

What Do Chinese Judges Maximize?
——**Economic Analysis of Law in Empirical and Comparative Perspectives**
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Abstract: Under the constraints of various existing formal and informal judicial management systems, this paper discusses the preferences of Chinese judges, and proposes a preliminary Chinese judicial utility function. By comparing the differences of utility functions between Chinese and American judges, it makes further studies on the sources of humanity and information behind the judicial management system. According to the theory, “the level of working specificity is inversely proportional to the importance of personnel selection system, and is proportional to the importance of ex-post supervision and management system”, different from the Anglo-American system which emphasizes ex-ante selection and looses ex-post supervision, the Chinese institutional structure ignores ex-ante selection but stresses on ex-post administrative supervision, bringing up a group of judges who maximize income and official position. Therefore, the ideas of Chinese judicial management system should be changed.

Keywords: Chinese judges utility function information asymmetry

It is human nature to seek profits and avoid disadvantages.
——Guan zhong¹

The aristocracy of America is on the bench and at the bar.
——Tocqueville²

I Presentation of Questions

The rule of law in modern times can not be established or operated without the intermediary and carrier of normative system—the judge. Shen Jiaben once said, “A good law is not enough, we also need someone to enforce it.”³ If the judicial system is regarded as a complicated and huge machine running at a high speed, there is no doubt that the judge is the program operator who controls operating instructions and enables the machine to meet the needs with society. Therefore, if we want to know the machine’s operating efficiency or whether it is fair, we have to recognize the judges in the world of fact. We should know who they are, what they think, and the various formal and informal constraints they are facing with. We have to focus on the judge’s realistic choice in a view of behaviorism, and then give advisory opinions to make the smooth functioning of judicial system. Theoretically, first, we should know the judges’ preferences and propose a judicial utility function, in other words, we need to investigate what judges maximize on the basis of reality.

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¹ 《管子·禁藏篇》

² (法) 托克维尔:《论美国的民主》(上卷), 董果良译, 商务印书馆 1988 年版, 第 309 页。

³ 沈家本:《历代刑法考 刑制总考》, 中华书局 1985 年版, 第 51 页。

In fact, with the expansion and “intrusion” of “economic imperialism” into judicial field, many academic efforts have been made to analyze judicial behavior using the term of utility-maximizing.⁴ Particularly in Posner’s book *overcoming law*, he discusses it in one whole chapter with the title “what do judges maximize”. As Posner focuses on the “ordinary” appellate judge with secure tenure, he points out that, under the premise that the judges are paid almost the same (moonlighting income is extremely restricted⁵), voting in cases and the deference received from it, leisure-seeking are the most important elements in judicial unity function, while reputation, prestige and avoiding reversal are less important to ordinary judges. Based on the analysis, Posner proposes a simple judicial unity function.⁶ However, current researches from Posner and other scholars are all concentrated on American judges (especially American federal judges). They come to conclusions by explaining judicial behaviors such as caring about the unity of voting, seeking leisure (Posner), thirst for jurisdiction, avoiding heavy workload, hoping promotion to the appellate-court⁷, pursuing a higher cited rate of assignments,⁸ etc.

Since in the United States, the judicial profession security system is relatively perfect. These conclusions will undoubtedly be valuable for American judges who went through a rigorous selection with specific composition and homogeneity. But do they apply to Chinese judges? Of course the answer is no. Firstly, the route of entry and the composition of Chinese judges are very different from their U.S. counterparts, that is the low-quality issue of Chinese judges in many scholars’ eyes (although few relevant research involves in what the actual situation is and how low the quality is); secondly and more importantly, in current political and judicial system, many formal and informal institutional constraints that Chinese judges are facing, are extremely with

⁴ See, Mark A. Cohen, “The Motives of Judges: Empirical Evidence from Antitrust Sentencing”, 12 *International Review of Law and Economics* 13 (1992); Cohen, “Explaining Judicial Behavior or what’s ‘Unconditional’ about the Sentencing Commission?” 7 *Journal of Law Economics, and Organization* 183 (1991); Robert D. Cooter, “The Objectives of Private and Public Judges,” 41 *Public Choice* 107 (1983); Jeffrey N. Gordon, “Corporation, Markets, and Courts: 91 *Columbia Law Review* 1931, 1967-1971 (1991); Thomas J. Miceli and Metin M. Cosgel, “Reputation and Judicial Decision-making,” 23 *Journal of Economic Behavior and Organization* 31 (1994).

