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Ambivalence and Activism: Employment Discrimination in China

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Ambivalence and Activism: Employment Discrimination in China

*Timothy Webster**

ABSTRACT

Chinese courts have not vigorously enforced many human rights, but a recent string of employment discrimination lawsuits suggests that, given the appropriate conditions, advocacy strategies, and rights at issue, victims can vindicate constitutional and statutory rights to equality in court. Specifically, carriers of the hepatitis B virus (HBV) have used the 2007 Employment Promotion Law to ground legal challenges against employers who discriminate against them in the hiring process. Plaintiffs' relatively high success rate suggests official support for making one prevalent form of discrimination illegal. Central to these lawsuits is a broad network of lawyers, activists, and scholars who actively support plaintiffs, suggesting a limited role for civil society in the world of Chinese law. Although many problems remain with employment discrimination, China has made concrete steps toward repealing a legal edifice of discrimination that stretches back decades and reshaping policies and attitudes to eradicate a prevalent form of discrimination, targeting carriers of infectious disease.

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In 2003, two young college graduates almost got jobs in China's elite civil service.¹ Zhou Yichao, handsome and twenty-three years old, scored well on both the written test and the oral interview, ranking eighth of the 157 applicants. Zhang Xianzhu, twenty-five years old and bespectacled, ranked first among the thirty applicants in his hometown. Both men then took medical examinations, the final phase of the Chinese hiring process. Their medical examinations revealed that both men carried the hepatitis B virus (HBV), and according to provincial regulations on civil service

1. The *Los Angeles Times* and *New York Times* both covered these men's sagas. See Joseph Khan, *Chinese People's Republic Is Unfair to Its Short People*, N.Y. TIMES, May 21, 2004, at A13 (describing the case of Zhang Xianzhu); Ching-Ching Ni, *Killer Inspires Drive Against Hepatitis Bias*, L.A. TIMES, Jan. 8, 2004, at A5 (describing the cases of Zhou Yichao and Zhang Xianzhu).

examinations, this rendered them ineligible for government posts. Both were surprised by this result.

Zhou Yichao first contemplated suicide, but upon reconsideration, he bought a paring knife, went to the government office to ask about the results, and then stabbed two civil servants, killing one. Zhang Xianzhu also took an unexpected course of action. He retained a prominent discrimination lawyer and sued the government agency for violating his constitutional rights. Around these two cases—the murder trial of Zhou Yichao and the administrative litigation initiated by Zhang Xianzhu—a legal movement coalesced. China's HBV community, which at that point consisted of a couple of online chat rooms and discussion boards, seized upon these cases to launch a multifaceted campaign to introduce antidiscrimination laws, eliminate employment discrimination, and change social attitudes more generally. Somewhat remarkably, HBV advocates have largely succeeded in the first mission, lobbying government bodies to institute legal protections. However, like discriminatory attitudes more generally, discrimination by employers remains deeply rooted in contemporary China.

Since these events unfolded in 2003, advocates have petitioned government bodies, conducted campaigns to increase public understanding of the actual health risks of HBV, and litigated dozens of discrimination lawsuits. The government's response has been impressive. In at least three national laws (*fali*) and six administrative regulations (*guize*), Chinese government bodies have addressed the employment rights of disadvantaged Chinese, including women, ethnic minorities, the disabled, and carriers of infectious diseases (like HBV and AIDS). Central to the government's various legislative responses has been the careful mobilization of the HBV community, which has drafted recommendations and petitions to government agencies, sent open letters to Chinese government leaders, and commented on draft legislation prepared by the national legislature. This campaign opened a discussion about the nature of discrimination in China, as well as the role that citizens play in eradicating it.

Discrimination is a prevalent but poorly understood social problem in China. The shift from a state-controlled to a market-based economy in the past thirty years has impacted virtually every aspect of Chinese society, from raging economic growth to a floating population larger than most countries. But it has also opened up new opportunities for people to assert their free will, whether by purchasing new products, enjoying new forms of leisure, or engaging in new occupations. It has also given employers, once bound by the *diktat* of centralized economic planning, considerable autonomy to hire, as well as to discriminate in that process.

Of course, discriminatory practices and attitudes do not materialize out of thin air. One of this Article's primary arguments is that the Chinese government—at all levels—plays a leading role in promoting discrimination.² By mandating an earlier retirement age for women, as it has done since the early 1950s, the Chinese government signals to society that women are frail, merit special treatment, and cannot work as hard or as long as men. Likewise, the household registration system (*hukou*) stamps a person as either rural or urban and links his access to social benefits to the locality where he is registered. Given the enormous gap between rich cities and poor villages, as well as the difficulty of changing one's *hukou* status, Chinese villagers face dim job prospects and a thicket of municipal restrictions on hiring out-of-towners. Official barriers also remain intact against carriers of infectious diseases. As seen above, civil service positions require applicants to be free of infectious diseases, even when the job itself presents no risk of contagion.

Facing these policies and social attitudes that reflect distrust and disfavor, advocates of various stripes—nongovernmental organizations (NGOs), public interest lawyers, concerned citizens, government-operated nongovernmental organizations (GONGOs), and others—have mobilized to challenge discrimination. In close contact with the media and online channels, these advocates have raised awareness, lobbied legislative and administrative bodies to repeal discriminatory regulations and pass protective ones, and filed dozens of lawsuits claiming employment discrimination. This Article argues that these mobilization efforts, as well as the legislative and administrative responses by government bodies, indicate a newfound responsiveness of the Chinese government to equal employment, a core issue of human rights. More importantly, the fact that courts have routinely found for victims of discrimination suggests that the level of commitment is more than merely “discursive,” or paper on the books. Although we can, and will, rightly question the efficacy of remedies ordered by Chinese courts, it is clear that officials across various sectors of the Chinese government agree that discrimination against HBV carriers, if no one else, is worth proscribing.

2. The Chinese government is by no means unique in this regard. Over the years, the United States federal government and state governments have promulgated numerous facially discriminatory laws, from the Chinese Exclusion Act, Pub. L. No. 71, 22 Stat. 58 (1882) and the Asian Exclusion Act, 43 Stat. 153 (1924), to the Jim Crow laws passed in many Southern states. Most recently, a new Arizona law requires law enforcement officials to determine the immigration status of any person “where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States.” Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Ariz. Sess. Laws 113, 113. In July 2010, a federal judge blocked this provision of the law, and several others, from going into effect. *United States v. Arizona*, 703 F. Supp. 2d 980, 987 (D. Ariz. 2010).

This Article proceeds in five parts. Because the field of employment discrimination is so vast, this Article narrows the scope by focusing on three large disadvantaged groups: women, migrant workers, and carriers of infectious diseases. Discrimination itself is a multifaceted phenomenon. Therefore, in analyzing the current status of discrimination in China and the laws that prohibit it, this Article adopts several methodologies, including interviews with lawyers and activists involved in discrimination issues, analysis of verdicts brought by victims of discrimination, sociological materials on social movements, and conventional methods for the excavation and interpretation of current (and annulled) Chinese law and regulation. An interdisciplinary approach permits reflection both on the nature of existing Chinese law and on the processes and people that have led to its reformulation and revision.

Part I briefly describes the historical context for the discussion and reviews competing concepts of employment discrimination as developed in the West.

Part II describes the most common—and perhaps the most serious—manifestations of employment discrimination in contemporary China. These manifestations can be overt: job advertisements openly express preferences or limitations based on gender, health status, age, height, household registration, and so on. The prevalence of discriminatory preferences in job advertisements reflects both the popularity of discriminatory attitudes and the impunity employers enjoy in screening candidates in this manner. Alternatively, more covert forms of discrimination are practiced in the selection process itself. Employers deploy a wide range of techniques to exclude women, hepatitis B carriers, and other disfavored groups (women under 5'2" or over thirty years old; men under 5'5" or over thirty-five years old). Medical examinations, photographs, CVs, written examinations, and other "objective" forms of documentation provide employers with the pretextual grist needed to weed out undesirable applicants. During the interview itself, employers may ask female candidates about their marital status and future plans for children. These processes produce distinctively discriminatory workspaces, which are reproduced and normalized in factories, stores, and offices.

Part III outlines the law of employment discrimination prior to the Employment Promotion Law.³ It attends to laws that both promote and proscribe discrimination, highlighting the essentially ambivalent role that the Chinese government has played in this regard. On the one hand, China has instituted a number of discriminatory laws and practices in its sixty-year history. Women,

3. Jiuye Cujin Fa [Employment Promotion Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008).

for instance, must retire before men,⁴ a form of paternalism perhaps plausible in the 1950s, when the regulation was first passed, but no longer apposite.⁵ Likewise, State Council regulations issued in the 1980s—and still in effect—foreclose job opportunities to infectious diseases carriers due to concerns about contagion.⁶ These restrictions sweep broadly and do not accurately reflect the medical risk that potential workers may pose to their colleagues and customers. On the other hand, national legislation—such as the Labor Law⁷ and the Women's Law⁸—has prohibited discrimination against various disadvantaged groups since the early 1990s. But they have provided little legal protection and few remedial opportunities or mechanisms. More recent regulations have further sought to entrench the rights of migrant workers, with varying degrees of success.

Part IV explains how advocates for HBV carriers have effected legal change in the area of employment discrimination. Using sociological and political theory, this Part describes how a social movement coalesced around the issue of HBV discrimination. Spurred by the cases of Zhou Yichao and Zhang Xianzhu, HBV advocates have activated a wide range of civil society actors—carriers, public interest lawyers, concerned citizens, online discussion boards, and NGOs—to champion the rights of HBV carriers. Using media pressure and online tools to mobilize public opinion, HBV advocates adopted a multipronged strategy to challenge many forms of discrimination, including employment discrimination. By litigating cases and encouraging thwarted jobseekers to come forward and sue, they frame the struggle as one with deeply human consequences. Judges are often sympathetic to the discrimination claims of HBV carriers because employment rights are the core socioeconomic rights that China claims to privilege. Activists also petition Chinese government bodies to suggest ways to resolve problems with existing law, and they point out areas that law should cover. These various strategies have convinced several government agencies to issue regulations to protect the rights of roughly 120 million carriers.

Part V examines the 2007 Employment Promotion Law and its progeny of lawsuits. The law expands existing legal protections, but it also offers victims of employment discrimination a new tool with which to challenge discrimination: access to courts. By suing, affected jobseekers can vindicate labor rights that existed almost

4. See *infra* notes 115–25 and accompanying text.

5. See *infra* notes 115, 117, 125.

6. See *infra* notes 213–18 and accompanying text.

7. Laodong Fa [Labor Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995), available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383754.htm.

8. Funü Quanyi Baozhang Fa [Law on the Protection of Women's Rights and Interests] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 3, 1992, effective Oct. 1, 1992).

exclusively as theory or principle for the past two decades. It is too early to decide whether litigation will meaningfully alter the practices and attitudes of Chinese employers, but the threat of losing a lawsuit may deter some from discriminating against applicants. Still, a great deal of work must be done to advance this key human right. Accordingly, the end of this Part offers ways to make the law more effective.

I. BACKGROUND

A. *Historical Background*

Throughout its short history, the People's Republic of China (PRC) has always had antidiscrimination law. The 1954 Constitution, in a nod to the recently annexed Tibet and Xinjiang, guaranteed the right to equality for all ethnic groups: "The People's Republic of China is a unified multiethnic nation. All ethnicities shall be equal. It is prohibited to *discriminate* against or oppress any ethnicity"⁹ This is the sole appearance of the word "discriminate" in the 1954 Constitution,¹⁰ and one of two in the current Constitution,¹¹ but it was not the only provision to address discrimination. Its close correlate, "equality," also appeared—as it has in all four of China's constitutions—to guarantee equality between men and women in the social, political, cultural, and educational fields.¹² Gender equality has long been a central concern for the Chinese government, but it remains an elusive goal to achieve.

During the early years of the PRC, women gained traction in the fields of culture, education, and employment, but made less progress in social rights, and remained largely invisible in the political sphere (as they do today).¹³ In other words, a wide gulf separates the

9. XIANFA art. 3 (1954) (emphasis added).

10. The 1982 Constitution prohibits discriminating between religious believers and non-believers. XIANFA art. 36 (1982).

11. *Id.* art. 4 ("Discrimination against and oppression of any nationality are prohibited."); *id.* art. 36 (prohibiting discriminating "against citizens who believe in, or do not believe in, any religion"). Both provisions remain aspirational.

12. See XIANFA art. 48 (1982) ("The state protects women's rights and interests, implements equal pay for equal work between men and women, and cultivates and promotes female cadres."); XIANFA art. 53 (1978) (specifying further the principle of equal pay for equal work (*tonggong tongchou*)); XIANFA art. 27 (1975) (providing that women and men enjoy equal rights in all aspects); XIANFA art. 96 (1954) (providing that men and women enjoy equal rights in politics, economics, culture, society, family life, and all other aspects).

13. See *Women a Rare Sight in China's Corridors of Power*, ABC NEWS (Oct. 22, 2007), <http://www.abc.net.au/news/stories/2007/10/22/2065608.htm>.

No woman has ever served on the all-powerful Politburo Standing Committee, and Ms. Wu [Yi] was the only woman on the outgoing 24-member Politburo,

aspirations of equality enshrined in the Chinese Constitution from the promotion of equality and proscription of discrimination in everyday life. Moreover, because individuals cannot assert constitutional rights,¹⁴ the Constitution, without some kind of implementing legislation, continues to inspire but not safeguard basic rights.

In the early days of the PRC, the Chinese government made concerted efforts to increase the role and visibility of women in the workplace. The central government issued administrative regulations to staff women in fields traditionally dominated by men, such as the commercial and service sectors.¹⁵ Women were also encouraged to enter professions formerly monopolized by men, such as tractor drivers, railroad engineers, and pilots.¹⁶ In this period, women worked in “every sector of the national economy, every industry, and every profession, revealing a huge potential labor force that had never been recognized or understood by the society or by women themselves.”¹⁷

Under the planned economy, government personnel offices made most employment decisions, which filled quotas in line with national economic policy.¹⁸ If an employee possessed little education, she usually was assigned to the same work unit as her parent.¹⁹ A more educated employee could take an examination for entry into more specialized positions like teacher, scientist, or engineer.²⁰

At the same time, China also put in place restrictions that, however well-intentioned, laid the foundation for today’s discriminatory edifices, practices, and attitudes. The differential retirement age for men and women is the leading example of these unintended consequences. Aimed at shortening the time a woman had to work in acknowledgement of her role in delivering and rearing

ranked one notch below the Standing Committee. Before her, just three women had been full Politburo members, and all were wives of top leaders, including Mao’s wife, Jiang Qing

Id.

14. ZHOU WEI, XIANFA JIBEN QUANLI SIFA JIUJI YANJIU [STUDIES ON JUDICIAL REMEDIES FOR BASIC RIGHTS IN THE CONSTITUTION] 118–19 (2003). Instead, lawyers must rely on statutes that implement constitutional protections in order to file cases in People’s Courts. *Id.* at 119.

15. Jiang Yongping, *Employment and Chinese Urban Women Under Two Systems*, in HOLDING UP HALF THE SKY: CHINESE WOMEN PAST, PRESENT & FUTURE 207, 210 (Tao Jie et al. eds., 2004).

16. *Id.*

17. *Id.* at 210–11.

18. Yong-Qing Fang et al., *National Policy Influence on Women’s Careers in the People’s Republic of China*, in EMPLOYMENT OF WOMEN IN CHINESE CULTURES: HALF THE SKY 49, 51 (Cherlyn Skromme Granrose, ed., 2005) [hereinafter EMPLOYMENT OF WOMEN].

19. *Id.*

20. *Id.*

children, the policy, when initially promulgated in 1957, was seen as a boon to women.²¹ Fifty years later, the policy has come to signify something different: that women are somehow less capable or suitable than men for both labor and cadre positions. As a result, many women are let go, often forcibly, five to ten years before their male counterparts, even if they want to keep working.²²

Likewise, when instituted in 1958, the household registration system (*hukou*) restricted the movement of all Chinese citizens, keeping urban residents in cities and rural residents in the countryside.²³ Since that time, the Chinese government has systematically privileged the development of urban areas over rural ones. Better funded education, transportation, health care, social benefits, and other services have made China's cities much more attractive places to live.²⁴ However, because the government restricted travel, and made changing one's *hukou* status very difficult, rural residents were condemned to a lifetime of poverty,²⁵ enjoying none of the "access to economic and social opportunities, activities and benefits" that their urban compatriots enjoyed.²⁶ At present, urban residents tend to view rural residents (many of whom migrated to the cities for low-end jobs) with a mixture of contempt and hostility, while city governments have issued a raft of ordinances that privilege local (urban) residents over outside (rural) residents in employment, education, and social services.²⁷

With the move away from central planning and the opening up of the market economy in the 1980s and 1990s, the problem of discrimination crept into employment decisions. No longer firmly fixed to their work units, Chinese citizens had greater mobility to pursue a broader range of employment opportunities. Employers, no longer bound by centralized hiring decisions, could select whom to employ with little outside input. In this newly emergent space, a host of traditional attitudes about women, outsiders, illness, and disability resurged. Stereotyped thinking still retains currency in the minds of

21. Ding Hua, *Laodong Falü/Zhengce Zhidingzhongde Shehui Xingbie Pingdeng Huigu Yanjiu* [Review of Gender Equality in Labor Law and Policymaking], in XINGBIE PINGDENGDE FALÜ YU ZHENGCE: GUOJI SHIYE YU BENTU SHIJIAN [LAWS & POLICIES TOWARDS GENDER EQUALITY: INTERNATIONAL PERSPECTIVES AND LOCAL IMPLEMENTATION] 167, 187 (Tan Lin & Du Jie eds., 2008).

22. See *infra* Part III.B.

23. FEI-LING WANG, ORGANIZING THROUGH DIVISION & EXCLUSION: CHINA'S HUKOU SYSTEM 24 (2005).

24. See CONG.-EXEC. COMM'N ON CHINA, CHINA'S HOUSEHOLD REGISTRATION SYSTEM: SUSTAINED REFORM NEEDED TO PROTECT CHINA'S RURAL MIGRANTS 2-3 (2005), <http://www.cecc.gov/pages/news/hukou.pdf?PHPSESSID=d7ba37aeb55f864e3c62880ef899d59a> (describing how the Chinese government gave benefits to non-agricultural workers and encouraged movement to urban areas to combat the rural labor surplus).

25. See *infra* Part III.B.

26. FEI-LING WANG, *supra* note 23, at 24.

27. See *infra* notes 165-71 and accompanying text.

many Chinese and finds analogues across a wide variety of government policies and legislation.

B. Defining Discrimination

Before examining the legal edifices that promote and proscribe employment discrimination, some discussion of discrimination itself is needed. Employment discrimination is a complicated phenomenon, involving conscious decisions and unconscious assumptions about people due to qualities supposedly possessed by virtue of their sex, race, national origin, or other immutable characteristics.

In the United States, federal courts distinguish direct discrimination, also known as disparate treatment, from indirect discrimination, or disparate impact. Direct discrimination—"the most easily understood type of discrimination"²⁸—occurs when an employer treats a person less favorably than someone else due to a protected trait, such as his or her gender, age, or race.²⁹ Indirect discrimination is somewhat harder to grasp, as it involves a facially neutral practice or policy with "a disproportionately adverse effect on minorities."³⁰ Chinese scholars are fond of citing an 1870 ordinance from the San Francisco City Council banning the use of shoulder poles (or *danbao*).³¹ Although facially neutral, the ordinance clearly targeted Chinese immigrants, who retained the use of the pole to transport objects in their adoptive homeland.³²

Finally, systemic discrimination refers to policies or practices that have a disproportionately broad impact on a larger subpopulation (racial, geographical, professional, or otherwise).³³ This Article argues that the *hukou* system constitutes the most pernicious form of systemic discrimination in contemporary China. Systemic discrimination, though developed in the United States and other Western societies, is relevant to the structural elements of discrimination in the PRC: lopsided development, inequality of educational opportunity, and uneven access to social services. In other words, the manifestations and structural causes of discrimination travel quite well.

28. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

29. Ricci v. DeStefano, 129 S. Ct. 2658, 2672 (2009) (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 985–86 (1988)).

30. *Id.*

31. See, e.g., ZHONGGHUA RENMIN GONGHEGUO JIUYE CUJIN FA JIEDU [AN INTERPRETATION OF THE EMPLOYMENT PROMOTION LAW OF THE PEOPLE'S REPUBLIC OF CHINA] 70 (Xin Chunying ed., 2007) [hereinafter PROMOTION LAW INTERPRETATION].

32. *Id.*

33. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, SYSTEMIC TASK FORCE REPORT TO THE CHAIR OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 1 (2006) (defining systemic cases as those which have "a broad impact on an industry, profession, company, or geographic location").

