

including the formal procedural requirements and legal argumentation from all parties, presupposes a strong demand to justify any limitations on the free speech of authors and artists by means of the law.⁴⁵⁶ And those justifications will be, once put down on paper, checked and challenged constantly. For example, the high standards set up by Chinese courts for biographers using primary sources can be criticized and scrutinized by defendants, lawyers, history scholars, and the public. If Chinese courts give in and lower the standards, it will be a big step in cutting back censorship and protecting free speech.

CONCLUSION

On the whole, Chinese law offers protection of posthumous reputation and posthumous privacy. With no statutory law applicable in 1989, this body of law has been developed gradually by Chinese courts under the supervision of the Sup. People's Ct. in various forms of legal interpretations. A striking feature of this body of law is that posthumous privacy is actually protected under the name of posthumous reputation. This can be attributed to the fact that as a Western-oriented legal concept, privacy is rather new to Chinese society and thus had been weakly protected under the rubric of defamation law for a long time before gaining independence in Chinese law in 2010.

The legal protection is rather strong for four reasons. First, the Chinese custom to respect the dead still remains a rather strong factor for judges to consider in adjudication, although it has gradually lessened in past decades. Second, under many circumstances, surviving family members have substantial interests in the reputation and privacy of the dead, due to shared social status and China's hierarchical social structure. Third, the reputation of many dead political figures still plays an important role in China's official history that justifies the legitimacy of the ruling regime. For this reason, the reputations of political figures have been closely monitored by the state authority. Finally, a fundamental reason for the strength of China's defamation protection is China's notoriously weak protection of a free speech right, despite it being recognized in the Chinese constitution. In most Western democracies, protection

456. For a discussion of the minimum requirement of legal morality of law as a formality requirement, see FULLER, *supra* note 447.

of free speech sets a strong limitation on protection of reputation and privacy of the living, not to mention those of the dead. Common law countries do not offer protection of reputation and privacy of the dead, and even in most continental countries, free speech is an important value to be weighed in conflicts that deal with reputation or privacy. In China, the strong protection of the dead's reputation and privacy is practically possible with a very weak free speech right. This is most readily observed in politically-charged cases where posthumous reputation is regarded as an element of the official government history that justifies the ruling of the party state.

In contrast to this are some positive developments in relation to cases that lack famous individuals or a highly charged political issue. In these cases, as discussed above, Chinese judges, similar to their Western colleagues, have delivered solid arguments to support free speech rights of authors and film directors, and restrict the strong protection of posthumous reputation. However, in general, the strong protection remains a dominating feature of Chinese law, and the status quo will not be changed until the point of a fundamental political change to democracy.