The preceding definitions are particularly important because Chinese statutory law, like U.S. statutory law,³⁴ does not define discrimination, even as many laws proscribe it. The lack of a formal definition has not hobbled the judicial development of antidiscrimination law in the United States, where courts routinely step in to fill gaps in legislation by defining discrimination, creating judicial mechanisms such as burdens of proof by which to capture discriminatory conduct, or prescribing remedies.³⁵ But Chinese courts play a far less active role in defining and creating law and legal mechanisms.³⁶ Instead, Chinese courts play a more active role in the enforcement of existing laws than the creation or critique of law and policy.³⁷

II. CHINESE DISCRIMINATION

Chinese scholars identify many types of discrimination in China. One Chinese scholar identified over a dozen forms of discrimination in employment alone.³⁸ Some of these forms, such as age and disability, are similar to recognized forms of discrimination in U.S. federal law.³⁹ Others would not properly be considered discrimination in the United States, but rather proxies of an employee's abilities, such as academic background, CV, and work experience.⁴⁰ Still others reflect China's unique socio-political biases,

34. See *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 660 (7th Cir. 2005) ("Title VII does not define 'discrimination' Lack of a definition leaves unresolved the question *how important* a difference must be to count as 'discrimination.'").

35. See HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 164–66 (2d ed. 2004) (describing the variety of ways in which appellate courts have defined discrimination).

36. See Benjamin L. Liebman, *China's Courts: Restricted Reform*, 21 *Colum. J. Asian L.* 1, 32 (2007) (noting the "modest reach of judicial innovation in China").

37. Of course, the Supreme People's Court (SPC) can issue judicial interpretations (*sifa jieshi*) of a particular law, which offer guidance to judges applying the law. See, e.g., *Introduction to China's Legal System*, Law Library of Cong., <http://www.loc.gov/law/help/china.php> (last visited Apr. 8, 2011). But the SPC has issued no such document regarding employment discrimination.

38. Lou Yaoxiong, *Woguo "Jiuye Qishi" de Fali Fenxi ji Duice [Analysis and Countermeasures for the Law of "Employment Discrimination" in China]*, Beijing Youdian Daxue Xuebao (Shehui Kexueban) [J. Beijing U. Posts & Telecomms. (Soc. Sci. Ed.)], no. 3, 2004, at 63, 64.

39. Congress made age discrimination illegal by the Age Discrimination in Employment Act of 1967, Pub. L. No. 90–202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2006)). Disability discrimination was banned by the Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327 (codified as amended at 42 U.S.C.A. §§ 12111–12213, 47 U.S.C.A. §§ 225, 611 (West 2011)).

40. Federal law protects against discrimination based on race, color, religion, sex, national origin, age, disability, and genetic information. The framework has been gradually built up over four decades, from the 1964 Civil Rights Act to the 2008 Genetic Information Nondiscrimination Act. See generally U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *FEDERAL LAWS PROHIBITING DISCRIMINATION QUESTIONS AND*

such as region (e.g., antipathy for people from Henan province), household registry, and membership in the communist party.⁴¹ Other forms of discrimination reflect concerns about the human body, such as height and appearance, or concern over the spread of disease.⁴² To this list one must add categories already protected in Chinese national legislation, such as sex, religious belief, race, and ethnicity.⁴³

Despite this profusion of categories, certain classifications are more pernicious than others. Discrimination based on a person's academic background, CV, and work experience may usefully identify talent, giving employers a shortcut to wade through the large number of job applicants in China's crowded job market. Yet other forms of discrimination—such as sex, health status, and household registration—serve only to disqualify persons based on outmoded thinking and irrational presumptions about the capacity to work productively.

This Part examines three types of empirical evidence of employment discrimination: job advertisements, statistical surveys, and personal narratives. Job advertisements, both in print and online, help depict the culture of job recruitment. Since these ads are often the first link in the chain of the hiring process, they are particularly valuable indicia of what is permissible and expected of applicants. Advertisements also reveal the expectations and preferences that employers bring to bear on their personnel decisions. Similarly, statistical surveys about attitudes and experiences of discrimination provide an empirical basis to understand which forms of discrimination are most widespread. Different studies arrive at divergent conclusions about which forms of discrimination are most prevalent, but such divergence may be inevitable whenever perceptions, personal experiences, and other subjective forms of knowledge are analyzed. Finally, personal narratives shed additional light on the experience of discrimination from the applicant's perspective, while illuminating the techniques used to weed out candidates. Interview questions, e-mail exchanges, requests for photographs, and other devices to smoke out "undesirable" job candidates may not be captured by statistics or other sources, but these techniques are critical to understanding the mechanics of employment discrimination in China.

ANSWERS, <http://www.eeoc.gov/facts/qanda.html> (last updated Nov. 21, 2009) (listing discrimination laws). Presently, Congress is considering extending the same protections to sexual orientation. See, e.g., *Employment Non-Discrimination Act*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/issues/workplace/enda.asp> (last updated Apr. 8, 2011) (describing the content and current status of the bill).

41. Lou Yaoxiong, *supra* note 38, at 64.

42. *Id.*

43. Laodong Fa [Labor Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995) art. 12.

A. Job Advertisements

In the United States and the United Kingdom, critical assessment of job advertisements has provided important insights into the discriminatory preferences of employers. In the United States, for instance, gender and age discrimination surfaced in advertisements throughout the 1980s, even though federal law had banned such preferences since the 1960s.⁴⁴ In one survey, researchers found 9.5 percent of advertisements in the classified section of various Sunday newspapers to be either “questionable or blatantly illegal.”⁴⁵ Of these discriminatory advertisements, 90 percent discriminated based on sex, whether for men or women.⁴⁶ In the United Kingdom, researchers noted a decline in the number of advertisements with age preferences from 1981 to 1991, suggesting that one form of illegal discrimination was on the wane but still evident.⁴⁷

More recently, it has become common for U.S. employers to *counter* discriminatory preferences in job advertisements. Companies and organizations now routinely state that they are “Title IX” employers, or otherwise encourage applications from women and minority candidates.⁴⁸ Whether this change reflects greater tolerance by employers or a heightened recognition of the value (moral, economic, or otherwise) of a diverse workforce remains an open question. Alternatively, this greater openness could simply respond “to tightened government regulation and threats of lawsuits.”⁴⁹ Whatever the underlying reason, a notable shift away from discriminatory job advertisements is clearly detectable in the United States and United Kingdom.

China presents a far different picture, as recent studies show. Zhihong Gao’s study of online recruiting⁵⁰ and Zhou Wei’s research on

44. John P. Kohl et al., *The Ongoing Battle of Discrimination in Help Wanted Ads*, 15 BUS. FORUM 8, 9 (1990).

45. *Id.* at 10.

46. *Id.* at 11.

47. Ann E. McGoldrick & James Arrowsmith, *Recruitment Advertising: Discrimination on the Basis of Age*, 15 EMP. REL. 54, 55 (1993).

48. See, e.g., *Recruiting and Hiring Policy*, VANDERBILT UNIV. (Sept. 1, 2009), <http://hr.vanderbilt.edu/POLICIES/hr-017.pdf>.

Vanderbilt University and Medical Center are committed to ensuring equal employment opportunities. In compliance with federal law, including the provisions of TITLE IX of the Education Amendments of 1972, Sections 503 and 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990, Vanderbilt University does not discriminate

Id.

49. Zhihong Gao, *Gender Discrimination in Chinese Recruitment Advertisements: A Content Analysis*, 9 J. ASIA-PAC. BUS. 395, 404 (2008).

50. *Id.*

print advertisement⁵¹ suggest that age, gender, and physical appearance remain critical criteria for employers. Other factors, such as household registration and height, appear less frequently than age and gender, instead surfacing in more specialized or exotic positions.⁵² Many advertisements contained multiple forms of discrimination—women under the age of thirty, men over 5'5"—so these categories should not be thought of in isolation.⁵³

Gao surveyed 955 white-collar job advertisements on ChinaHR.com, a leading employment website.⁵⁴ She found that the most frequently cited discriminatory basis was age, which appeared in 24.2 percent of the ads, followed by gender (12.3 percent), and physical appearance (10.5 percent).⁵⁵ Further deconstruction of the categories led to interesting, if predictable, results. For example, gender restrictions targeted both men (5.5 percent) and women (6.7 percent); most of the former were for managerial positions, while most of the latter were for sales and clerical positions.⁵⁶ These advertisements reinforce the traditional power structure that subordinates women to men. Moreover, many ads for women contained other restrictions, such as age (typically under thirty) and appearance (“good looking,” “having a nice image,” “tall enough”).⁵⁷ This multiplicity of restrictions suggests “a more demeaning dimension to gender discrimination” in China, namely that Chinese women “are treated . . . as sex objects . . . to please the eyes of male bosses and clients.”⁵⁸

Other surveys of China’s advertising reveal that age and gender weigh heavily on employers’ minds. One study surveyed 568 firms across eight different job sectors, including goods and manufacturing, research and development, commerce and logistics, finance and public finance, and administrative and personnel.⁵⁹ To ensure a broad

51. Ning Xueling & Zhao Tieshan, *1995-2005-nian Shanghaiishi he Chengdushi Baokan Guanggao Yaoqiu Laodongzhe yu Gangwei Zhize Wuguande Tiaojian Tubiao* [Charts on Conditions Irrelevant to Professional Responsibilities of Laborers and Positions Sought in Shanghai and Chengdu Print Job Advertisements from 1995 to 2005], in *FANQISHIFA YANJIU: LIFA LILUN YU ANLI* [STUDIES ON ANTIDISCRIMINATION LAW: LEGISLATION, THEORY & CASES] 338 (Zhou Wei ed., 2008).

52. *Id.* at 369, 390. Ning and Zhao surveyed 242,520 advertisements from four newspapers (two in Shanghai, two in Chengdu) over a ten-year period. *Id.* at 338–39, 345. Age, academic background, and work experience were among the most prevalent preferences that appeared in print. On the other hand, height restrictions appeared in 3.4 percent of the advertisements, while household registration restrictions appeared in 7.8 percent. *Id.* at 369, 390.

53. *Id.* at 347.

54. Zhihong Gao, *supra* note 49, at 405.

55. *Id.* at 406–07.

56. *Id.* at 407.

57. *Id.* at 411.

58. *Id.*

59. See Zhu Aisheng, Sun Weixiang & Zhao Butong, *Zhaopinzhong Qishi Xianxiangde Shizheng Yanjiu* [An Empirical Study of Discriminatory Phenomena in

snapshot of discrimination, the authors surveyed state-owned enterprises, collective enterprises, privately owned companies, foreign invested companies, and shareholding companies.⁶⁰ Again, age was the preeminent factor, appearing in 54.4 percent of the advertisements examined.⁶¹ Among the more discriminatory sectors were finance, administration and personnel, and commerce and logistics; in these sectors, over half of the advertisements contained age restrictions, targeting candidates who were either eighteen to twenty years old or, somewhat more commonly, twenty-five to thirty-five years old.⁶² By contrast, few employers specifically targeted persons aged thirty-five to forty-five years old or forty-five and over.⁶³

Gender was a less prominent factor than age, but the use of gender varied considerably across sectors. Certain sectors preferred men. Twenty-two percent of the advertisements in production required men, while only four percent required women.⁶⁴ Research and development was similarly skewed: 14 percent required men, while only 2 percent required women.⁶⁵ Commerce and logistics likewise favored men by a ratio of 28 percent to 6 percent.⁶⁶ However, other sectors sought women: administrative and personnel preferred women by a ratio of 31 percent to 8 percent, and education and hygiene preferred women by a ratio of 30 percent to 6 percent.⁶⁷ These statistics certainly support the idea that men are preferred in industries that require physical labor or scientific skills, while women are valued for administrative skills or ability to teach.

Although somewhat less prevalent than age or gender, *hukou* status also matters to many employers. Statistical evidence is limited, but one survey of Chongqing showed that only 7 percent of positions contained *hukou* restrictions, but that over 20 percent of employers restricted labor in this way.⁶⁸ The author of the survey conducted phone interviews with twenty of the employers that

Recruitment], 20 SHENGCHANLI YANJIU [STUD. ON PRODUCTION] 74, 74 (2007) (including slashes in the categories themselves).

60. *Id.*

61. *Id.*

62. *Id.* Several of the bases discussed in this Article—such as academic background, professional title, or work experience—would not constitute discrimination under U.S. law. This reveals an important difference in American and Chinese conceptions of discrimination.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Yuan Weiqin, *Chongqing Wailai Wugong Jiuye Qishi Diaocha* [Survey of Employment Discrimination Against Chongqing's Outside Workers], in JINZHI JIUYE QISHIDE FALÜ ZHIDU YU ZHONGGUODE XIANSHI [LEGAL SYSTEMS OF ANTI-DISCRIMINATION IN EMPLOYMENT & CHINA'S REALITY] 171, 183–84 (Zhou Wei et al. eds., 2008) (presenting research that indicates 683 of 9,606 positions contained such restrictions, while 142 employers out of 683 implemented such restrictions).

included these restrictions. When asked why they discriminated against outsiders, the employers' responses included: (1) "We don't know what to make of outside laborers; we do not know if they are thieves or hooligans"; (2) "We have never hired outsiders, nor thought to hire them"; (3) outsiders require a certain period of time to acclimate to Chongqing; and (4) "Outsiders' habits are different from ours. . . . We hired one before, but he was stubborn as a mule."⁶⁹ Whether based on ignorance or limited experience, the prevailing attitudes in at least one of China's metropolitan areas suggest a deep prejudice toward outside labor.

A culture of discrimination has congealed at the first step of the Chinese hiring process, presaging a process replete with discrimination. Little wonder that workspaces in China are so clearly gendered, with men occupying posts at the managerial levels and women suffusing the lower rungs of the service sector.⁷⁰ Although the evidence is more limited, negative attitudes toward "outsiders" (Chinese citizens with non-local residency status) likewise characterize many employers. If China seriously intends to be rid of employment discrimination, some effort must be made to end discriminatory advertisements, which both naturalize and reproduce artificially segregated workspaces.

B. Statistics

Statistical surveys provide another glimpse at the problem of employment discrimination. Surveys usefully reflect both reality (which groups work at what levels of society) and perceptions of reality (have you ever been discriminated against?). Both reality and its perception are critical in understanding discrimination because of the important role that perception plays in perpetuating discrimination.

In May 2006, scholars at China University of Political Science and Law interviewed 3,500 people about their attitudes and experiences with discrimination in ten large cities: Beijing, Guangzhou, Nanjing, Wuhan, Shenyang, Xi'an, Chengdu, Zhengzhou, Yinchuan, and Qingdao.⁷¹ The results provide a relatively

69. *Id.* at 185.

70. Given the Chinese preference for numerical slogans, it is no surprise that scholars have described this phenomenon as "the three manys and the three fews." Namely, "many deputies, but few executives; many low-level workers, few high-level workers; many idle, few busy." See generally Yi Xiaorong, *Zhongguo Funü Quanyi Baohu Tanwei: yi Falü Yuanyuan wei Shijiao* [A Micro-Exploration of the Protection of Chinese Women's Rights and Interests: From the Perspective of Legal Sources], in SHEHUI XINGBIE PINGDENG YU FALÜ: YANJIU HE DUICE [GENDER EQUALITY AND LAW: RESEARCH AND SOLUTIONS] 17, 22 (Jia Lin & Jiang Xiuhua eds., 2007) [hereinafter GENDER EQUALITY].

71. Zhongguo Zhengfa Daxue Xianzheng Yanjiusuo [Constitution Research Ctr. of the China Univ. of Politics and Law], *Zhongguo Shida Chengshi Jiuye Qishi*

comprehensive picture of the circumstances of discrimination in today's China.

When asked if there is discrimination in employment today, 85.5 percent responded affirmatively, while 50.8 percent of respondents believed that discrimination was "extremely severe."⁷² A mere 6.6 percent replied that there was no discrimination.⁷³ Similarly, a majority of respondents (54.9 percent) believed that they had personally experienced some kind of discrimination in the hiring process,⁷⁴ and almost one-sixth (15.7 percent) of respondents had experienced "very severe" or "relatively severe" discrimination.⁷⁵

Further breakdown of the types of discrimination is also revealing. According to 62.6 percent of respondents, the most common form of discrimination is academic discrimination, meaning that the employer overemphasizes a candidate's academic background or that the educational requirement exceeds the actual necessities of the job.⁷⁶ Health discrimination came in second at 47.7 percent, followed by appearance (36.7 percent), age (32.9 percent), household registration status (28.7 percent), and finally sex (21 percent).⁷⁷ Although this study did not find that sex discrimination is a particularly widespread strain of employment discrimination, other studies have concluded otherwise. For instance, in a survey conducted by the Women's Federation of Jiangsu Province, 80 percent of female college students had been rejected for a position due to their gender, and over one-third of these women had multiple rejections of this sort.⁷⁸

Likewise, the China Women's Federation, together with the National Bureau of Statistics, conducted national surveys on women's employment and social status in 1990 and 2000.⁷⁹ Over the course of that decade, employment rates for men and women dropped, but the decline was steeper for women.⁸⁰ In 1990, 90 percent of men were employed, but that number fell to 81.5 percent in 2000 (constituting a

Zhuangkuang Wenjuan Diaocha [Questionnaire Survey on the Situation of Employment Discrimination in Ten Large Chinese Cities], in *ZHONGGUO JIUYE QISHI XIANZHUANG JI FANJIUYE DUIXIANG [EMPLOYMENT DISCRIMINATION IN CHINA: CURRENT CONDITIONS AND ANTI-DISCRIMINATION STRATEGIES]* 505 (Cai Dingjian ed., 2007) [hereinafter *EMPLOYMENT DISCRIMINATION IN CHINA*].

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Zhang Lixia, *Shilun Woguo Funü Jiuyequande Falü Baohu [Theorizing Legal Protection of Chinese Women's Employment Rights]*, *HENAN DAXUE XUEBAO (SHEHUI KEXUEBAN) [HENAN U. J. (SOC. SCI. ED.)]*, Jan. 2004, at 104 & n.2.

79. Yi Xiaorong, *supra* note 70, at 22.

80. See Jiang Yongping, Presentation on the Situation of Chinese Gender Equality and Gender Equality Promotion Policies (PowerPoint on file with author).

9 percent decrease).⁸¹ By comparison, 76.3 percent of women were employed in 1990, but that number fell to 63.7 percent in 2000 (representing a 16 percent decrease).⁸² For young and middle-aged urban women, the employment rate dropped from 80 percent to 72 percent.⁸³ Women also accounted for a larger proportion of those laid off (56 percent), even though they make up a minority of the work force.⁸⁴

Local surveys also indicate the relative absence of women in positions of leadership. Hebei Province, for example, conducted a survey of government employment in 1994.⁸⁵ The percentage of women in high-level management positions—whether in government enterprises, agencies, or institutions—was well below 1 percent.⁸⁶ A more recent survey found that only 4.1 percent of top leaders in government were women.⁸⁷

The situation is not much better for carriers of infectious disease, especially China's 120 million HBV carriers. Yirenping, a leading NGO that advocates on behalf of people with HBV, has recently surveyed the hiring practices of multinational corporations with offices in China.⁸⁸ According to a 2006 survey, 77 percent of multinational corporations claimed that they would refuse applicants carrying HBV.⁸⁹ Two years later, the same survey found that (a) 84 percent of multinationals still require job applicants to take physical examinations and submit the results, and (b) 44 percent would still turn down applicants who tested positive.⁹⁰ The 33 percent decrease from 2006 to 2008 is a positive development, but the fact that 44 percent would still discriminate, even though such discrimination is now clearly illegal after the 2007 Employment Promotion Law,⁹¹ is surprising. It suggests, among other things, that foreign corporations are either unaware of legal developments in Chinese labor law or unconcerned about their consequences.⁹²

81. *Id.*

82. *Id.*

83. Yi Xiaorong, *supra* note 70, at 22.

84. *Id.*

85. Yong-Qing Fang, *Women's Development in Hebei Province, PRC, in EMPLOYMENT OF WOMEN*, *supra* note 18, at 157, 157.

86. *Id.* at 162.

87. Yong-Qing Fang et al., *supra* note 18, at 65 (citing a 2003 survey).

88. *Discrimination Against Hepatitis B Carriers Rising—Survey*, CHINA DAILY, Mar. 5, 2009, http://www.chinadaily.com.cn/china/2009-03/05/content_7542374.htm.

89. *Id.*

90. *Id.* The second survey was conducted from October to December of 2008. *Id.*

91. See Jiuye Cujin Fa [Employment Promotion Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007) art. 30 (banning discrimination against carriers of infectious diseases).

92. Chinese public sector employers, on the other hand, are perhaps more enlightened. The majority of cases I have found online target corporations, Chinese or foreign. See Appendix. Moreover, five government departments conducted a "knowledge competition," complete with prizes, concerning the contents of the Labor Contract Law

Likewise, scholars have conducted independent research on various subpopulations in China. Ye Jingyi and Shi Yuxiao surveyed carriers of the hepatitis B virus about their experiences with employment discrimination.⁹³ Over half of the respondents (52.3 percent) claimed that they had been refused a job.⁹⁴ Of these people, 72.3 percent claimed they were denied the job because they failed to pass a physical examination,⁹⁵ while only 11.7 percent believed the denial was for another reason.⁹⁶ Over half of respondents (56.3 percent) claimed to have experienced some form of discrimination while on the job, while almost one-third (32 percent) had been fired at one time.⁹⁷ In this last category, over 70 percent of respondents claimed that their employers told them the truth—that they were fired because they carried the hepatitis B virus—while 18.8 percent said their employer used an excuse to terminate them.⁹⁸

Statistics offer another window into the realities of employment discrimination, illuminating the experiences of employees and applicants, as well as the attitudes and perceptions of employers and society at large. A degree of subjectivity infuses many of these surveys, reflecting the nature of discrimination itself. The experience of discrimination presumably involves subjective determinations by job applicants who feel discriminated against, particularly if the reason for their refusal is never explicitly stated, but it also presumably includes conscious and unconscious discrimination by employers, who may be unaware of their own biases. Still, the surveys make clear that discrimination (perceived and otherwise) is widespread, affecting various groups of people.

C. Personal Experiences

Although unverifiable through statistical means or numerical measures, anecdotal experience rounds out the portrait of

and Employment Promotion Law in November and December 2007. Three of the eighty questions concerned employment discrimination. *Wubumen Lianhe Juban Laodong Hetong Fa he Jiuye Cujin Fa Zhishi Jingsai* [Five Bureaus Unite to Conduct a Knowledge Competition on the Labor Contract Law and the Employment Promotion Law], LAODONG BAOZHANGBU WANGZHAN [DEPT OF LABOR & SOC. SEC.] (Nov. 11, 2007), http://www.gov.cn/gzdt/2007-11/05/content_796320.htm.

93. Ye Jingyi & Shi Yuxiao, *You Canji Qishi Dao Jiankang Qishi* [From Disability Discrimination to Health Discrimination], in JINZHI JIUYE QISHI: GUOJI BIAOZHUN HE GUONEI SHIJIAN [EMPLOYMENT DISCRIMINATION: INTERNATIONAL STANDARDS & NATIONAL PRACTICE] 318–19 (Li Weiwei & Lisa Stearns eds., 2006).

94. *Id.*

95. *Id.* The Chinese hiring process typically involves three examinations. If one passes the written examination, she may then be invited for an oral examination. If successful at this stage, the candidate then must typically go for a physical examination at a nearby hospital.

96. *Id.* at 319.

97. *Id.*

98. *Id.*

discrimination. Personal narratives convey three related themes. First, they bring to light actual techniques used by employers to exclude qualified candidates. Second, when repeated across time and space, anecdotal experience illuminates which forms of discrimination are most prevalent. Third, and with the first two factors in mind, such narratives can guide discussions of ways to stop discrimination in the workplace. For example, if employers can pose personal questions to female job applicants during an interview—about marital status, boyfriends, plans to have children, and so on—women face a substantial barrier to securing employment. Although dozens of anecdotes portray the actualities of hiring, two in particular shed light on the techniques used to weed out women.

First, a female job applicant e-mailed her résumé to a company.⁹⁹ She did not indicate her sex on the application, and she did not include a photograph, a common accompaniment of many job applications in China. The employer called her the next morning, telling her that she did not include a photograph. The applicant offered to send one off right away, but the employer stalled, saying they still wanted to “research other applications.” She never heard back from the company, but she believes that the company liked her résumé. Upon realizing she was female—as they could determine through the phone call—they lost interest. The authors of the study from which this anecdote is drawn suggest that this technique is commonly used to ferret out female candidates, and that it constitutes a form of sex discrimination.¹⁰⁰

Second, a female law graduate described her classmate’s interview with a small company.¹⁰¹ The interview centered around three questions: “Are you married?”; “Do you have a boyfriend?”; and “How much do you want for a salary?”¹⁰² Interviewers frequently question women about childcare or pregnancy (planned or past), questions that would be illegal under U.S. law.¹⁰³ They either ask these questions directly or ask if the applicant would be willing to

99. Tong Xin & Liang Meng, *Tamen Weihe Chenmo: Nüduxuesheng Zai Qiuzhi Guochengzhong Suozaoshoude Xingbie Qishi Yanjiu* [Why Do They Keep Silent: Research on the Gender Discrimination Encountered by Female College Graduates in the Hiring Process], in XINGBIE PINGDENGDE FALÜ YU ZHENGCE: GUOJI SHIYE YU BENTU SHIJIAN [LAW AND POLICIES TOWARDS GENDER EQUALITY: INTERNATIONAL PERSPECTIVES AND LOCAL IMPLEMENTATION] 243, 251 (Tan Lin & Du Jie eds., 2008).

100. *Id.*

101. *Id.* at 254.

102. *Id.*

103. See *King v. Trans World Airlines, Inc.*, 738 F.2d 255, 259 n.2 (8th Cir. 1984) (“We note that . . . questions about pregnancy and childbearing would be unlawful *per se* in the absence of a bona fide occupational qualification.”); see also *id.* (emphasizing that questions about childcare are technically neutral, but may disparately impact women).

move around to different cities with the job; if the applicant is unwilling to move, the employer will ask if she has a boyfriend.¹⁰⁴

Although this may seem like an unwelcome intrusion into the applicant's personal life, employers are not simply being nosy. Because employers typically pay for the ninety days of maternity leave required by the Labor Law, many profit-minded employers would prefer to avoid this liability altogether.¹⁰⁵ Therefore, the extirpation of discrimination against women will likely require a change in thinking about responsibilities for child care (a normative matter) and the reallocation of the costs of providing maternity leave and child care (a policy matter).

With some understanding of the manifestations of employment discrimination and a basic grasp of their underlying rationales, Part III turns to the laws that both proscribe and promote discrimination.

III. THE LAW OF EMPLOYMENT DISCRIMINATION

A. *Antidiscrimination Law*

In the 1990s, Chinese law began to guarantee equal rights in employment. The 1990 Law to Protect Disabled Persons mandated that "[n]o discrimination shall be practiced against disabled persons in recruitment, employment, obtaining permanent status, technical or professional titles, payment," and other areas.¹⁰⁶ The 1992 Law on the Protection of Rights and Interests of Women (Women's Law) first extended protections to women in numerous areas of employment, including hiring and firing; titles, promotions, and salaries; and marriage, pregnancy, and nursing.¹⁰⁷ Likewise, the 1994 Labor Law ensured that workers "regardless of their ethnic group, race, sex, or religious belief, shall not be discriminated against in employment."¹⁰⁸ Despite these provisions, however, employers could discriminate with impunity against any protected class because the mechanisms to implement these laws were either weak or nonexistent.¹⁰⁹ Unlike the

104. Tong Xin & Liu Meng, *supra* note 99, at 254.

105. See Laodong Fa [Labor Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995) art. 62 ("Female staff and workers shall be entitled to no less than ninety days of maternity leaves for childbirth . . .").

106. Canjiren Baozhang Fa [Law on the Protection of Disabled Persons] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 1990, effective May 15, 1991) art. 34.

107. See, e.g., Funü Quanyi Baozhang Fa [Law on the Protection of Women's Rights and Interests] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 3, 1992, effective Oct. 1, 1992) arts. 24–26 (guaranteeing equal pay for equal work); *id.* art. 25 (guaranteeing equality in post, rank, and titles); *id.* art. 26 (providing "special protection during menstrual period, pregnancy, obstetrical period and nursing period").

108. Labor Law art. 12.

109. EMPLOYMENT DISCRIMINATION IN CHINA, *supra* note 71, at 39.

United States, China does not have an Equal Employment Opportunity Commission to investigate allegations of employment discrimination. Moreover, China lacks implementing regulations or judicial interpretations that tell courts how to handle employment discrimination claims or remedy successfully litigated claims.¹¹⁰ Indeed, some courts refuse to accept employment discrimination claims on the grounds that they are not listed in the Regulation on the Causes of Action for Civil Cases, issued by the Supreme People's Court.¹¹¹

In summary, before the passage of the Employment Promotion Law (EPL) in 2007, Chinese law proscribed employment discrimination but offered very little by way of remediation. Before turning to the impact of the EPL, however, it is first necessary to examine the obverse of Chinese antidiscrimination law: laws promoting discrimination.

B. *Discriminatory Laws and Their Repeal*

The Chinese government, both at the central and local levels, has promulgated a number of laws, regulations, and ordinances that exclude persons from certain jobs, force women to retire early, or otherwise disadvantage certain applicants based on immutable characteristics. State-sponsored discrimination both naturalizes discriminatory practices and perpetuates the marginalization of various groups outside the power structures of Chinese society. The continued development of antidiscrimination law requires a careful review of the underlying rationales for discriminatory laws, a comparison of these rationales with contemporary realities, and a decision as to whether amendment or withdrawal may be appropriate. Many policies developed in the 1950s—when the PRC was a new country inculcating a revolutionary spirit in its people—no longer match contemporary realities. In some instances, the government has already responded with appropriate changes, often after sustained pressure from the public, petition drives, and media scrutiny. This work should continue, either through incremental revisions or by passing an all-encompassing antidiscrimination law.¹¹² This Part outlines some of the major laws and policies that promote discrimination based on gender, *hukou* status, and infectious disease. It then discusses recent changes or revisions to these discriminatory laws and policies.

110. Interview with Liu Minghui, Professor, China Women's College (Mar. 18, 2009). Other courts have, of course, accepted such cases as falling within the "other torts" category.

111. *Id.*

112. Scholar Zhou Wei has drafted a comprehensive antidiscrimination law (on file with author).

1A. Gender Discrimination

A number of Chinese laws promote employment discrimination against women. The most widely cited is the differential retirement age, which mandates that women must retire before men. In 1958, China's highest executive body, the State Council, issued Temporary Guidelines Handling the Retirement of Workers and Professionals, which initially set the differential retirement ages.¹¹³ Although these "temporary" guidelines were withdrawn in 2001, other State Council Guidelines from the 1970s propagated this practice into the present.¹¹⁴

Differential retirement ages may have made sense in the 1950s. Under the influence of the Soviet Union, and with a mind toward protecting women, not inhibiting gender equality, China passed a differential retirement age for men and women.¹¹⁵ Because women needed time for maternity leave, maternal protections, and raising children, it was "reasonable" for them to work less and retire earlier.¹¹⁶ In the immediate post-revolutionary period, traditional notions about the division of labor still prevailed, despite some revolutionary stirrings about the proper role of women.¹¹⁷ In practice, however, during that period women handled more of the domestic responsibilities, and men provided for the family through outside work.¹¹⁸

113. Guowuyuan Guanyu Gongren, Zhiyuan Tuixiu Chuli de Zanxing Guiding [State Council's Temporary Guidelines Handling the Retirement of Workers and Professionals] (promulgated Nov. 16, 1957, withdrawn Oct. 6, 2001) art. 2. Article 2(1) set the retirement age for male workers and professionals at 60 years, female workers at 50 years, and female professionals at 55 years. In addition, for particularly laborious work, such as jobs at high altitudes or high temperatures, the retirement age for men was 55 years, and 45 years for women. *Id.* art. 2(2).

114. See *infra* notes 120–21 and accompanying text.

115. Peng Xizhe, *Yunyong Shehui Zhengce Gongju Tuijin Shehui Xingbie Pingdeng: Yi dui Zhongguo Yanglao Zhidude Fenxi Weili* [Using Social Policy Tools to Promote Gender Equality], in GENDER EQUALITY, *supra* note 70, at 27, 34.

116. See Laodongbu Bangongting, *Guowuyuan Renshiju, Quanguo Zonggonggui Laodong Baoxianbu Guanyu Gongren, Zhiyuan Tuixiu Chuli Zanxing Guidingde Wenti Jieda* [Answers to Questions on Temporary Regulations Related to Handling the Retirement of Workers and Professionals from the General Office of the Ministry of Labor, the Bureau of Personnel of the State Council, and the Labor Insurance Department of the National Federation of Trade Unions], as cited in Chen Weimin & Li Ying, *Tuixiu Nianling Dui Zhongguo Chengzhen Zhigong Yanglaojin Xingbie Chayide Yingxiang Fenxi* [An Analysis of the Influence of the Retirement Age on Gender Differences in Pensions of Chinese Urban Workers and Professionals], in GENDER EQUALITY, *supra* note 70, at 39, 45.

117. See Chen Weimin & Li Ying, *Tuixiu Nianling Dui Zhongguo Chengzhen Zhigong Yanglaojin Xingbie Chayide Yingxiang Fenxi* [An Analysis of the Influence of the Retirement Age on Gender Differences in Pensions of Chinese Urban Workers and Professionals], in GENDER EQUALITY, *supra* note 70, at 39, 45 (describing the rationale for a post-revolutionary law on women's retirement age).

118. Feng Yuan, *Cong Tongling Tuixiude Zhenglun Kan Gonggong Zhengcede Juece Guocheng* [Looking at Decisional Process in Public Policy from the Point of View

A generation later, in 1978, the State Council issued another set of “temporary” guidelines, both of which mandated differential retirement ages and remain in effect: the Temporary Measures on the Retirement and Resignation of Workers (Workers’ Measures) and the Temporary Measures on the Proper Arrangement of the Elderly, Weak, Infirm and Disabled Cadres (Cadres’ Measures).¹¹⁹ The Workers’ Measures provide that “Workers in state-owned enterprises, institutional units, government or [communist] party organs, or mass organizations *must* retire upon reaching any of the following conditions: (1) males reaching 60 years, and females reaching 50 years, after they have worked continuously for ten years.”¹²⁰ The Cadres’ Measures, on the other hand, provide that “Cadres working in party or government organs, mass organizations, enterprises or institutional units *can* retire upon reaching any of the following conditions: (1) males reaching 60 years, and females reaching 55 years.”¹²¹ In other words, the retirement age for men is sixty whether they are cadres or workers, whereas female cadres must retire at fifty-five and female workers at fifty. It is important to note that private companies are not bound by either directive, although they frequently force women to retire before men.¹²²

By law, then, many female professionals are let go upon reaching the age of fifty-five. But many female professionals have been misclassified as workers, either because they were wrongly classified when they began their jobs in the 1980s, or because they have elevated to professional status over the course of their careers.¹²³ Doctors, teachers, accountants, journalists, health care professionals, and many others are fired at the age of fifty.¹²⁴ Moreover, when they sue in court, or pursue labor arbitration, these women face

of the Controversy on Retiring at the Same Age], in GENDER EQUALITY, *supra* note 70, at 61, 62.

119. See *infra* notes 120–21.

120. Guowuyuan Guanyu Gongren Tuixiu, Tuizhide Zanxing Banfa [State Council’s Interim Procedures on the Retirement and Resignation of Workers] (June 13, 1978) (emphasis added), available at <http://law.cctv.com/program/xyh/topic/C19562/20071017/104947.shtml>.

121. Guowuyuan Guanyu Anzhi Laoruobingcan Ganbude Zanxing Banfa [State Council’s Interim Measures on the Proper Arrangement of the Elderly, Weak, Infirm and Disabled Cadres] (promulgated by the Standing Comm. Nat’l People’s Cong., June 2, 1978) (emphasis added).

122. Interview with Guo Huimin, Professor, Northwest Polytechnical Univ., Sept. 22, 2009. Professor Guo explained that women may make more money from social security than from their working wage. From the company’s perspective, replacing older employees with younger ones can significantly lower payroll expenditures.

123. GUO JIANMEI, WOMEN WATCH—CHINA, CASE STUDIES OF EARLY RETIREMENT OF FEMALE PROFESSIONAL & TECHNICAL PERSONNEL IN CHINA 3 (2008).

124. *Id.* at 3.

insurmountable obstacles, often because the decision to fire them is authorized by local government policy.¹²⁵

Differential age restrictions harm women in several ways. First, for many women, their professional lives may only begin to blossom at age fifty, particularly if they deferred professional commitments to raise children, obtain advanced degrees, or both. To require women to retire at fifty-five, five years before their male counterparts, nullifies a lifetime of toil, trouble, and deferred gratification.

Second, retirement pensions are tied directly to the number of years worked. If a woman retires five to ten years before a man, her pension will be somewhere between 7 percent and 20 percent less than a man's.¹²⁶ This ensures that differential treatment persists long after retirement.

In addition to early retirement, Chinese law also prohibits women from engaging in certain jobs, including working in mines,¹²⁷ felling and stacking timber, setting up scaffolding, demolishing buildings, working on electric power lines, and other jobs requiring dangerous or intense physical labor.¹²⁸ The labor regulations establish broader protections for menstruating women, pregnant women, and nursing mothers, who are barred from working in walk-in refrigerators, cold water, or other jobs involving low temperatures.¹²⁹ It is unclear whether this form of paternalism is any more justifiable than the concerns underlying the early retirement system. Some test of strength, stamina, or agility would better replicate a person's physical capacities than a blanket ban. Although arguably well intended, these regulations underscore the general notion that women are not fit for the workplace, or some sizable fraction of it.

Local regulations likewise discriminate against women. In 2003, Hunan published Temporary Measures for Physical Examinations of Civil Servants, which apply to civil servants and those working in state-sponsored institutions such as universities and hospitals.¹³⁰ The Hunan guidelines require that women who work in a medical facility's gynecological department have "normally developed secondary sexual characteristics; symmetrical breasts without lumps; vulva [that is not] inflamed, ulcerous or tumorous; and uterus [that is

125. *Id.* at 4.

126. Chen Weimin & Li Ying, *supra* note 117, at 46.

127. Laodong Fa [Labor Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995) art. 59.

128. Nüzhi Gong Jinji Laodong Fanweide Guiding [Regulation on the Scope of Prohibited Labor for Female Workers] (promulgated by the Ministry of Labor, Jan. 18, 1990) art. 4 (establishing a blanket ban on these and other activities).

129. *Id.*

130. Cai Dingjian, *Fanjiuye Qishi Zhonghe Yanjiu Baogao* [Overview Report of Employment Discrimination], in *EMPLOYMENT DISCRIMINATION IN CHINA*, *supra* note 71, at 5, 23.

not] prolapsed.”¹³¹ This regulation certainly sounds like *per se* discrimination, at least to one trained in U.S. antidiscrimination law, because there are no corresponding anatomical specifications for male workers. As they stand, these requirements heighten the burden on women, subjecting their bodies to notions of anatomical correctness that have no bearing on their ability to perform the job. Moreover, this regulation might eliminate disabled persons and breast cancer survivors, suggesting multiple forms of discrimination.

1B. Efforts to Reform Gender Discrimination

The most significant legal reform in the area of women’s rights generally,¹³² and discrimination specifically, was the 2005 revision of the Law on the Protection of Women’s Rights and Interests (Revised Women’s Law).¹³³ This law addresses several weaknesses in China’s existing legal structure, such as the underrepresentation of women in national and local politics, the fragility of women’s property rights, and the prevalence of sexual harassment in the workplace.¹³⁴ For the first time,¹³⁵ the law explicitly states that the promotion of equality between men and women is a basic “state policy,” lending additional rhetorical support to a position that the government has long exhorted.¹³⁶

A group of elite scholars and officials began drafting revisions to the existing law in 2003, drawing heavily on international and comparative experience.¹³⁷ This group included members of

131. *Id.*

132. To be sure, other areas of gender reform are important, including the passage of regulations on domestic violence by the Supreme People’s Court and Ministry of Public Security. But these do not focus specifically on the issue of discrimination or employment discrimination. See Sheji Jiating Baoli Hunyin Anjian Shenli Zhinan [Adjudication Guidance on Cases Involving Domestic Violence in Marriage] (promulgated by the Sup. People’s Ct., Mar. 16, 2008).

133. Funü Quanyi Baozhang Fa [Law on the Protection of Women’s Rights & Interests] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 3, 1992, amended Aug. 28, 2005, effective Dec. 1, 2005), available at http://www.npv.gov.cn/englishnpc/Law/2007-12/13/content_1383859.htm.

134. See Rong Jiaojiao, *Law Revised to Protect Women’s Rights*, CHINA FEATURES (Sept. 20, 2005), <http://www.chinese-embassy.org.uk/eng/zt/t213042.htm> (“Another highlight is that sexual harassment, for the first time, is made unlawful through legislation.”).

135. *Id.*

136. Funü Quanyi Baozhang Fa [Law on the Protection of Women’s Rights & Interests] art. 2 (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 3, 1992, amended Aug. 28, 2005, effective Dec. 1, 2005), available at http://www.npv.gov.cn/englishnpc/Law/2007-12/13/content_1383859.htm.

137. See generally Rangita de Silva de Alwis, *Opportunities & Challenges for Gender-Based Legal Reform in China*, 5 EAST ASIA L. REV. 197, 198–99 (2010) (“The 2005 amendments to the 1992 Law on the Protection of Women’s Right and Interests (LPWRI) in China was a milestone law reform initiative. Since then, other gender-based law and policy reforms have spawned nationally and locally in the wake of the

government-run entities like the All China Women's Federation and the Chinese Academy of Social Sciences, as well as civil society actors such as the Center for Women's Law and Legal Services at Peking University.¹³⁸ Through workshops, conferences, and roundtables, these scholar-activists helped channel recommendations from United Nations committees and other countries' laws into the legislative process of the PRC.¹³⁹ Although not all their suggestions made it into the law, they laid out several issues—including discrimination, domestic violence, and property rights—for future regulations and provincial implementation.

Despite various improvements made in the law, the Committee on the Elimination of All Forms of Discrimination Against Women issued a long list of concerns and recommendations in its 2006 Report.¹⁴⁰ First, the Report expressed concern over China's "capacity to understand the meaning of substantive equality and non-discrimination."¹⁴¹ Because many Chinese still do not understand the concept or problems of discrimination, the Report specifically recommended that China include "a definition of discrimination against women in its domestic law, encompassing both direct and indirect discrimination."¹⁴² As we saw above in Part II, discrimination against women is quite widespread in China; one reason may be a lack of understanding as to why discrimination is a problem.

A second concern was the lack of "effective legal remedies" for violations of the Women's Convention,¹⁴³ as well as a lack of "awareness-raising and sensitization measures about such legal remedies against discrimination so that women can avail themselves of them."¹⁴⁴ Indeed, the lack of effective remedies and the general failure to implement laws are constant criticisms leveled at the Chinese legal system.¹⁴⁵ As discussed in Part V, discrimination

LPWRI revisions, and have mobilized a slowly growing gender and law network in China.").

138. *Id.* at 205.

139. *Id.*

140. See Comm. on the Elimination of Discrimination Against Women, Rep. on its 36th Sess., Aug. 7–25, 2006, ¶ 8, U.N. Doc. CEDAW/C/CHN/CO/6 (Aug. 25, 2006) [hereinafter CEDAW Report] ("It calls upon the State party to submit the present concluding comments to all relevant ministries and to Parliament so as to ensure their full implementation.").

141. *Id.* ¶ 10.

142. *Id.*

143. *Id.* ¶ 11.

144. *Id.* ¶ 12.

145. See, e.g., Yuwen Li, *Court Reform in China: Problems, Progress and Prospects*, in IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA 55, 82 (Jianfu Chen et al. eds., 2002) (noting that "the gap between law-making and law enforcement by the courts has become more obvious" in recent years).

against women continues in China, but no plaintiff has stepped forward to challenge it.¹⁴⁶

A third concern was “traditional stereotypes regarding the role of women and men in society.”¹⁴⁷ In other words, the divide between men’s work and women’s work remains relatively clear in China, with men occupying higher rungs and women down below. The Report recommended a broad campaign of education and awareness raising, particularly directed at men and boys, through radio, television, and print media.¹⁴⁸ The Report also suggested the inclusion of gender sensitivity into school curriculum and textbooks.¹⁴⁹ The Report made other suggestions, but they lie beyond the scope of this Article.

Debate continues over the differential retirement age, but little forward momentum is detectable. In April 2009, one of China’s most senior female politicians, Chen Zhili, called on the city of Beijing to take the lead in equalizing the retirement age for cadres.¹⁵⁰ Noting that Beijing’s decision to do so “would have a huge influence on the rest of China,” Ms. Chen believed that leveling the retirement age would greatly advance equality between the sexes.¹⁵¹ The mere fact that a person of Ms. Chen’s stature would make such an appeal is significant, and it indicates some level of support among Chinese government officials. Still, the fact that this proposal has not moved forward in over a year does not bode well for its implementation.

2A. *Hukou* Discrimination

The household registration, or *hukou*, system helps maintain the physical separation of urban residents from their rural brethren. Instituted in 1958, the system initially permitted the government to distribute resources and benefits more effectively, to control migration from rural areas to urban settings, and to keep closer tabs on criminal activity.¹⁵² Citizens were categorized according to their place of residence, as well as whether they were rural (“agricultural”)

146. See *infra* Part V.B.

147. See CEDAW Report, *supra* note 140, ¶ 17 (“The Committee is concerned that these prevailing attitudes continue to devalue women and violate their human rights.”).

148. *Id.* ¶ 18.

149. *Id.*

150. See Zhang Haiyan, *Quanguo Fulian Zhuxi Chen Zhili Huyu: Beijing Shuaxian Shixing Nannü Tongling Tuixiu* [Chairwoman of the All China Women’s Federation Chen Zhili Calls on Beijing to Take the Lead in Implementing Equal Retirement Age], FAZHIWANG [LEGAL DAILY], Apr. 3, 2009, http://www.legaldaily.com.cn/0801/2009-04/03/content_1064630.htm (noting that the committee chairwoman urged the city of Beijing to experiment with a workplace policy that calls for the same retirement age for male and female upper level employees).

151. *Id.*

152. *Migrant Workers in China*, CHINA LAB. BULL. (June 6, 2008), <http://www.china-labour.org.hk/en/node/100259>.

or urban (“non-agricultural”).¹⁵³ If a citizen had a Beijing *hukou*, for instance, that citizen benefited from the panoply of benefits (insurance, education, social welfare, and even food rations during the PRC’s more tumultuous periods) that Beijing provided its residents. If, on the other hand, you lived in Beijing without a Beijing *hukou*, you did not have access to these services.¹⁵⁴

In recent years, the system has relaxed somewhat.¹⁵⁵ Wealthy or educated rural residents can apply to become local residents of various cities, depending upon criteria set out by the city.¹⁵⁶ The estimated 150 million migrants working in Chinese cities offer proof that people are no longer as tightly bound to their native villages as they were in the early days of the PRC.¹⁵⁷ However, this change does not mean that life has become any easier for today’s migrant workers. Typically, they toil at low-wage jobs without social security, a guaranteed wage, or access to medical care.¹⁵⁸ Equally troubling, their children are often ineligible to attend local schools, creating another generation of marginalization.¹⁵⁹

A number of regulations reinforce the *hukou* system and further disadvantage migrant workers. National regulations, for instance, instruct local employers—private, public, and state organs alike—on how to hire workers who come from outside their locality.¹⁶⁰ One regulation from the Ministry of Labor provided that outside workers could be hired only if no local person was qualified to fill the position and the local labor and employment agencies approved the employer’s request for an outside hire.¹⁶¹ In other words, local people were preferred in job recruitment, and outsiders could fill positions only when a local agency approved of the placement. Although this

153. CONG.-EXEC. COMM’N ON CHINA, *supra* note 24, at 2–3.

154. *See id.* at 7–8 (education).

155. *See* Hein Mallee, *Migration, Hukou and Resistance, in* CHINESE SOCIETY: CHANGE, CONFLICT AND RESISTANCE 83, 99 (Elizabeth J. Perry & Mark Selden eds., 2000) (describing the recent relaxation of the *hukou* system as a product of both state-initiated changes and large-scale labor migration).

156. *See, e.g.*, CONG.-EXEC. COMM’N ON CHINA, *supra* note 24, at 5 (noting that Zhejiang Province allows individuals who have purchased a home of a certain price or size to obtain a local *hukou*).

157. *China’s New-Generation Migrant Workers Number 100 Million*, PEOPLE’S DAILY ONLINE (June 22, 2010), <http://english.peopledaily.com.cn/90001/90782/7033954.html> (“Data from the National Bureau of Statistics shows that there were a total of 230 million rural migrant workers in China in 2009, including 150 million working outside their hometowns.”).

158. *Migrant Workers in China*, *supra* note 152.

159. *Id.*

160. *See, e.g.*, Nongcun Laodongli Kuasheng Liudong Jiuye Guanli Zanzing Guiding [Temporary Regulation on the Administration of Cross-Provincial Employment of Rural Workers] (promulgated by the Ministry of Labor, Nov. 17, 1994, withdrawn Feb. 7, 2005) art. 2. The regulations apply to private companies (*qiye*), individual economic organizations and state organs, enterprise organizations, and social groups. *See id.*

161. *Id.* art. 5.

regulation has since been withdrawn,¹⁶² it set a precedent to which many cities have clung. Nanjing, for instance, still encourages employers to hire local laborers: “first urban, then rural; first this city, then other cities; first this province, then other provinces.”¹⁶³ By mandating “first this city, then other cities,”¹⁶⁴ this principle privileges not only Nanjing residents, but also *any* other urban residents. This preference represents discrimination against rural people in its purest form.

Other cities restrict migrant labor in even less nuanced ways.¹⁶⁵ Some cities, either by enacting a strict numerical target or by setting an acceptable percentage of outsiders in the total work force, impose quotas on the number of outside workers allowed to work in the city.¹⁶⁶ Other cities prohibit or severely restrict the use of migrant workers in specific positions. Shanghai, for instance, closed several positions, including shop assistants, maintenance staff, and custodians, to persons without local residency.¹⁶⁷ Although these positions are not high-status positions, they would likely appeal to the frequently less educated and underprivileged migrant class. More expansively, Beijing placed restrictions on various white-collar positions, including administrators in the financial and insurance sectors, accountants, bank tellers, and staff at “star-level” hotels.¹⁶⁸ These regulations restrict the number of positions available to migrant workers and steer them toward the most grueling jobs.

162. Laodong he Shehui Baozhangbu Guanyu Feizhi ‘Nongcun Laodongli Kuasheng Liudong Jiuye Guanli Zanzing Guiding’ ji Youguan Peitao Wenjiande Tongzhi [Notice on the Abolishment of the Ministry of Labor and Social Security’s ‘Temporary Regulation on the Administration of Cross-Provincial Employment of Rural Workers’ and Related Accompanying Documents] (promulgated by the Ministry of Labor and Social Security, Feb. 7, 2005), available at http://fj.cq.gov.cn/wmfw/news/2008-3/183_713.shtml. The regulation was withdrawn in 2005.

163. Nanjingshi Wailai Laodongli Laodong Guanli Guiding [Nanjing Regulations on Managing Labor of Outside Laborers] (promulgated by the Nanjing City People’s Government, July 7, 1999, effective July 7, 1999) art. 6.

164. *Id.*

165. Bingqin Li, *Urban Social Exclusion in Transitional China* 22–23 (London Sch. of Econ. Ctr. for Analysis of Soc. Exclusion, Paper No. 82, 2004), <http://sticerd.lse.ac.uk/dps/case/cp/CASEpaper82.pdf>.

166. Yao Guojian, *Identity Discrimination in Employment—Household Registration and Regional Origin*, in *TAKING EMPLOYMENT DISCRIMINATION SERIOUSLY: CHINESE AND EUROPEAN PERSPECTIVES* 133, 136 (Yuwen Li & Jenny Goldschmidt eds., 2009); Liu Xin, *Dui Jiuye Qishi Xingzheng Fagui Guizhang Qingli Baogao* [A Report on Administrative Rules and Regulations in Employment Discrimination], in *EMPLOYMENT DISCRIMINATION IN CHINA*, *supra* note 71, at 448, 453, 454.

167. Bingqin Li, *supra* note 165, at 22.

168. See Nian Benshi Yunxu he Xianzhi Shiyong Waidi Renyuan de Hangye Gongzhong Fanwei [Scope of Jobs and Professions that Permit and Restrict the Usage of Outside Personnel in Beijing in 1996] (promulgated by Beijing Labor Bureau, Mar. 28, 1996).

Apart from job restrictions and prohibitions, cities also levy fees on employers that hire outside workers; these fees fall under the various guises of “registration fees,” “work management fees,” “processing fees,” “administrative service fees,” and so on.¹⁶⁹ The effect is to drive up the cost of hiring outside workers and to encourage the hiring of local employees.

Finally, cities may require migrant workers to obtain work permits, residency permits, health permits, and other documentation in order to work.¹⁷⁰ The hassle of obtaining such permits, coupled with the fear that one’s status as a non-resident is automatically disqualifying, may dissuade many migrant workers from applying for this paperwork. In this way, cities can prevent migrant workers from taking up local posts and greatly restrict the number of eligible candidates. At the same time, these regulations generate revenue from people who can least afford it.¹⁷¹

2B. Efforts to Reform *Hukou* Discrimination

The new millennium has witnessed a number of reforms to the *hukou* system. While these reforms were percolating in the 1990s,¹⁷² a wave of dissatisfaction hit the Chinese press in 2000.¹⁷³ In December 1999, the Beijing government published 103 additional job categories from which migrant workers would be barred.¹⁷⁴ After vigorous academic debate, and most likely with the imprimatur of high officials, Chinese newspapers ran editorials and personal pleas from migrant workers that questioned the *hukou* system.¹⁷⁵ One editorial acknowledged the problem of local protectionism but questioned whether senior officials had considered the national picture.¹⁷⁶ Another noted that China was “treating its precious labor resources as a burden and inhibiting the economic interests, the very livelihoods, of tens of millions of rural laborers.”¹⁷⁷ News websites

169. Liu Xin, *supra* note 166, at 454.

170. *Id.*

171. Yu Zhu, Liyue Lin & Bin Wang, *Social Protection for Rural-Urban Migrants in an Era of Increasing Population Mobility and Socioeconomic Transformation: China’s Experience Since the Late 1970s*, at 4 (Soc. Prot. in Asia, Working Paper No. 3, 2009), <http://www.socialprotectionasia.org/pdf/CPDR-SPA-WP03.pdf>.

172. See FEI-LING WANG, *supra* note 23, at 187 (“These gradual and controlled reforms have relaxed the *hukou*-based regulation of internal migration at the level of small cities and towns yet have kept the quota-based migration restrictions largely intact for large cities.”).

173. See Erik Eckholm, *China’s Controls on Rural Workers Stir Some Rarely Seen Heated Opposition*, N.Y. TIMES, Mar. 10, 2000, at A10.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* (quoting a reader commentary from the *China Youth Daily*).

and Internet bulletin boards also posted criticisms of the system and calls for its reform.¹⁷⁸

Over time, even the official state news media began to criticize the *hukou* system. An article from *People's Daily* made a number of strong claims, such as (a) that residency and migration were "basic rights" (with the implication that they should not be violated by state or local policy); (b) that the *hukou* system itself was incompatible with China's current economic development and tarnished its image of reform and openness; (c) that the system enabled corruption, as evident in the prevalence of bribes to officials and the auctioning of local residency permits by small cities; and (d) that abolishing the current system followed "the general trend of history."¹⁷⁹ The article ambitiously predicted that the system would one day be considered a relic of the planned economy.¹⁸⁰

As noted, the central government had already initiated modest reform efforts. In 1997, the State Council initiated an experimental program permitting migrant workers to obtain local *hukou* in selected small towns and cities.¹⁸¹ If they lived in the locality for at least two years, with a stable income and a permanent residence, migrants could apply for permanent residency.¹⁸² Over 540,000 migrants became full residents in 328 cities,¹⁸³ and this success led the State Council to expand the experiment to cover all small towns and cities.¹⁸⁴ Nevertheless, given the episodic nature of many migrant workers' work assignments (such as construction or infrastructure) and the seasonal rhythms of their lives (returning home to their native villages during holidays), these requirements still exclude highly transient migrants, who are arguably the most precariously positioned. Additionally, large cities such as Beijing, Shanghai, and Shenzhen—each of which employs millions of migrant workers—were exempt from the program.¹⁸⁵

178. See FEI-LING WANG, *supra* note 23, at 181–82.

179. He Jun, *Huji Zhidu Zuizhong Jiang Chengwei Jihua Jingjide Canyu Biaozhi [In the End, the Hukou System Will Become a Vestige of the Planned Economy]*, RENMIN RIBAO (Aug. 28, 2001).

180. *Id.*

181. Guowuyuan Pizhuan Gong'anbu Xiaochengzhen Huji Guanli Zhidu Gaige Shidian Fang'an he Guanyu Wanshan Nongcun Huji Guanli Yijiande Tongzhi [State Council Plan Approving the Public Security Bureau's Experimental Plan of Reforming the Management System for Residential Permits in Small Towns and Cities and Notice of Opinions on Perfecting the Management System of Rural Residential Permits] (promulgated by Ministry of Pub. Sec., May 20, 1997, effective June 10, 1997).

182. *Id.* art. 3.

183. FEI-LING WANG, *supra* note 23, at 187.

184. Guowuyuan Pizhuan Gong'anbu Guanyu Tuijin Xiaochengzhen Huji Guanli Zhidu Gaige Yijiande Tongzhi [State Council Notice Approving the Public Security Bureau's Opinions on Promoting Reform of the Management System for Residential Permits in Small Towns and Cities] (Mar. 20, 2001).

185. *Id.*

The State Council continues to issue directives that relax the *hukou* system and mitigate the discriminatory effects of various local regulations. In 2003, for instance, it issued a Notice on Successfully Managing Employment and Services for Migrant Workers.¹⁸⁶ The preface describes the current employment prospects for migrant workers in unusually candid terms: they “still face a number of irrational restrictions in employment; their rights and interests are not effectively protected; they are not paid their due wages; they are charged excessive fees; and they are subject to other serious phenomena.”¹⁸⁷ The Notice then calls on local governments to “abolish irrational restrictions on the employment of migrant workers,” including the abolishment of administrative approvals, professional restrictions excluding migrants, and registration requirements.¹⁸⁸ It also mandates that local governments impose the same technical qualifications and health standards on migrant workers as on local residents.¹⁸⁹ With the Notice, the central government took a first step toward peeling away the encrustation of discriminatory provisions that had piled up from the 1990s.

Subsequent regulations in 2004 and 2006 likewise target discriminatory regulations. The 2004 Notice on Further Improving the Employment Environment for Migrant Workers praises the “large-scale work” of various cities and local departments since the 2003 Notice.¹⁹⁰ But it also recognizes the manifold problems facing migrant workers, which include inadequate training services and recruitment opportunities, employment fees, numerous procedures, unpaid wages, violations of their rights and interests, and “illegal elements” who defraud migrant workers by charging recruitment fees for nonexistent jobs.¹⁹¹ The 2004 Notice repeats, almost verbatim, the 2003 Notice’s instruction to abolish administrative approvals, professional restrictions, and registration requirements, but the 2004 Notice uses the terms “*discriminatory* regulations and irrational restrictions,” an acknowledgment that these regulations offend both morality and reason.¹⁹²

In 2006, the State Council issued Certain Opinions on Resolving Problems of Migrant Workers.¹⁹³ The Opinions acknowledge the

186. Zuohao Nongmin Jincheng Wugong Jiuye Guanli he Fuwu Gongzuode Tongzhi [Notice on Successfully Managing Employment and Services for Migrant Workers in Cities] (promulgated by State Council, Jan. 2003).

187. *Id.* pmbl.

188. *Id.* art. 2.

189. *Id.*

190. Jinyibu Zuohao Gaishan Nongmin Jincheng Jiuye Huanjing Gongzuo de Tongzhi [Notice on Further Improving the Employment Environment for Migrant Workers] (promulgated by State Council, Dec. 27, 2004).

191. *Id.* pmbl.

192. *Id.* art. 1(1) (emphasis added).

193. Guowuyuan Guanyu Jiejue Nongmingong Wentide Ruogan Yijian [State Council Opinions on Resolving Problems of Migrant Workers] (promulgated by State

“important contributions” that migrant workers have made to the development of China and articulate a series of programmatic steps to alleviate the burden of this disenfranchised subpopulation:

Migrant workers are a new labor force that has sprung up in the processes of industrialization and urbanization during China’s reform and opening up. Their residency status is rural, but they engage primarily in non-agricultural production. Some go out to do both industrial and agricultural work during the non-agricultural season, and are very mobile. Others have been employed in cities for a long time, and comprise a large proportion of industrial workers. A large number of migrants work in cities and towns, where they have made important contributions to the construction of a modern China.¹⁹⁴

Article 5 of the Opinions sets out basic principles, such as “equal treatment.” It calls on cities to “[r]espect and maintain migrant workers’ legal rights, eliminate discriminatory regulations and systemic obstacles to their working in cities, [and] permit them to enjoy equal rights and obligations in urban professional employment.”¹⁹⁵ Other provisions address now-familiar dilemmas of unpaid wages, labor contracts, employment services and training, and social protections.¹⁹⁶

But the problem, as the title intimates, is that these are merely *opinions*. Although legally binding,¹⁹⁷ they do not specify the sanctions a court should impose upon finding a violation. As a result, it is unlikely that a court of law would find against a municipality for contravening these regulations. Like so much Chinese law, the Opinions propose prohibitions but not sanctions to enforce them.

Despite some changes in the residency requirements, the essential structure of the *hukou* system remains largely intact. By dividing citizens into “agricultural” and “non-agricultural,” then allocating resources unevenly between the city and countryside, the PRC continues to reinforce the marginalization of hundreds of millions of citizens. Although recent reform efforts aim to ameliorate some of the discriminatory burdens that cities have attached to migrant workers, the systemic discrimination remains untouched. By permitting greater mobility than it did fifty years ago, China has

Council, Mar. 27, 2006). Article 5 lists the “Basic Principles,” the first of which reads “Equal treatment. Respect and protect the legal rights and interests of migrant workers; eliminate discriminatory regulations and systematic obstacles facing migrant workers who work in cities; make them enjoy the same rights and obligations as city residents in the professional fields.” *Id.* art. 5.

194. *Id.* pmb.

195. *Id.* art. 5.

196. *Id.* arts. 6, 8, 11–13, 16.

197. See Wang Chenguang, *Introduction: An Emerging Legal System, in* INTRODUCTION TO CHINESE LAW 1, 16 (Wang Chenguang & Zhang Xianchu eds., 1997) (“According to the Constitution, the State Council has the legislative power to make administrative regulations . . . [which] are mandatory for the people’s courts to follow . . .”).

slightly blurred the division between urbanites and villagers. Yet, as one scholar concluded, "Chinese society by and large can still be divided into an 'agricultural' segment and a 'non-agricultural' one, and glaring differences remain in entitlements between the two."¹⁹⁸

3A. Discrimination Against Infectious Disease Carriers

With an estimated 120 million carriers of the hepatitis B virus,¹⁹⁹ 4.5 million known cases of tuberculosis,²⁰⁰ and 700,000 carriers of HIV,²⁰¹ a sizeable portion of the Chinese populace faces the possibility of a different form of discrimination. Quite apart from the public health concerns raised by these diseases, the Chinese government has also had to deal with employment-related issues, such as workplace safety and discrimination.²⁰² For a long time, the government's thumb was decidedly on the side of public health and safety. Numerous laws and regulations excluded qualified but diseased persons from a variety of positions. Recent reform efforts, however, suggest both a growing willingness to strengthen the rights of disease carriers and a clearer awareness of the actual threat that such persons pose to public safety generally and the workplace in particular. Perhaps more importantly, citizen activism has played a critical role in promoting reform; the mobilization of public opinion has signaled to the Chinese government that hepatitis B discrimination is palpable, destructive, and in certain instances deadly.

A number of national laws and regulations prevent persons who carry infectious diseases from engaging in certain lines of work. These regulations reflect the comprehensible concern that placing an infectious disease carrier in certain occupations might facilitate the spread of disease. Thus, the Food Safety Law prohibits persons with "dysentery, typhus, viral hepatitis, active pulmonary tuberculosis, or purulent or weeping skin diseases" from "working in direct contact with food for consumption."²⁰³ This provision excludes a narrow range of job possibilities for a narrowly tailored group of disease

198. Mallee, *supra* note 155, at 99.

199. Andrew Jacobs, *China to End Required Testing for Hepatitis B*, N.Y. TIMES, Oct. 13, 2009, at A5.

200. Tian Ying, *China's Tuberculosis Control Project Benefits Millions*, XINHUA, Feb. 21, 2010, http://news.xinhuanet.com/english2010/china/2010-02/21/c_13182336.htm.

201. *China: Statistics*, UNICEF (Mar. 2, 2010), http://www.unicef.org/infobycountry/china_statistics.html.

202. See PROMOTION LAW INTERPRETATION, *supra* note 31, at 82 (discussing legal safeguards against employment discrimination against carriers of infectious diseases).

203. See Shipin Anquan Fa [Food Safety Law] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 2009, effective June 1, 2009) 2009 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. art. 34 (viral hepatitis includes forms A, B, and C).

carriers. Hepatitis A, for instance, can be spread through contaminated food or water,²⁰⁴ while tuberculosis can be spread aerially when an infected person coughs, sneezes, or even speaks.²⁰⁵ Prohibiting carriers of these diseases from working in food production bears a rational relationship to public safety.

Unfortunately, other regulations are less defensible. The Administrative Regulations on Public Hygiene, for instance, restrict the same carriers of disease listed in the Food Safety Law from a wide range of posts, mainly involving direct contact with customers: hotels, restaurants, inns, cafes, bars, teahouses, public baths, barber shops, beauty salons, movie theatres, dance halls, concert halls, gyms, public parks, museums, libraries, and more.²⁰⁶ Without doing a separate epidemiological study for each disease, it seems clear that this regulation sweeps too broadly.

Hepatitis B provides a good example: it can be spread by birth; sex with an infected person; sharing needles, razors, syringes, or toothbrushes with an infected person; direct contact with blood or open sores of an infected persons; or exposure to blood from sharp instruments (as used in ear-piercing or tattooing).²⁰⁷ It seems highly improbable that a person with the hepatitis B virus would spread the disease if working at a movie theatre or a museum, for example, although one can imagine a hypothetical situation where such contact might occur. But by restricting carriers of HBV from all manner of public employment, the regulation sends a strong symbolic message, both to carriers and a public that is largely uninformed about the transmission of such diseases, that carriers pose a health risk, should not work in public places, and should avoid coming into contact with the general public.

Similarly, the 1989 Supervisory Regulations on Hygiene in Cosmetic Products ban some people from working directly in the production of cosmetics.²⁰⁸ In addition to carriers of the diseases listed above (viral hepatitis, tuberculosis, and dysentery), persons with eczema, ringworm, and other dermatological conditions are also

204. *Hepatitis A Information for Health Professionals: Hepatitis A FAQs for Health Professionals*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 9, 2009), <http://www.cdc.gov/hepatitis/HAV/HAVfaq.htm>. Uncooked contaminated foods have led to outbreaks. *Id.*

205. *Tuberculosis: Basic TB Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 1, 2009), <http://www.cdc.gov/tb/topic/basics/default.htm>.

206. See Gonggong Changsuo Weisheng Guanli Tiaoli [Administrative Provisions on Public Hygiene] (promulgated by the State Council, Apr. 1, 1987, effective Apr. 1, 1987) arts. 2, 7 (listing public places and forbidden diseases).

207. *Hepatitis B Information for the Public: Hepatitis B FAQs for the Public*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 9, 2009), <http://www.cdc.gov/heapatitis/B/bFAQ.htm>.

208. Huazhuangpin Weisheng Jiandu Tiaoli [Supervisory Regulations on Hygiene in Cosmetic Products] (promulgated by the State Council, Sept. 26, 1989, effective Jan. 1, 1990) art. 7.

prohibited.²⁰⁹ This prohibition may be rational for ringworm, which can be spread through indirect contact if a second person touches an object that has been touched by the infected person. Eczema, however, is not contagious.²¹⁰ Prohibiting persons with eczema from working in cosmetic production serves no purpose except to discriminate against them. By excluding people in this way, the State Council signals that their skin problem—a superficial blemish—renders them unfit for the work of “beautiful people.”

These restrictions entrench discrimination against carriers of diseases, excluding capable workers from jobs based on unfounded fears rather than genuine science. Regulators should instead determine the nexus between the spread of the disease (whether through casual contact, blood, bodily fluid, etc.) and the likelihood of contagion for a particular position. They can then specify which diseases are particularly contagious, and which positions should be off limits for medical reasons. Some comfort can be drawn from the fact that these quite sweeping regulations were issued in the 1980s, whereas more recent laws—like the 2009 Food Safety Law noted above—significantly narrow the scope to a few forbidden posts.²¹¹ However, until these regulations are formally withdrawn, they remain valid law in the PRC. Moreover, because recently promulgated laws often explicitly carve out job posts proscribed by early regulations and directives passed decades ago,²¹² these regulations continue to generate prejudice against people.

3B. Efforts to Reform Discrimination Against Infectious Disease Carriers

Not long after the Zhang and Zhou incidents,²¹³ various government bodies began revising laws and regulations. In 2005, the Ministry of Personnel issued the government’s first responsive regulation, permitting *some* carriers of the hepatitis B virus to work

209. *Id.*

210. JANET ZAND ET AL., SMART MEDICINE FOR HEALTHIER LIVING 259 (1999).

211. *See supra* note 203 and accompanying text.

212. *See, e.g.*, Jiuye Cujin Fa [Employment Promotion Law] (promulgated by Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Jan. 1, 2008) art. 30.

[N]o suspected carrier of any infectious pathogen the likely existence of which has been proven by a medical examination shall be permitted to enter into any type of employment prone to facilitate the spread of infectious diseases and therefore forbidden by any law, administrative regulations or the Public Health Administrative Department of the State Council before he/she is cured or eliminates the suspicion that he/she carries the infectious pathogen in question.

Id.

213. *See supra* note 1 and accompanying text.

in civil service positions.²¹⁴ Applicants with “chronic or acute hepatitis” were still barred, but “antigen carriers” who had been examined could still work.²¹⁵

In 2007, the Ministry of Labor and Social Security promulgated two regulations that secure the employment rights of HBV carriers. The first, *Opinion on Protecting the Employment Rights of Carriers of the Hepatitis Surface Antigen*, deals exclusively with carriers.²¹⁶ It provides, in pertinent part, that “[a]part from those jobs specifically proscribed by national laws, administrative regulations, and regulations from the Ministry of Health due to ease of contagion, employers may neither refuse to hire, nor fire, a carrier of the hepatitis B antigen because he carries the antigen.”²¹⁷ The regulation “strictly regulates the employer’s request and use of medical examinations,” permitting them only when there is “actual need” based on the exigencies of the job.²¹⁸ An employer cannot force a job applicant to take a hepatitis B test unless HBV carriers are prohibited from taking the job by national laws or administrative regulations.²¹⁹ The regulation also calls on medical institutions to “protect the privacy rights of hepatitis antigen carriers,” suggesting that they too have a responsibility to keep this delicate information in the proper hands.²²⁰ Finally, the regulation calls on local offices of the Labor Ministry, as well as labor arbitration committees, to protect the legal rights and interests of laborers in general. Specifically, the regulation calls on these actors “to prevent occurrences of the employment discrimination issue” in hiring and employing workers.²²¹ This regulation represents a targeted response to the problem of discrimination against HBV carriers. By calling on labor arbitration committees, the regulation holds out the promise of implementing antidiscrimination law.

Second, the Ministry of Labor of Social Security promulgated *Regulations on Employment Services and Employment Administration*, which complement the *Employment Promotion Law* in various ways,²²² including prohibitions of discrimination against

214. Gongwuyuan Luyong Tujian Tongyong Biaozhun (shixing) [General Standards for Physical Examinations in the Employment of Civil Servants (provisional)] (promulgated by Ministry of Personnel, Jan. 17, 2005).

215. *Id.* art. 7.

216. Guanyu Weihu Yigan Biaomian Kangyuan Xiedaizhe Jiuye Quanlide Yijian [Opinion on Protecting the Employment Rights of Carriers of the Hepatitis Surface Antigen] (promulgated by the Ministry of Labor & Soc. Sec., May 18, 2007).

217. *Id.* art. 2(1).

218. *Id.* art. 2(2).

219. *Id.*

220. *Id.*

221. *Id.* art. 3(1).

222. Jiuye Fuwu yu Jiuye Guanli Guiding [Regulations on Employment Services & Employment Administration] (promulgated by the Ministry of Labor & Soc. Sec., Nov. 5, 2007, effective Jan. 1, 2008) art. 1. (noting that the “regulations were

women, disabled persons, and carriers of infectious diseases.²²³ Apropos of HBV, the Regulations, for the first time, prescribe a punishment for employers that discriminate against carriers. If an employer requires an HBV test for a job not prohibited to carriers by national law or administrative regulation, the employer faces a fine of up to 1,000 rmb (about \$150).²²⁴

In this way, the regulation addresses a fairly common type of indirect discrimination in China, as analyzed more fully in the following section. Employers may claim that the medical examination (of which the HBV test forms a part) is a neutral policy designed to ensure the health of all applicants, but they may instead use the results to exclude HBV carriers. Although 1,000 rmb is a small sum for many Chinese employers, the Regulations are helpful in articulating a sanction, something Chinese labor law has tended to avoid.

In February 2010, the Chinese government fully scrapped HBV testing.²²⁵ Three ministries issued a Notice to prohibit employers and schools from requesting HBV testing in medical examinations, requesting the results of an applicant's HBV tests, or asking the applicant if he carries the antigen.²²⁶ Medical institutions are likewise banned from giving schools or employers the results of the medical examination.²²⁷ The Notice also recognizes the important privacy rights that attach to this information by making it for the examinee's eyes only.²²⁸ Finally, the Notice includes sanctions against employers and schools that illegally request HBV examinations.²²⁹

formulated in accordance with the Employment Promotion Law . . . so as to improve employment service . . . foster and perfect an openly structured human resources market . . . and provide services for job-seekers"). As a regulation issued by the Labor Ministry, the Regulations would be subordinate to the Employment Promotion Law if there were a conflict in their provisions. Lifa fa [Legislation Law] (promulgated by Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000) art. 79.

223. Regulations on Employment Services & Employment Administration, arts. 16, 18–19.

224. *Id.* art. 68.

225. Guanyu Jinyibu Guifan Ruxue he Jiuye Tijian Xiangmu Weihu Yigan Biaomian Kangyuan Xiedaizhe Ruxue he Jiuye Quanlide Tongzhi [Notice Further Regulating the Items on Physical Examinations for Education and Employment to Protect the Educational and Employment Rights of Hepatitis B Surface Antigen Carriers] (promulgated by the Ministries of Educ., Health, and Labor & Soc. Sec., Feb. 10, 2010) [hereinafter 2010 Notice].

226. *Id.* art. 1.

227. *Id.*

228. *Id.* art. 2 ("The hepatitis B items on the examination report should be sealed, only to be opened by the examinee. No employer or individual may open another person's examination report.")

229. See *id.* art. 3 ("If employers violate this Notice, and request an applicant sit for an HBV examination, they should timely terminate the request, correct the mistake, and be punished according to the *Regulations on Employment Services and Employment Administration.*")

IV. THE HBV SOCIAL MOVEMENT

In 2003, the cases of Zhou Yichao and Zhang Xianzhu first raised the profile of HBV discrimination. Zhou's criminal trial and Zhang's administrative trial received national and international attention.²³⁰ The trials informed government officials, among others, that employment discrimination against HBV carriers required a rapid response. But the cases also set in motion a wider chain of events—a social movement that has clamored for legal reform. Before examining the various activities and channels by which HBV advocates have fomented legal change, this Part provides a rudimentary primer to illuminate the basic concepts of social movements.

Sociologists attend to three facets of social movements to explain their emergence, evolution, and success (or failure).²³¹ First, scholars direct attention to the particular group's political opportunities and constraints, including changes in institutional structures or informal power relations.²³² This analysis may also include the openness of the political system, the stability of elites that support the system, and the state's capacity for repression.²³³ In other words, one must appreciate the broader political context and the internal dynamics that permit a movement to gain traction in a particular society.

Second, and inseparable from the issue of context, scholars consider the "mobilizing structures" of a movement: the collective vehicles, networks, and organizations through which people advocate for change.²³⁴ For a movement to survive and achieve success, however defined, activists must create organizational structures to sustain collective action.²³⁵ The individual accomplishments of people like Martin Luther King, Jr. and Susan B. Anthony are impressive, but neither would likely have succeeded without an organization of supporters, such as the Southern Christian Leadership Conference or the National Women's Rights Convention. The context of rights-promotion for HBV carriers in China is, of course, vastly different from late nineteenth-century New England or mid-twentieth-century Georgia, but the importance of organizational

230. See *supra* note 1.

231. Doug McAdam, John D. McCarthy & Mayer N. Zald, *Introduction to COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES & CULTURAL FRAMINGS* 1, 2 (Doug McAdam et al. eds., 1996) [hereinafter *COMPARATIVE PERSPECTIVES*].

232. *Id.* at 2–3.

233. *Id.* at 12.

234. *Id.* at 2.

235. *Id.* at 13.

structures in sustaining collective action runs throughout most social movements.²³⁶

Third, a proper analysis must account for “framing processes,” the shared meanings through which advocates and affected people understand their situation.²³⁷ Social movements are predicated upon the tension between shared anxieties about a particular problem and optimism that collective action can redress it.²³⁸ The framing process asks: What stories do they tell to explain their particular conditions? How do they interpret events to fit within these dominant narratives?²³⁹

To sum up, any analysis of social movements needs to account for the sociopolitical context in which a movement emerges, the organizational networks that foster the desired change, and the signification processes through which agents perceive the problem and the solutions. There is room, of course, to quibble with the lines between these categories,²⁴⁰ but they seem to constitute three vital acts of any social movement.

As noted, 2003 was “the year of antidiscrimination” for HBV carriers.²⁴¹ Within months of each other, the Zhou and Zhang cases showed how serious and widespread discrimination was; moreover, they showed that the government itself was an agent of discrimination. The incidents provided a useful political opportunity around which antidiscrimination advocates could raise awareness of the problem of employment discrimination, particularly discrimination against carriers of HBV. Two ambitious and accomplished young men sought to join government service, the highest calling for aspiring youth in traditional China from the Tang Dynasty to the present.²⁴² Both passed the “substantive” portions of the challenging civil service examination, yet another proud tradition that ensures that only the most qualified enter government service.²⁴³ Yet both were denied positions due to a factor that they

236. *Id.* (“For the movement to survive, [social activists] must be able to create a more enduring organizational structure to sustain collective action. Efforts to do so usually entail the creation of the kinds of formal social movement organizations (SMOs) stressed as important by resource-mobilization theorists.”).

237. *Id.* at 2.

238. *Id.* at 5.

239. *Id.*

240. Anthony Oberschall, *Opportunities and Framing in the Eastern European Revolts of 1989*, in *COMPARATIVE PERSPECTIVES*, *supra* note 231, at 93, 93. Oberschall divides the social movement into four components: discontents and grievances, ideas to frame the important issues, collective action, and political opportunity. *Id.* at 94.

241. See, e.g., Cheng Gong, *Fan Yigan Qishi Lu Manman* [*The Road Against Hepatitis B Discrimination Is Long*], *NANFANG ZHOUMO* [S. WEEKEND], Oct. 27, 2005, <http://www.southcn.com/weekend/commend/200510270009.htm>.

242. See IMMANUEL C.Y. HSÜ, *THE RISE OF MODERN CHINA* 75–78 (6th ed. 2000) (describing the civil service examinations in Imperial China and their role in establishing social status).

243. *Id.*

could not control, a factor that would imperil neither their ability to work nor the health of their colleagues.²⁴⁴

In recent years, high-profile cases such as Zhou's and Zhang's have catalyzed legal reform efforts, or at the very least symbolized larger problems that litigation aims to address.²⁴⁵ The criminal trial of Zhou Yichao and his subsequent execution may not have aroused much public sympathy, but the affair surely captured the attention of the government. In contrast, Zhang's decision to channel his disappointment through administrative litigation served more than his own ends, coupled with extensive media coverage, ensured that hundreds of millions of people in and outside of China.²⁴⁶ The court's highly technical decision did not vindicate Zhang,²⁴⁷ but it did spark a debate about the human rights of one of China's largest disadvantaged groups and the function of courts in protecting those rights. At the time, Chinese courts manifested little sympathy for plaintiffs suing for discrimination and generally avoided ascribing any kind of culpability to government actors.²⁴⁸ However routine the filing of an employment discrimination action may seem to American readers, Zhang's decision to litigate was by no means automatic. His parents firmly opposed the decision to sue.²⁴⁹ At that time, very few

244. See Ching-Ching Ni, *supra* note 1, at A5 (noting that hepatitis B cannot be contracted without the exchange of bodily fluids).

245. The linking of cases or incidents to subsequent legal reform is a ripe topic for study. Important case studies would include the Yang Jia case (mental health of criminal defendants), the She Xianglin cases (sentencing and proof), the Deng Yujiao case (murder of government official by woman he tried to rape), or any of the recent murders in detention centers. See *infra* Appendix.

246. In contrast, Zhang's decision to channel his disappointment through administrative litigation served more than his own ends; through extensive outreach to the media, HBV advocates ensure that hundreds of millions of people in and outside of China could learn about Zhang's case. See Zhou Wei & Li Cheng, Xianfa Pingdeng, Ziyou yu Fanqishide Gongyi Susong—Anli, Guocheng yu Pinglun [Public Interest Litigation in Constitutional Equality, Liberty & Antidiscrimination—Cases, Processes & Criticisms] 76 (2009) (unpublished manuscript) (on file with author) (listing numerous Chinese articles about the lawsuit and subsequent hearings).

247. The court merely found that the hospital that administered the medical examination wrongly concluded that Zhang was unfit to work at the Personnel Bureau. Accordingly, the Bureau's adoption of the hospital's conclusion lacked a factual basis. But the court did not order compensation for Zhang or order the Personnel Bureau to hire him. ZHOU WEI, ZHONGGUODE LAODONG JIUYE QISHI: FALÜ YU XIANSHI [EMPLOYMENT DISCRIMINATION IN CHINA: LEGISLATION & REALITY] 348, 355–56 (2006).

248. One much discussed case involved Jiang Tao, who sued the Chengdu branch of the People's Bank of China in early 2002. In job advertisements, the Bank required male applicants to be 168 centimeters (5'7"), but Jiang stood 165 centimeters (5'6"). With the help of his professor, Zhou Wei, Jiang sued the Bank, which then removed the height requirement from the advertisement. The removal mooted the case. As far as the court was concerned, "Plaintiff Jiang Tao's claimed rights infringement has not yet occurred, and is hence not litigable." Zhou Wei & Li Cheng, *supra* note 246, at 28.

249. *Id.* at 78.

people had sued for employment discrimination, and those who did had little to show for it.²⁵⁰

In September 2003, Zhang's name appeared on *gandan xiangzhao*, an online discussion board for HBV carriers.²⁵¹ The site's webmaster and various posters encouraged Zhang to take legal action to protect his rights.²⁵² The site also served to connect Zhang with Professor Zhou Wei of Sichuan University in Chengdu.²⁵³ In 2002, Professor Zhou made headlines by litigating one of China's first employment discrimination cases, which involved height discrimination.²⁵⁴ He wanted to expand his work in the field of constitutional litigation, ever hoping to "marry theory and practice."²⁵⁵ He heard about Zhang's case through *gandan xiangzhao*, and he instructed a student to contact Zhang through the website.²⁵⁶ Professor Zhou wanted "to fight for the basic survival rights of 120 million HBV carriers" and to "protect the basic rights of humanity."²⁵⁷ Even at this early stage, the issue of employment discrimination was framed as a basic human right to survival.²⁵⁸

250. The plaintiffs whose cases appear in this book sued on the understanding that their personal rights had been violated At the time they filed, most knew that the majority of lawsuits had been unsuccessful up until that time, but they nevertheless chose to litigate in order to balance individual rights and interests, transmit legal knowledge, and support the public interest.

Id. at ii.

251. Zhou Mu, "Yigan Qishi" An Kaiting: Zhou Wei Lüshi Jieshou Jizhe Zhuanfang ["Hepatitis B Discrimination" Case Opens: Lawyer Zhou Wei Accepts Exclusive Interview], CHENGDU WANBAO, Dec. 12, 2003, <http://news.sina.com.cn/c/2003-12-20/03432419602.shtml>. Meaning, literally, "the liver and gall bladder illuminate each other," but more figuratively, devotion or sincerity between two people, *gandan xiangzhao* was one of the first fora where Chinese HBV carriers could openly and anonymously discuss their problems. *Id.*

252. *Id.*

253. *Id.*

254. See Zhou Wei & Li Cheng, *supra* note 246, at 23.

255. *Id.* at 1.

256. See Zhou Mu, *supra* note 251.

257. *Id.*

258. In this way, HBV advocates share similarities with rural rights resisters as theorized by O'Brien and Li, who define rightful resistance as a "popular form of contention that operates near the boundary of authorized channels, employs the rhetoric and commitments of the powerful to curb the exercise of power, hinges on locating and exploiting divisions within the state, and relies on mobilizing support from the wider public." KEVIN J. O'BRIEN & LIANJIANG LI, *RIGHTFUL RESISTANCE IN RURAL CHINA 2* (2005). HBV advocates use the language of the state—constitutional law, national law, regulations, and so on—to frame their struggle, such as the right to survival. But they are quite keen on using authorized channels to effectuate legal change, as seen in the numerous petitions they have submitted to the National People's Congress. They are also less concerned about exploiting the central-rural divide. For the most part, HBV advocates are comparatively wealthy, well educated, and more Internet-savvy than rural resisters. Moreover, rightful resisters occasionally agitate quite demonstrably (i.e., tearing up ballots, grabbing microphones to denounce local

With Professor Zhou as his advocate, Zhang Xianzhu sued the Wuhu Personnel Bureau in November 2003.²⁵⁹ At the time, there was no law on point, so Professor Zhou fashioned a number of innovative corollaries to press the case. For instance, Zhang's complaint alleged that the Bureau's conclusion not to hire him because of HBV constituted "malicious discrimination" and "did not fulfill the state's legal obligations to respect and protect human rights, and to treat citizens equally under the law."²⁶⁰ It was, in other words, a violation of the right to equality enshrined in Article 33(2) of the Chinese Constitution.²⁶¹ In subsequent filings, Professor Zhou noted that Chinese laws—such as the Law on the Prevention of Infectious Diseases and the Food Safety Law—and regulations—such as the Public Safety Hygiene Regulations A—bar HBV carriers from employment in potentially high-risk positions like medical facilities and food production plants.²⁶² He argued that these concerns were inapposite to an office job in a personnel bureau.²⁶³

The court found the hospital—not a party to the lawsuit—had erred in concluding Zhang was unfit for the position.²⁶⁴ Anhui Province's Provisional Implementing Regulations for the Physical Examination of National Civil Servants disqualified actively infected carriers of HBV, but it did not disqualify passive carriers like Zhang.²⁶⁵ Moreover, the hospital exceeded its jurisdiction in ruling on Zhang's suitability; jurisdiction properly belonged to the Personnel Bureau.²⁶⁶ Ultimately, the court found that it could order no remedy because the recruitment cycle ended with the second-placed candidate filling the post.²⁶⁷ Zhang won a symbolic victory on a very minute

officials), and repose trust in the central government at the expense of local officials. *Id.* at 56–57. HBV advocates may demonstrate publicly, but not in a confrontational way, and there is not an implicit trust in the central government over local governments. *Id.* at 42–43.

259. ZHOU WEI, *supra* note 247, at 326.

260. *Id.* at 327.

261. *Id.*

262. For instance, the Food Safety Law, Law on Prevention of Infectious Diseases, Administrative Provisions on Public Hygiene, and Implementing Regulations for the Administrative Provisions on Public Hygiene all place various restrictions on HBV carriers in fields such as food production, water provision, child care, and even beauty salons. *Id.* at 329, 333. But the position Zhang applied for involved economic administration in the county affairs office, and was unlikely to involve the kind of direct human contact that would conceivably make an HBV carrier "undesirable." *Id.* at 333.

263. *Id.* at 355.

264. *Id.*

265. *Id.* at 333.

266. *Id.* at 355.

267. *Id.*

point of law, and his case made headlines all over China,²⁶⁸ but he left the courthouse as unemployed as when he entered it.²⁶⁹

Zhang's lawsuit was itself an event, providing an opportunity to call attention to the larger issue of discrimination against HBV carriers. Advocates informed the media about Zhang's case, ensuring that dozens of journalists attended the hearings and reported on the announcement of the verdict.²⁷⁰ Members of the online support group *gandan xiangzhao* also attended the hearings, both to show support for Zhang and to increase visibility for their cause. Press reports about a figure as sympathetic as Zhang opened up discussions and allayed people's fears about working alongside HBV carriers.²⁷¹

The *gandan xiangzhao* website quickly gained a large following among HBV carriers and others.²⁷² An international domain name since 2001, the site had attracted 85,000 registered members by December 2004,²⁷³ and it served as a sounding board for the frustration of carriers and their experiences in education, employment, housing, public services, and other fields. The ability to communicate openly, freely, and honestly about this topic brought together a large community of HBV advocates who had neither discussed the issue publicly nor publicly identified themselves as a group in need of legal protection.

The website also functioned as a collective action center. On August 13, 2003, advocates posted a proposal on the site, asking the Standing Committee of the National People's Congress (the highest legislative body of China) to review the constitutionality of the

268. See Zhou Wei & Li Cheng, *supra* note 246, at 76 (listing the newspaper articles covering the case, from such sources as *People's Daily*, *Xinhua*, *CCTV*, *Southern Weekend*, and others).

269. Zhang has not had an easy time finding work. He was let go from a job in a Guangzhou factory after his boss recognized him from the lawsuit. He also taught at an elementary school in Guizhou. He has received offers from hospitals and pharmaceutical companies to serve as a spokesperson, but he worried that such positions would "be equal to selling my own soul." See generally Huang Maowang, *Zhang Xianzhu: Yigan Zhidu Qishi Yin Ta Zhibu* [*Zhang Xianzhu: Systemic Discrimination Against Hepatitis B Stopped Because of Him*], FAZHI ZHOUBAO [LEGAL WEEKLY], Aug. 29, 2008, <http://www.dffy.com/sifashijian/jj/200808/20080829151838.htm>.

270. See Zhou Wei & Li Cheng, *supra* note 246, at 78–79 (noting that fifty journalists attended the December 19, 2003, hearing and over thirty journalists, from all over the country, attended the verdict on April 2, 2004).

271. See, e.g., Du Wenjuan, *Chuanranbing Fangzhifa: Zhang Xianzhu wei 1.2 Yiren Weiquan* [*Ways of Curing Infectious Diseases: Zhang Xianzhu Protects the Rights of 120 Million*], RENMIN RIBAO [PEOPLE'S DAILY], Apr. 13, 2005, <http://www.china-law.gov.cn/article/xwzx/fzxw/200504/20050400064939.shtml>.

272. Some of the plaintiffs analyzed in Part V of this Article also used the *gandan* site for legal and moral support. Plaintiffs 3 and 21, among others, used the site. See *infra* Appendix.

273. See "In the Hepatitis B Camp" Website: Home of Hepatitis B Carriers in China, HEPATITIS B CARRIERS BBS, <http://www.hbvhbv.com/english> (last visited Apr. 9, 2011).

provincial regulations on civil servant examinations.²⁷⁴ Over 1,600 Chinese citizens signed the petition before sending it to the Standing Committee in November 2003.²⁷⁵ The petition warned of “dozens, even hundreds, of Zhou Yichaos” if the government did not attend to this “serious social problem.”²⁷⁶ Invoking domestic laws and international human rights law,²⁷⁷ the petition urged “the Chinese State and Central People’s Government to honor their solemn commitment to the people of the world, and ensure the collective *right to exist* of 120 million people. If we improve the living conditions of 120 million people, this would be China’s contribution to all of humanity.”²⁷⁸

The petition contained a number of proposals, some of which have since been adopted. First and foremost, the petition called on the State Council to remove HBV from the list of disqualifying diseases on the civil service examinations,²⁷⁹ a task realized gradually by regulations issued in 2007 and 2010.²⁸⁰ Another proposal suggested the protection of privacy rights for HBV carriers;²⁸¹ this proposal subsequently materialized in the 2010 Notice discussed above.²⁸² Perhaps most importantly, this petition served as a template for subsequent requests made to government bodies. Lu Jun, one of China’s leading HBV advocates, has called on government bodies to pass various types of protective legislation and regulation.²⁸³ HBV advocates continue to petition the National

274. See Zhanyou Daqianming Faqi “Weixian Shenchashu” [Droves of Netizens Sign “Review of Constitutionality”], XINLANG DUSHU [NEW WAVE READER], Jan. 24, 2005, http://book.sina.com.cn/longbook/ele/1106534107_zhanshengyigan/54.shtml.

275. A copy of the petition appears on the *gandan xiangzhao* website. 1611 wei Gongming Yaoqiu dui Zhongguo 31 sheng Gonwuyuan Luyong Xianzhi Yigan Xiedaizhe Guiding Jinxing Weixian Shengcha he Jiaqiang Yigan Xiedaixhe Lifa Baohude Jianyishu [A Petition by 1,611 Citizens to Demand Review of the Constitutionality of China’s 31 Provinces’ Regulations Limiting the Hire of Civil Servants with the Hepatitis B Virus, and to Strengthen the Legal Protection of Hepatitis B Virus Carriers], HEPATITIS B CARRIERS BBS (Nov. 20, 2003, 2:13 PM), <http://www.hbvhbv.com/forum/thread-298433-1-963.html> [hereinafter *Petition*].

276. See *id.* art. II(8) (referring to the example of Zhou Yichao).

277. For instance, the *Petition* cites Article 33 of the Chinese Constitution (equal protection clause), and the first and second chapters of the Labor Law, which guarantee *inter alia* equal employment. *Id.*

278. *Id.* art. II(11) (emphasis added).

279. *Id.* art. III(1).

280. See *supra* Part III.3.B.

281. *Petition*, *supra* note 275, art. III(3).

282. See 2010 Notice, *supra* note 225, art. II.

283. See Zhao Xiaoqiu, *Tamende Fanyigan Qishizhi Zhan* [Their Battle Against Hepatitis B Discrimination], FALÜ YU SHENGHUO (Apr. 27, 2010), <http://focus.news.163.com/10/0427/18/659VUC2900011SM9.html> (noting that nine HBV websites collectively drafted a petition to protect the employment, education, and privacy rights of HBV carriers, which prominent advocate Lu Jun personally delivered to the State Council in September 2004, and that Lu Jun delivered similar petitions during the annual meetings of the National People’s Congress and the Political Consultative Committee in 2005, 2006, and 2007).

People's Congress, the Supreme People's Court, and various ministries to enhance the protections of HBV carriers and disadvantaged people more generally.²⁸⁴

Upon the success of the *gandan xiangzhao* website, advocates established other websites and organizations to agitate on behalf of HBV carriers. For instance, hbver.com includes a message board, news articles about HBV, information about cirrhosis of the liver, and links to medicines and prevention methods.²⁸⁵ Another site, ganbaobao.com, contains a special section on rights protection, with articles on the prevalence of discrimination, news about various lawsuits, and advice on how to handle rights infringements.²⁸⁶ Another legally oriented site is fanqishi.com, which links to articles on laws and lawsuits involving various forms of discrimination.²⁸⁷ These sites continue to play the role of informant and sounding board for HBV carriers, allowing people from all over China (and the world) to participate in the discussion. In addition, specialized organizations have sprung up to raise awareness, educate citizens, litigate cases, and petition government bodies to enhance protections. The most successful of these organizations is probably Yirenping, which litigates cases, surveys employer attitudes, publishes a bimonthly newsletter with recent developments, and submits petitions to government bodies on behalf of HBV carriers.²⁸⁸

In society more generally, for the first time, a wider discussion of discrimination took place online, both on hepatitis B websites and on state-run news agencies such as CCTV. They debated public safety

284. See Guanyu "Jiuye Cujin Fa" Bufen Tiaokuan Jinxing Sifa Jieshide Jianyi [Proposal to Create a Judicial Interpretation for Some Provisions in the "Employment Promotion Law"] (on file with author) (proposing to have district courts consider hearing employment discrimination cases, distinguish employment discrimination cases from labor dispute cases, and order defendants to pay for emotional pain and suffering damages when necessary). The petition was sent to the Supreme People's Court in early 2010. See Waidi Canjiren ye Xiang Guangzhoushi Gongjiao Youhui [Non-resident Disabled People Also Enjoy Transportation Benefits from Guangzhou City], YANGCHENG WANBAO, May 16, 2010, http://www.ycwb.com/ePaper/ycwb/html/2010-05/16/content_829080.htm (noting that 171 disabled people from twenty-five provinces signed a petition to the Guangzhou Transportation Commission requesting preferential services on Guangzhou public transit).

285. See Zhansheng Yigan [Fighting for Victory], HBVER.COM, <http://www.hbver.com/Index.html> (last visited Apr. 9, 2011) (providing comprehensive information for hepatitis B patients including new medical discovery, news, and discrimination against hepatitis B carriers).

286. See Ganbaobao [Precious Liver], GANBAOBAO.COM.CN, <http://www.ganbaobao.com.cn> (last visited Apr. 9, 2011). The section on "rights protection by friends of the liver" (*gan you wei quan*) appears in the lower right hand section of the front page.

287. See generally *Anti-Discrimination Laws*, FANQISHI.COM, <http://www.fanqishi.com> (last visited Apr. 9, 2011) (containing hepatitis B discrimination news, cases, and statutes against employment discrimination from both China and abroad).

288. See generally *Beijing Yi Ren Ping Center*, YI REN PING, <http://www.yirenping.org> (last visited Apr. 9, 2011) (linking to relevant laws and regulations as well as reporting Yirenping's litigation efforts).

concerns, legal issues such as the rights to equal employment and privacy, and other matters related to hepatitis B.²⁸⁹ HBV came out of the closet and onto the tongues and screens of millions of Chinese. Significant media attention helped the mobilizing structures keep the issue on the public radar.

Finally, there is the issue of signification processes.²⁹⁰ How do HBV advocates understand their struggle? What language or discourse do they use to frame the debate between carriers and the employers who seek to avoid them? As a socialist country with a long history of state-sponsored employment, China privileges social and economic rights (such as food, education, social welfare, and employment) over civil and political ones.²⁹¹ In complaints to courts of law, signs brandished during demonstrations, and interviews with journalists and others, the issue is framed in socioeconomic terms. For example, advocates carry signs that state “Eliminate Hepatitis B Discrimination—Construct a Harmonious Society,” or “Eliminate Hepatitis B Discrimination—Promote Equal Employment,” or even “It Is Not Easy to Deprive 120 Million HBV Antigen Carriers of the Right to Survive.”²⁹² By framing the issue in terms used by the government—such as “harmonious society”—the movement aligns itself with government interests and avoids appearing confrontational or oppositional. Instead, they present their cause as one of necessity, equality, and the right to a job. No one is asking for charity or a politically sensitive privilege such as the right to vote. Instead, advocates insist that HBV carriers simply want to work, to contribute to society, and to live. No official could cavil about such a platform of demands.²⁹³

By raising public awareness, petitioning for legal reform, and mobilizing media support for their cause, activists have made HBV discrimination one of China’s leading equality issues. Their actions have helped create a legal foundation from which they can assert rights and perhaps change employer behavior. The success of their assertion of rights is taken up in the final section.

289. See, e.g., Xiaochu Yigan Qishi [*Eliminating Hepatitis Discrimination*], CCTV (Feb. 18, 2004), <http://www.cctv.com/program/jkzlzmb/20040218/100084.shtml> (transcribing an interview between a CCTV reporter and Tsinghua University’s Yang Suiyan).

290. See McAdam et al., *supra* note 231, at 16–17.

291. ROBERT WEATHERLEY, *THE DISCOURSE OF HUMAN RIGHTS IN CHINA* 24–25 (1999).

292. During demonstrations, activists have carried banners with these and other slogans. Jiang Yongping, *supra* note 80.

293. Women’s rights advocates, by contrast, have framed the discussion in terms of international human rights law. See generally de Silva de Alwis, *supra* note 137, at 207 (noting China’s obligations under international human rights conventions).

V. EMPLOYMENT PROMOTION LAW

The Employment Promotion Law of 2007 would have helped HBV carriers like Zhang Xianzhu and Zhou Yichao.²⁹⁴ Drafting began in late 2003,²⁹⁵ perhaps spurred by the public outcry surrounding Zhang and Zhou. Initially, however, the drafters were mainly focused on irregularities in China's labor market, which they sought to rectify through training programs, regulation of employment agencies, and boosting investment in employment services.²⁹⁶ There was particular concern about the oversaturation of labor in industries like manufacturing, as well as the lack of technical expertise in other industries, such as high-tech fields.²⁹⁷

Although these issues were the primary concerns of the National People's Congress (NPC), public comment on an early draft brought to light a topic not then on the agenda. The NPC's General Office of Standing Committee posted a draft of the Employment Promotion Law (EPL) on its website from March 25 to April 25, 2007, during which time the general public submitted over 11,000 opinions, 7,000 of which concerned discrimination in employment.²⁹⁸ People recounted their personal experiences with discrimination in many forms, including sex, age, appearance, and disability discrimination.²⁹⁹ Public opposition to discrimination against hepatitis B carriers was particularly acute.³⁰⁰ Based on this response, the NPC's Legal Affairs Commission introduced an entirely new chapter into the law: Chapter 3, "Equal Employment," systematized the smattering of protections interspersed throughout the earlier draft and expanded protections to five groups of disadvantaged people.³⁰¹

294. See Jiuye Cujin Fa [Employment Promotion Law] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008) art. 30 (covering infectious disease carriers). But Jiang Tao would not have been covered, since the law does not cover height discrimination.

295. *China Hopes to Promote Justice in Employment by New Law*, CHINA DEV. GATEWAY (Mar. 11, 2007), <http://www.chinagate.cn/english/social/50373.htm>.

296. *Id.*

297. Tian Chengping, *Guanyu "Zhonghua Renmin Gongheguo Jiuye Cujin Fa (Caoan)" de Shuoming [Explanation of the PRC Employment Promotion Law (Draft)]*, in PROMOTION LAW INTERPRETATION, *supra* note 31, at 219, 220.

298. Liu Bohong, *Jiang Xingbie Pingdeng Naru Lifa Guocheng [Incorporating Gender Equality into the Process of Making Legislation]*, in NEW AND EMERGING DEVELOPMENTS IN GENDER AND LAW IN CHINA: COMPILATION OF PAPERS AND PRESENTATIONS AT THE CHINA GENDER AND LAW EXPERTS CONSULTATION 75, 87 (Wellesley Ctrs. for Women ed., 2010) [hereinafter EMERGING DEVELOPMENTS].

299. See PROMOTION LAW INTERPRETATION, *supra* note 31, at 65.

300. *Id.* at 81.

301. Jiuye Cujin Fa [Employment Promotion Law] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008) arts. 25–31 (containing provisions on gender, ethnicity, the handicapped, carriers of infectious diseases, and rural workers in urban areas); *Quanguo Renda Falü Weiyuanhui Guanyu "Zhonghua Renmin Gongheguo Jiuye Cujin Fa (Caoan)" Xiugai Qingkuangde Huibao*

This process marked an important innovation in the drafting of Chinese law. Since 2005, the NPC has posted draft laws on the Internet to solicit feedback from concerned citizens and interest groups.³⁰² The experience with the EPL shows that public opinion—when directed at the right target and conveyed through the proper channels—can have an enormous impact on the final form that the law takes.

Since entering into effect on January 1, 2008, the EPL has generated a large number of lawsuits challenging a few types of employment discrimination. Unlike previous guarantees of equality in employment, found in such laws as the Labor Law or Women's Law, the EPL grants access to People's Courts, an invitation that many discrimination victims have taken up.³⁰³ The following subparts discuss the relevant provisions, several representative lawsuits, and a number of suggestions for improving the implementation of the EPL.

A. Provisions

The third chapter of the EPL guarantees equal employment, providing the most robust set of protections against employment discrimination in Chinese law.³⁰⁴ By granting victims of discrimination access to courts, the EPL overcomes the common critique that Chinese labor law exists solely on paper and rarely leads to meaningful implementation.³⁰⁵

[*Report of the NPC Law Committee on the Situation of Revising the "PRC Employment Promotion Law (Draft)"*], in PROMOTION LAW INTERPRETATION, *supra* note 31, at 226–27. An earlier version of the law included age as another prohibited category, but this was apparently excised in subsequent decisions. See *Jiuye Cujin Fa Caoan: Jianli Pingdeng Jiuye Jinzhi Xingbie Qishi* [Employment Promotion Law Draft: Establishing Equal Employment, Prohibiting Sex Discrimination], CHINA NEWS, Feb. 26, 2007, available at <http://www.chinacourt.org/html/article/200702/26/235907.shtml>.

302. See *NPC Invites Public's Comments on Draft Employment Law*, CHINA DAILY, Mar. 27, 2007 (noting that the NPC publicized the draft Property Law in 2005 and the draft Labor Contract Law in 2006).

303. *Jiuye Cujin Fa* [Employment Promotion Law] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008) art. 62.

304. Chapter III of the Employment Promotion Law is entitled Equal Employment (*gongping jiuye*). Articles 25–31 provide a wide array of protections, many of which are described below. By comparison, Article 12 of the Labor Law protected against discrimination in employment due to "nationality, race, sex or religious belief." *Laodong Fa* [Labor Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995) art. 12. The Labor Law did not protect migrant workers or the disabled to the extent of the Employment Promotion Law. Moreover, without the access to courts granted by Article 62 of the Employment Promotion Law, the Labor Law made it difficult for victims of employment discrimination to operationalize the protections of the Labor Law.

305. See, e.g., Ronald C. Brown, *China's Employment Discrimination Laws During Economic Transition*, 19 COLUM. J. ASIAN L. 361, 426 (2006).

The EPL contains a general proscription of employment discrimination, mirroring language found in the Labor Law and Labor Contract Law.³⁰⁶ More importantly, it provides specific prohibitions for five disadvantaged groups: women, ethnic minorities, disabled persons, people with infectious diseases, and rural workers.³⁰⁷ Unlike U.S. federal law³⁰⁸ or China's Labor Law,³⁰⁹ which simply list bases on which it is illegal to discriminate, the EPL grants different levels of protection to each group.³¹⁰ This structure allows the EPL to adapt to the existing legal framework and to address problems unique to each group.

Three provisions in particular—on women, infectious disease carriers, and rural residents—are germane to the present discussion. Article 27 provides:

The state ensures that women have labor rights equal to those of men.

When an employer hires personnel, it may not refuse to employ a woman on the basis of her sex, except for jobs or positions that the state has specified as being unsuitable to women, or set standards for the employment of women that are higher than those for men.

When an employer hires a female, it may not include provisions in her employment contract that place restrictions on her getting married, having children, etc.³¹¹

Although this provision appears to provide robust protections for women, scholars have criticized the Employment Promotion Law for including the exception for jobs deemed “unsuitable to women.”³¹² This exception may encourage employers to classify jobs as “unsuitable” for women based on stereotyped or outdated notions of women's capacities, further segregating the workforce and possibly pushing women into low-paying jobs.³¹³

It has been said by some employers in China that labor laws are irrelevant due to the unlikely prospect that employees will complain to the authorities or that the laws will be enforced. Further, there is little evidence to suggest that either the promise of remedies or the threat of penalties enhance enforcement.

Id.

306. Article 4 echoes Article 12 of the Labor Law, by providing that individuals “shall have the right to equal employment and to select their own jobs in accordance with the law. The employment of workers shall not be subject to discrimination on the basis of such factors as ethnicity, race, sex, religion, etc.” Employment Promotion Law art. 4.

307. *Id.* arts. 27–31.

308. The Civil Rights Act of 1964 proscribed discrimination on an “individual's race, color, religion, sex or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2006).

309. *See* Labor Law art. 12 (listing prohibited bases of discrimination).

310. Employment Promotion Law arts. 27–31.

311. *Id.* art. 27.

312. Guo Huimin, *Gender-Based Employment Discrimination*, in EMERGING DEVELOPMENTS, *supra* note 298, at 90, 95.

313. *Id.*

An additional concern involves the use of the word “hire” in section 2 (*zhaoyong*) and “employ” (*luyong*) in section 3.³¹⁴ Women face discrimination in various phases and aspects of their jobs, from hiring to retirement, promotion, pregnancy leave, wages, and sexual harassment. By using the word “hire,” the law limits its scope to the period before the woman becomes an employee. Although the word “employ” in paragraph 3 would seem to dispense with this concern, that paragraph only covers terms that appear in the “employment contract.”³¹⁵ An employer is unlikely to indicate that he will sexually harass a female employee in the terms of the employment contract. In short, the law does not protect women in promotion, training, titles, termination, and other phases of employment, as similar laws do in Japan³¹⁶ and the United States.³¹⁷

The Employment Promotion Law also safeguards the rights of carriers of infectious disease. Article 30 provides:

When hiring personnel, an employer may not refuse to employ someone on the grounds that he or she is a carrier of an infectious disease. However, a certified carrier of an infectious disease may not, until he or she has recovered, or the suspicion of infectiousness has been eliminated, engage in work prohibited by laws, administrative statutes or the State Council’s health authority, due to the fact that it would facilitate the spread of the disease.³¹⁸

Again, one could argue that the specification of prohibited jobs may reinforce the notion that disease carriers should be excluded from the workplace. However, by requiring employers to base their judgments on a certification that the person carries a disease, the role of suspicion and misinformation, which occasionally trump sound medical reasoning, will be minimized.³¹⁹ As we shall see in Part V.B, this is the most actively litigated provision of the EPL.

314. Employment Promotion Law art. 27.

315. *Id.*

316. See Megan L. Starich, Comment, *The 2006 Revisions to Japan’s Equal Employment Opportunity Law: A Narrow Approach to a Pervasive Problem*, 16 PAC. RIM L. & POL’Y J. 551, 562 (2007) (discussing improvements in Japanese gender discrimination law).

317. Title VII of the Civil Rights Act of 1964 covers hiring, promotion, discharge, pay, fringe benefits, job training, classification, and other aspects of employment. 42 U.S.C. § 2000e (2006).

318. Employment Promotion Law art. 30.

319. Even in mid-2010, after the passage of the Employment Promotion Law and regulations banning the use of HBV tests in hiring, HBV carriers worry that employers are uninformed about the law. See generally Jiang Dahong, *Yigan Qishi Hai Meiyou Tingzhi: Chao Liuchengde Ruzhi Tujian Hai Zai Jiancha [Discrimination Against Hepatitis B Still Has Not Stopped: Over Sixty Percent of Medical Examinations Still Test for It]*, RENMIN WANG [PEOPLE’S WEB] (Mar. 24, 2010), <http://health.people.com.cn/GB/11212873.html> (noting that one month after the issuance of the Notice on HBV Examinations, less than one-half of government departments interviewed had implemented the Notice, and less than 20 percent had received the Notice itself).

Finally, the EPL protects the rights of migrant workers³²⁰ by providing that “Rural workers employed in cities shall enjoy labor rights equal to those of urban workers. No discriminatory restrictions may be set against rural workers seeking employment in cities.”³²¹ While this provision addresses a key problem discussed above—the plethora of discriminatory restrictions that cities have imposed against migrant workers³²²—it is not clear how the law should be implemented. First, and unlike the above provisions on women and carriers of infectious diseases, this article says neither that “the state ensures that rural workers have labor rights equal to those of urban workers” (as it does for women in Article 27), nor that “the state safeguards the labor rights of rural workers” (as it does for the disabled in Article 29).³²³ It thus arguably offers a lower level of protection to rural residents than it does to women and carriers of infectious diseases.

Second, if a migrant worker were to bring a lawsuit based, for instance, on a city regulation that favors hiring local residents, against whom would he file the case? The employer who did not hire him could simply point to the municipal agency that promulgated the discriminatory regulation. But the agency did not cause the harm—the employer refused to hire the plaintiff. Just as in the Zhang Xianzhu case, a court could find that the municipal agency exceeded its jurisdictional limits or the agency’s actions lacked a factual basis, then deem itself powerless to devise a remedy.³²⁴ Moreover, a court cannot annul a regulation passed by an administrative agency.³²⁵ Of course, until a migrant worker brings a lawsuit challenging discrimination under the EPL, we will have to wait to see how a court enforces this provision.

B. Cases

The twenty-five lawsuits found and analyzed by this author took place all over China, in Beijing, Shanghai, Xinjiang, Guangxi,

320. Article 20 also calls on the state “to guide the orderly transition of surplus agricultural labor” to urban areas, and on local people’s governments “in both labor-exporting and labor-importing areas to improve the environment and conditions for cities that employ rural laborers.” Employment Promotion Law art. 20.

321. *Id.* art. 31.

322. See *supra* notes 163–71 and accompanying text.

323. Employment Promotion Law arts. 27, 29.

324. See ZHOU WEI, *supra* note 247, at 355–56. The court found that the agency lacked factual basis for its actions, but also found the issue moot as the position has already been filled. *Id.*

325. Chinese courts cannot review *abstract* administrative acts, such as when an administrative body passes regulations or orders, but they can review *concrete* administrative acts, such as when an administrative body or its personnel exercises administrative authority that targets a specific citizen or legal person. Lin Feng, *Administrative Law*, in INTRODUCTION TO CHINESE LAW, *supra* note 197, at 75, 76.

Zhengzhou, Shenzhen, and many other places.³²⁶ The widespread use of lawsuits suggests that plaintiffs trust courts to entrust them with the adjudication of cases involving basic human rights.³²⁷ The overwhelming majority of suits—twenty-two of twenty-five—came from HBV carriers, a fact that signals both the strength and the limitations of the EPL.³²⁸ Of the nineteen fully adjudicated cases, fifteen resulted in compensation for the plaintiff, while the court ruled for the defendant in four cases.³²⁹ Many plaintiffs are young and college-educated, and the lawsuit involves their first job.³³⁰

It is important to note that, to date, no plaintiff has filed a lawsuit under the EPL for discrimination due to gender, disability, ethnicity, or rural status. In addition, the foregoing analysis is limited to lawsuits that appeared in the Chinese media and a small number of verdicts that the author obtained through contacting human rights lawyers in China. Because it is difficult to evaluate a judge's reasoning based on a small sample of media reports, the analysis is necessarily limited. Still, basic similarities across many cases offer the contours of the typical case.

HBV lawsuits follow a pattern, roughly analogous to Zhang Xianzhu's.³³¹ Plaintiff passes the written and oral examinations of his prospective employer, who then makes a job offer, possibly conditioned on a medical examination. When the applicant's medical examination reveals that he carries HBV, the employer either rejects

326. See *infra* Appendix.

327. I have discovered one case brought to a labor arbitration committee, but that seems to be the exception. *Zhongguo Yiyu Zhenghuanzhe Fanqishi Diyian de Qishi* [Notice of China's First Case of Antidiscrimination by Depressive], XINHUA, Aug. 4, 2008, http://news.xinhuanet.com/focus/2008-08/04/content_8768175.htm.

328. The three other cases involved depression, color-blindness, and a genetic blood disorder called thalassemia. "Jiyin Qishi Diyian" *Kaiting, Lianxi 1000 Man Guangdongren* [Hearing for "First Case of Genetic Discrimination," Affects 10 Million Guangdongers], YANGCHENG WANBAO [YANGCHENG EVENINGS NEWS], Feb. 3, 2010, http://news.ycwb.com/2010-02/03/content_2421762.htm; *Zhongguo Semang Jiuye Qishi Diyian Bei Juluzhe Suopei Wuwan Fuweijin* [First Case of Employment Discrimination Against the Color-Blind in China: Refused Applicant Seeks 50,000 in Damages], NANJING MUNICIPAL LEADING GROUP, May 21, 2009, <http://www.yfzs.gov.cn/gb/info/alxc/ldaj/2009-02/27/1414169613.html>; "Zhongguo Yiyuzheng Huanzhe Fanqishi Diyian" *de Qishi* [Notice on the "First Antidiscrimination Case from a Chinese Person Living with Depression"], XINHUA, Aug. 4, 2008, http://www.bj.xinhuanet.com/bjpd-jdwt/2008-08/04/content_14018937_1.htm.

329. See *infra* Appendix.

330. See, e.g., *infra* Appendix case 3 (Li Fei v. Wei Yi Da), case 23 (Du Lan v. Changsha Health Department), case 18 (Gong Ping v. Unnamed Defendant). Cases where the plaintiff is a college graduate are marked with a "cg" in the Appendix.

331. See, e.g., *Guangdong Huizhou Yigan Huanzhe Bei Citui Zhuanggao Qiye Suopei Qimanyuan* [Guangdong Huizhou: Hepatitis B Sufferer Is Fired and Receives 70,000 Yuan in Compensation from the Company], GUANGZHOU RIBAO [GUANGZHOU DAILY], Aug. 27, 2008; *Yigan Qishi Jujue Luren: Danwei Bei Pan Daoqian Jia Peichang* [Refusing Applicant Due to Hepatitis B Discrimination: Unit Ordered to Apologize and Compensate], XINHUA, May 23, 2008, available at http://www.bj.xinhuanet.com/bjpd-sdxx/2008-05/23/content_13349024.htm.

the application or rescinds the offer. After an attempt at mediation, the applicant sues in court (avoiding the sidestep of labor arbitration³³²) for economic damages, emotional distress damages, or breach of contract. He or she may also request an apology.

Chinese courts have some discretion in deciding whether to accept cases. Some courts refuse to accept cases of discrimination in hiring because it is not listed in the Supreme People's Court's causes of action.³³³ Nevertheless, many judges have accepted these cases, interpreting the disputes as implicating the right to health or the right to privacy.³³⁴ The first hurdle for many plaintiffs, then, is to find a judge or court willing to hear the case.

Judges also enjoy discretion in assessing damages from emotional distress.³³⁵ Based on the limited number of verdicts analyzed for this Article, emotional distress seems to be the main damage for which judges order compensation.³³⁶ Two cases bear this out. In the first case, the plaintiff passed the defendant employer's oral and written examinations during his final year of college, in December 2006.³³⁷ He then signed an employment agreement (*jiuye xieyi*) and stopped his job search in reliance on that agreement.³³⁸ However, in June 2007, the employer informed the plaintiff that he

332. Labor arbitration is undesirable from a plaintiff's perspective because it tends to favor employers, often because local governments support employers that provide jobs and tax revenues for local coffers. See Aaron Halegua, *Getting Paid: Processing the Labor Disputes of China's Migrant Workers*, 26 BERKELEY J. INT'L L. 254, 265 (2008) (discussing the labor bureau bias in favor of employers).

333. Interview with Liu Minghui, Professor, China Women's College (Nov. 26, 2008). The Supreme People's Court Regulation on Civil Causes of Action does not specifically list discrimination as a cause of action. See Minshi Anjian Anyou Guiding [Regulations on Civil Causes of Action] (promulgated by the Sup. People's Ct., Feb. 4, 2008, effective Apr. 1, 2008) (failing to include employment discrimination among the causes of action listed).

334. Minshi Anjian Anyou Guiding [Regulations on Civil Causes of Action] (promulgated by the Sup. People's Ct., Feb. 4, 2008, effective Apr. 1, 2008) arts. 1, 6, 163–66 (covering personality rights, the right to privacy, and various labor rights).

335. See Zuigao Renmin Fayuan Guanyu Queding Minshi Qinquan Jingshen Sunhai Peichangren Ruogan Wentide Jieshi [Supreme People's Court Interpretation of Several Issues in Determining the Duty to Compensate for the Tort of Emotional Distress] (promulgated by Sup. People's Ct., Mar. 8, 2001, effective Mar. 10, 2001) art. 10 (permitting judges to consider the extent of a tortfeasor's culpability; specific circumstances of the methods, situation, or conduct involved; consequences wrought by the tort; economic capacities of a tortfeasor; and the average living standards of the area where the case is heard).

336. Finding verdicts from Chinese civil litigation is difficult. The existing databases have few cases, unlike LEXIS and Westlaw in the United States. After several requests from Chinese lawyers and NGOs, the author was able to obtain a small sample of five such decisions, two of which are analyzed herein.

337. Plaintiff v. Guangxi Jingui Pulp Co. Ltd., Civ. Dec. No. 312, at 1 (Qinnan Dist. People's Ct., Apr. 29, 2008) (on file with author), *aff'd*, Civ. Dec. No. 253 (Qinzhou Interm. People's Ct., Oct. 23 2008). To protect the identity of the plaintiff, the name has been omitted.

338. *Id.*

would need to complete a liver examination, which revealed he carried HBV.³³⁹ The employer then refused to hire him because he carried HBV.³⁴⁰ Indeed, during a conversation that plaintiff actually taped and produced as evidence, a member of the company's human resources department explicitly stated that the plaintiff was not hired because of the result of his HBV test.³⁴¹

The plaintiff sued for breach of contract, but he also sued in tort, alleging that the company's refusal to hire him violated his right to equal employment and caused emotional distress.³⁴² The court agreed with both theories but interpreted his suit as a tort claim.³⁴³ It ordered the defendant to pay 10,000 rmb (of the 50,000 rmb requested by the plaintiff) in compensation for emotional distress; the court cited, among other things, the "the economic capacity of the defendant, and the lost work time of the Plaintiff."³⁴⁴ An appellate court upheld this ruling after the defendant appealed.³⁴⁵

In a second case, brought against the Dazhong News Group in Shandong, the plaintiff passed the written and oral examinations, as well as a second-round test.³⁴⁶ The defendant then sent an e-mail with a job offer, but the job offer was conditioned on passing a medical examination.³⁴⁷ The examination results revealed that the plaintiff carried HBV, but her liver functioned normally.³⁴⁸ The defendant still refused to sign a contract.³⁴⁹ The plaintiff sued for the breach of her right to equal employment, and she appended claims for emotional distress and economic damages, as well as an apology.³⁵⁰

The court found that the defendant's rejection "caused Plaintiff enormous psychological pressure and emotional pain. In light of such factors as the extent of Defendant's culpability, the consequences wrought by the tort, and the economic capacity for which the tortfeasor is responsible, this court comprehensively recognizes Plaintiff's demand for compensation for emotional distress."³⁵¹ It awarded her 15,000 of the 50,000 rmb that she sought in emotional

339. *Id.*

340. *Id.*

341. *Id.* at 2.

342. *Id.*

343. *Id.* at 3.

344. *Id.* at 4–5. The fact that lost work time was included suggests that this was not simply a decision based on emotional distress, but rather on the economic losses stemming from not having a job.

345. Plaintiff v. Guangxi Jingui Pulp Industrial Co. Ltd., Civ. Dec. No. 253, at 4 (Qinzhou Interm. People's Ct., Oct. 23, 2008).

346. Plaintiff v. Dazhong News Group, Civ. Dec. No. 3972, at 4 (Lixia Dist. People's Ct., Jan. 23, 2009) (on file with author).

347. *Id.* at 1.

348. *Id.* at 2.

349. *Id.* at 4.

350. *Id.* at 3.

351. *Id.* at 7.

distress damages.³⁵² She also requested half a year's wages, or 12,894 rmb, in economic damages to make up for the time lost between the defendant's refusal to hire her and her filing of the lawsuit.³⁵³ The court awarded a fraction of the damages sought—1,000 rmb—in light of her “work and life circumstances.”³⁵⁴ Finally, the court ordered the defendant to issue a public apology, to be authorized by the court, within thirty days of the issuance of the judgment.³⁵⁵

The above cases suggest the broad contours of HBV litigation. The key to success in these lawsuits—as in discrimination cases in the United States—is the adduction of proof. Unlike American litigants, Chinese plaintiffs cannot shift the burden of proof to defendants in discrimination cases; they must produce all the necessary documentation themselves.³⁵⁶ Luckily for carriers of HBV, there is often a long paper trail, something comparatively rare in other discrimination cases. These documents provide the evidentiary basis that judges need to determine that the defendant discriminated.³⁵⁷ Plaintiffs may produce notices from the employer that they passed the written and oral examinations, copies of job offers (or conditional job offers), and other indicia that they qualified for the position. They may also have a copy of the employer's request to sit for a medical examination, as well as the results of that exam. Finally, a written rejection, conversation, or phone call (sometimes recorded) encapsulates the rejection. From all of this evidence, judges have a solid foundation upon which to make a finding of discrimination.

However, a long paper trail will not arise under most other kinds of discrimination. In gender discrimination cases, women can be

352. *Id.*

353. *Id.*

354. *Id.* Though not a large amount, economic damages augmented her recovery and enlarged the cognizable scope of damages for employment discrimination. From the opinion, it is not clear what plaintiff's life and work conditions were.

355. *Id.*

356. China does permit the reversal of burden of proof, but only in limited circumstances such as products liability or medical malpractice. *Zuigao Renmin Fayuan Guanyu Minshi Susong Zhengjude Ruogan Guiding* [Several Rules of the Supreme People's Court on Evidence in Civil Procedures] (promulgated Dec. 21, 2001, effective Apr. 1, 2002) art. 4(6), (8), translated in CIVIL PROCEDURE LAW & COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA 243, 245 (Wei Luo trans., 1997). In all other suits, the plaintiff is responsible for producing the relevant evidentiary materials. *Id.* art. 1. As of October 2010, there is no law, regulation, or interpretation that permits a plaintiff in an employment discrimination lawsuit to reverse the burden of proof. *Id.*

357. In many verdicts, judges write at length about the quality and reliability of the evidence presented. See, e.g., *infra* Appendix (Plaintiff v. Dushi Zhongsheng Adver.). The court spends most of the ten-page opinion analyzing the credibility of both parties' evidence. Plaintiff v. Dushi Zhongsheng Adver., at 2–3 (Jiangnan Dist. People's Ct. Dec. 18, 2008) (on file with author) (categorizing the evidence into four kinds); *id.* at 4–9 (evaluating the evidence).

screened out much earlier in the process. A résumé may reveal the applicant's gender, either because of her given name or the photograph that often accompanies the application packet. If there is still doubt, a phone call can ferret out female applicants, and even if a phone call fails, the employer can simply interview the female candidate and turn her down without generating any indicia of discrimination. With the exception of explicit job advertisements,³⁵⁸ none of the discriminatory techniques discussed in this Article would produce documentation, and this lack of documentation leaves a judge to rule primarily on the plaintiff's allegations, suspicions, and interpretations. Even if the defendant made a plainly discriminatory statement during the interview, or injected discrimination obliquely by asking about boyfriends and children, the case would still hinge on hearsay: her word against his. This presents a dilemma for the presiding judge.

Therefore, it is not entirely surprising that no Chinese woman, to this author's knowledge, has filed a lawsuit based on gender discrimination in hiring.³⁵⁹ This absence can be explained in various ways, including the lack of evidence noted above. Some women simply accept the prevalence of sex discrimination and adopt an attitude of anger, resignation, and silence, the latter perceived as the most effective of the "reasonable alternatives."³⁶⁰ Others are too concerned with finding a job; they lack the time and resources needed to prosecute a lawsuit.³⁶¹ As one interviewee put it, "Even if I won the case, what kind of result would I get? Is the employer going to hire me? If a company didn't want to hire you, but you get the job [after litigation], they are not going to make it easy for you."³⁶² Particularly in light of the success of various hepatitis B cases, the

358. To my knowledge, no woman has sued for the explicit gender divisions in any newspaper or Internet advertisement.

359. Women have sued for various aspects of employment discrimination, including sexual harassment, termination due to pregnancy, early retirement, and termination after one's husband is terminated. But these cases all involve conduct *after* plaintiff has been hired. See generally FUNÜ QUANYI YU GONGYI SUSONG [WOMEN'S RIGHTS & PUBLIC INTEREST LITIGATION] (Guo Jianmei & Li Ying eds., 2008) (describing over a dozen lawsuits brought by the Center for Women's Law & Legal Services of Peking University, the leading women's rights NGO in China); see also Zao Jiuye Qishi, Weihe Weijian Nüxing Suzhe Falü [After Encountering Discrimination, Why Have We Not Seen Women Appeal to the Law?], XINJINGBAO [NEW CAPITAL NEWS], June 15, 2009, <http://www.chinanews.com.cn/edu/edu-jysp/news/2009/06-15/1734017.shtml> (noting that, as of June 15, 2009, not a single case of gender discrimination in hiring had been filed). Also note that recent searches on Google and Baidu revealed no discrimination cases brought by women (last checked Apr. 19, 2011).

360. See Zhao Li, *Huiwang Jiuye Cujin Fa Shishi Yinian: Weijuli Jiujing You Duo Qiang* [Reflecting on One Year of Implementation of the Employment Promotion Law: How Strong Is the Deterrence?], FAZHIWANG [RULE OF LAW WEBSITE] (Mar. 11, 2009), http://www.procedurallaw.cn/fzrd/200903/t20090311_191813.html.

361. *Id.*

362. *Id.*

absence of sex discrimination lawsuits calls into question the efficacy of the EPL as a tool to combat employment discrimination.

C. Problems

For all of its important advances, the Employment Promotion Law omits a few basic necessities. These gaps could be filled through subsequent legislation, provincial legislation, implementing guidelines, administrative regulations, or judicial interpretations. This section offers some suggestions to heighten the efficacy of China's antidiscrimination laws generally and the EPL in particular.

First, the EPL does not define discrimination. This may seem like a formality, but the concept of discrimination is not widely known in China, including among judges.³⁶³ Consequently, formalities like a clear definition of discrimination can make a big difference to the presiding judge.

Second, the EPL does not cover a wide range of discrimination that is quite common in contemporary China. Marital status, appearance, and height are routine bases for refusing to hire someone,³⁶⁴ even though they have almost no bearing on the ability to perform. To be sure, it is unreasonable to expect antidiscrimination law to respond perfectly to contemporary conditions *ab initio*, particularly given the slow and gradual development of Chinese legal reform, which prefers minor and incremental change to cataclysm. Moreover, as experience in other countries shows, protected classes tend to proliferate over time; in a few years, it is likely that a new group, currently unrecognized, may clamor for their rights more loudly or persuasively.³⁶⁵ For example, during the drafting of the EPL, a number of public commentators pointed out the prevalence of age discrimination.³⁶⁶ The decision not to include age discrimination may be tied to the prevalence of the differential retirement age for men and women, which has been a heated source of debate in recent years.³⁶⁷

363. Interview with Li Cheng, antidiscrimination lawyer and doctoral candidate, Shanghai Jiaotong University (Mar. 15, 2009).

364. See Zhu Zhe, *Bias Is a Way of Life in Jobs*, CHINA DAILY, Jan. 8, 2007, http://www.chinadaily.com.cn/china/2007-01/08/content_776547.htm.

365. The United States first protected race, sex, color, religion, and national origin in the 1964 Civil Rights Act; age in the 1967 Age Discrimination in Employment Act; and disability in the 1990 Americans with Disability Act. See *Federal Laws Prohibiting Discrimination: Questions and Answers*, EQUAL EMP'T OPPORTUNITY COMM'N (Nov. 29, 2009), <http://www.eeoc.gov/facts/qanda.html> (outlining antidiscrimination laws).

366. See PROMOTION LAW INTERPRETATION, *supra* note 31, at 65.

367. See, e.g., *Chen Zhili Urges Gender Equality in Retirement Age*, NAT'L PEOPLE'S CONG. OF THE PEOPLE'S REPUBLIC OF CHINA (Apr. 6, 2009), http://www.npc.gov.cn/englishnpc/news/Events/2009-04/06/content_1496720.htm (noting that Ms. Chen, a senior legislator in the NPC Standing Committee, expressed

Third, the protections offered are not as robust as they could be. As already discussed, discriminatory job advertisements are common, and interviewers routinely ask women personal questions about marriage and childbirth plans.³⁶⁸ Indeed, some employers still require women to forego pregnancy for many years as a condition of employment.³⁶⁹ A legal prohibition on gender restrictions in print and online advertisements would be a good first step, followed by the proscription of personal questions in interviews.

Fourth, the law does not address the evidentiary issues that typically emerge in employment discrimination lawsuits. In the United States, plaintiffs frequently struggle to adduce evidence of discrimination, which is almost exclusively within the defendant's possession.³⁷⁰ The Supreme Court responded to this lacuna with the *McDonnell-Douglas* burden-shifting mechanism: after the plaintiff makes a prima facie showing of employment discrimination, the burden shifts to the defendant to articulate a nondiscriminatory reason for its decision; if the defendant meets that burden, the burden shifts back to the plaintiff to prove why the defendant's proffered reason is pretextual.³⁷¹ To be sure, burden-shifting has attracted its own set of critics,³⁷² but it has leveled the evidentiary playing field between defendants, who are loath to turn over information behind their employment decisions, and plaintiffs, who must rely on stray comments or other circumstantial evidence to prove their case.

support for Beijing to change the law on retirement ages, calling the current system "a terrible waste of human resources, particularly for those who have doctorates or master's degrees"); *Nüganbu Wantui Tiaokuan Bei Cechu* [Provision on Later Retirement for Female Candidates Removed], BEIJING NEWS, May 5, 2005, <http://news.cctv.com/society/20090505/107566.shtml> (noting that the Beijing government decided to withdraw the issue of changing the age from further discussion).

368. See *supra* Part II.C.

369. de Silva de Alwis, *supra* note 137, at 233.

370. See LEWIS, & NORMAN, *supra* note 35, at 167–68 ("Unsurprisingly, outside the realm of policies that discriminate by their clear terms on the basis of a protected characteristic, cases presenting smoking-gun exemplars of 'direct,' 'express,' or 'facial' evidence are relative rarities.")

371. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 807 (1973).

372. See generally Denny Chin & Jodi Golinsky, *Employment Discrimination: Moving Beyond McDonnell-Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK L. REV. 659 (1998) (attacking the *McDonnell-Douglas* burden shifting framework). The authors suggest that burden-shifting distracts judges from focusing on the "ultimate question," namely, whether it is more likely than not that the employer engaged in discrimination. *Id.* at 678. They propose instead that judges at the summary judgment stage first weigh plaintiff's evidence, second weigh defendant's evidence that it did not discriminate, and third view the evidence holistically, drawing all reasonable inferences in plaintiff's favor. *Id.* at 674–78. If the evidence passes these three stages, the case is ready for a jury trial. *Id.* at 677–78.

Fifth, the law does not address the question of legal liability, and remedies in particular, with sufficient specificity.³⁷³ Suppose that the plaintiff proves that her job application was turned down for a discriminatory reason. What should her redress be? Does she get the job? Does she get the next available job? Should she receive another form of injunctive relief? And what remedial or punitive measures should courts levy against discriminating employers? Some scholars have suggested that employers should have to either withdraw discriminatory advertisements or lose the ability to advertise altogether.³⁷⁴ As for punitive measures, these scholars recommend a number of sanctions, including civil liability, to cover economic losses and emotional distress damages to the plaintiff; administrative liability, such as a fine from the employer to the relevant enforcement agency; and even criminal liability.³⁷⁵ These alternative forms of liability could take the form of implementing legislation from the Ministry of Labor and Social Services or a judicial interpretation by the Supreme People's Court.

The EPL could have taken a page from the 2007 Labor Contract Law, Section VII of which lays out various situations that a judge may face in presiding over a case.³⁷⁶ Because of Section VII, a judge knows what to do if, for example, an employer fails to set out mandatory clauses in the labor contract,³⁷⁷ retains the employee's ID card or seizes his property,³⁷⁸ or does not certify the termination of a labor contract.³⁷⁹ The EPL does not reach this level of specificity. As

373. Zhou Huyong, *Jiuye Qishi Susong Jiuji Tixi de Goujian* [Components of a Redress System for Employment Discrimination Litigation], 23 BEIJINGSHI GONGHUI GANBU XUEYUAN XUEBAO [J. OF BEIJING FED'N OF TRADE UNIONS CADRE C.] 42, 42 (2008).

374. Zhang Huagui & Guo Yiyi, *Lun Jiuye Xingbie Qishide Falü Guizhi: Jianping "Jiuye Cujin Fa" zhi Xiangguan Guiding* [On Legal Regulations of Sex Discrimination in Employment: A Critique of the Relevant Provisions in the "Employment Promotion Law"], 167 FAZHI YU JINGJI [L. & ECON.] 33, 34 (2008). The authors suggest that discriminating employers should bear both remedial (*buchangxing*) responsibility and punitive (*zhengfaxing*) responsibility. *Id.* at 34. The former would permit the appropriate government agency to make employers withdraw discriminatory requirements, such as "men only" or "men preferred." The latter could consist of civil, administrative, or criminal punishments to be used when the remedial responsibility could not make a plaintiff whole. *Id.*

375. *Id.* Criminal liability, which would require revision of the criminal code, is unlikely, though countries like France have criminalized some forms of racial discrimination. See generally Julie C. Suk, *Equal by Comparison: Unsettling Assumptions About Discrimination Law*, 55 AM. J. COMP. L. 295, 302–03, 309–11 (2006) (describing French criminal sanctions for discrimination and the history of sanctions on discriminatory speech in particular).

376. See *Laodong Hetong Fa* [Labor Contract Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008), ch. VII (detailing the situations in which an employer is liable).

377. *Id.* art. 81.

378. *Id.* art. 84.

379. *Id.* art. 89.

a result, additional regulations by other government organs are needed.

Sixth, a problem as widespread as employment discrimination requires the coordinated efforts of courts, labor bureaus, local people's congresses, and other official actors. The EPL tasks certain government organs with eliminating discrimination, but only in vague terms. For instance, Article 25 provides that "People's Governments at every level shall create a fair employment environment, eliminate discrimination in employment, formulate policies and take measures to support and assist the hard-to-employ."³⁸⁰ But local governments are busy entities, more likely concerned with creating jobs than assisting those who have been refused. Given their mandate to increase GDP and economic growth, local governments may hesitate to formulate such a policy, particularly if it might antagonize employers who practice employment discrimination.

Similarly, Article 60 provides that "Labor administration authorities shall supervise and inspect the implementation of this Law, establish a reporting system, accept reports of violations of this Law and promptly verify and handle the same."³⁸¹ This provision is more specific, but the author is not aware of a single labor bureau that has set up a reporting system. Such a body is certainly necessary, however; like the Equal Employment Opportunity Commission in the United States, it could handle cases, monitor job advertisements, and investigate employers against whom charges have been directed. As it stands now, many forms of employment discrimination go unpunished, while job advertisements help to segregate workspaces based on age, gender, and physical appearance.

VI. CONCLUSION

Employment discrimination is now firmly imprinted in the national psyche of the PRC. Famous cases have captured headlines and public attention. NGOs dedicated to various causes have been formed, raising awareness, suing offenders, conducting research, and even training employers about the problems of discrimination. A consensus is forming that discrimination—though widespread—is wrong. By passing the Employment Protection Law in 2007, the national government took its largest step toward ensuring equal employment. Plaintiffs have won a handful of well-publicized cases, suggesting that courts view the law favorably, and the media has the government's blessing to report on employment discrimination.

380. Jiuye Cujin Fa [Employment Promotion Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008) art. 25.

381. *Id.* art. 60.

Moreover, the long-discussed implementation deficit of Chinese law is shrinking, if only slightly.

If the Chinese government continues to advance these reforms, it will first have to revise a thicket of discriminatory legislation. Most likely, this revision process will be piecemeal, reflecting recent gradualist trends, as well as the general nature of Chinese legal reform. Or it could be achieved through an all-encompassing law, such as a new antidiscrimination law. Regardless, the government will have to chart new ground, resolving the evidentiary issues that the Employment Promotion Law does not address, reviewing the publication of discriminatory advertisements, explaining what kinds of remedies are available to successful plaintiffs, and perhaps even establishing a body to monitor employment discrimination. This short history of employment discrimination in China shows that proscription is always a work in progress. China has taken the first steps down the righteous path of prohibiting discrimination. Presumably, popular support for these initiatives will continue.

Finally, this Article demonstrates that Chinese citizens, with the assistance of civil society groups and online technologies, can effectuate legal change in a gradual, small-scale way. It remains to be seen how well this lesson can be applied to other areas of potential legal reform, but the EPL proves that the energies and activism of a small, committed group of people can change the law, even in democratically challenged contemporary China.

APPENDIX – HBV Litigation (unless otherwise noted)

#	Verdict	Plaintiff's status	Defendant	Dist. Ct., Place	Remedy: unknown
1	10/4/07	CHEN Long	Chang Shuo Tech Co.	Nanhui, Shanghai	D voluntarily offered 5k
2	10/14/07	LI Sheng	Nokia	Dongguan, GD	P could not verify voice
3	1/4/08	LI Fei, cg	Dongguan Wei Yi Da	Dongguan, GD	24k ec; D promised not to discriminate
4	3/25/08	ZHANG Lihong	Beijing Duoqi Qiye Consulting Co.	Chaoyang, BJ	Sought 50k
5	5/24/08	GAO Jun	Bide Telecom Co.	Chaoyang, BJ	17k ec, 2k emo, apology
6	7/19/08	YUAN Ye, cg	Jabil Elec.	Unknown	Undisclosed settlement
7	8/5/08	YUAN Yipeng (depression)	IBM Shanghai	Pudong LAC, SH	Reinstated labor K, 57k in lost wages
8	8/27/08	WANG An	Hongku Elec.	Huizhou, GD	5k emo, apology
9	10/25/08	XU Jianguo, cg	Guangxi Jingui Pulp Ltd.	Qinnan, Qinzhou	1 st : 10k emo, 2 nd : 10k emo
10	11/3/08	A Gang	Unnamed Co.	Nanning	Sought 30k in ec
11	12/9/08	WANG Xiaoguo, cg	Mai Ke Wei Er Air Con	Longgang, Shenzhen	Sought 65k in ec & emo, apology
12	12/10/08	TAO Ming	Jiangxi Province Chil's Hosp.	Nanchang, Jiangxi	Annulled D's rejection
13	12/18/08	LIANG Qi, 25	Dushi Zhongsheng Adver.	Wuhan, Hubei	5k emo, apology
14	1/23/09	ZHANG Yun, 21	Dazhong Daily News	Lixia, Jinan	15K emo, 1k ec, apology
15	2/27/09	ZENG Lei 25 cg (colorblind)	Henan Province Rural Credit Union	Jinshui, Zhengzhou	Sought 3k ec, 50k emo, apology, job
16	5/4/09	LI Wen, 23, cg	Unnamed Tech. Co.	Luogang Guangzhou	20k settlement
17	5/29/09	WANG Zhuo, 24, MS	Unnamed Eng. SOE	Chengguan, Lanzhou	15k settlement
18	6/15/09	GONG Ping, cg	Unnamed Cable Co.	Urumqi, Xinjiang	1 st : 0, 2 nd : 18k settlement
19	7/9/09	YU Lihua, cg	Shenzhen Development Bank	Luohu, Shenzhen	3k ec, 325 for tests, 30 for transport costs
20	10/9/09	GUO Lin, 25, cg	Fushikang Group Elec.	Jiangan, Hangzhou	5k settlement privacy viol
21	1/8/10	XIAO Qi	Provincial Testing Ctr.	Yunyan, Guiyang	1 st : 0, 2 nd : 0
22	1/14/10	TANG, XIE, ZHOU	Foshan Dep't of H.R.	Chancheng, Foshan	1 st : 0, 2 nd : ongoing
23	1/25/10	DU Lan	Changsha Ministry Health	Yuelu, Changsha	1 st : 0
24	3/5/10	CHEN Ling	Dechang Elec.	Baoan, Shenzhen	1 st : 0, 2 nd : 3k in emo
25	3/11/10	WANG Li	Taipingyang Prop. Ins.	Tianhe, Guangzhou	8k emo

*Prevailing party in **bold** (plaintiff in bold if the case settled because he or she received compensation)

**Abbreviations: cg: college graduate; ec: economic damages; emo: emotional distress damages; apology: court ordered defendant to publish written apology

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