⁵ the American Ethics Reform Act came into operation in January 1, 1991, it provided that the judge could not accept payment for speeches or articles, and their income from teaching has been at capped at a modest percentage (approximately 15 percent) of their judicial salaries, see, 理查德·A·波斯纳:《超越法律》, 苏力译, 中国政法大学出版社 2001 年版, 第 15 页。

⁶ Concrete analysis, See, 理查德·A·波斯纳: “法官最大化些什么? ”, 《超越法律》, 苏力译, 中国政法大学出版社 2001 年版, especially, 第 135—142 页。

⁷ See, Cohen’s empirical research on the federal district judges, Mark A. Cohen, “The Motives of Judges: Empirical Evidence from Antitrust Sentencing”, 12 *International Review of Law and Economics* 13 (1992); Cohen, “Explaining Judicial Behavior or what’s ‘Unconditional’ about the Sentencing Commission?” 7 *Journal of Law Economics, and Organization* 183 (1991)

⁸ See, Bruce H. Kobayashi & John R. Lott, “Judicial Reputation and the Efficiency of the Common Law”, unpublished, George Mason University School of Law, 1993.

“Chinese characteristics”. Institutional economics has pointed out that the choices of actors are by no means depended only on their own aspirations, but strongly on the established system and other people's behavior and existence. Therefore, in order to understand the preferences of Chinese judges and their behavior patterns, the conclusions from the West are clearly insufficient to allow us “explaining the doubts” (although we should follow their research ideas and methods), we need to enter into the Chinese judicial world and institutional context, to build a Chinese judicial utility function by understanding the actual situation of China, that is, to study what Chinese judges maximize.

This paper is with such an academic attempt and effort. Using the judicial data and information from field research, it tries to display the real situation of Chinese judges in the High, Intermediate and Primary court (except the Supreme Court), to examine what kind of “stick” or “carrot” the real system has brought to Chinese judges, and on this basis to build a Chinese judicial utility function. Moreover, the detailed judicial data, to some extent, also helps us verify the effect of relevant judicial reform measures taken by the Supreme Court, and study the deep-seated problems behind the reform and the direction of further reformation. Of course, the purpose of this paper is not only to describe, analyze or give policy recommendations, as an academic article, its aim is to go into theory behind the phenomenon and problem, in other words, not only to know “what”, but also to try to ask “why”. The “why” questioning helps me understand the sources of humanity and information that make the differences between Chinese and Western judicial management system, and from the historical and traditional perspective,(that is the path dependence), we give a “sympathetic understanding” to numerous types of supervision and complicated judicial performance appraisal system in China.

My basic point is: any organization will face a “trade-off” (that is the substitution and exchange of systems) between “how to select the right people” and “how to incent people” brought by information asymmetry, and the court is no exception⁹. If judicial selection procedure and standard are sufficiently rigorous, corresponding ex-post supervision and judicial management will be much easier (to borrow a metaphor from Judge Posner, premarital search is more

⁹ "How to select the right people" solves the judicial selection issue due to ex-ante information asymmetry; and "how to incent people" solves the moral hazard problem brought by ex-post information asymmetry, specifically, is to establish a set of scientific judicial management system

protracted and rigorous, the more trust and less supervision it has after marriage¹⁰), while if “selecting the right people” does not work well, it will inevitably lead to a lot of strict and harsh judicial supervision and management systems. However, the judiciary is more transactional than specific, and the difficulty of being supervised makes the “striking out” of judicial supervision and management system of little use, just like punching on a mass of cotton.¹¹ Thus, unlike the judges in the United States, Germany and other western countries who value the right of judicial decisions and enjoy the “judicial game”, under many existing constraints of formal, semi-formal and informal administrative management systems, the Chinese judges, who are mostly under 40 and dissatisfied with their current income, pay more attention to income (including various of “gray income”, even illegal income) and promotion in the hierarchical structure of the court. The lack of corresponding restrictions will inevitably lead to a widespread of judicial corruption. We need a new understanding of judicial system and institutional reconstruction to some extent.

This paper includes six parts. The first part is a simple literature review and presentation of questions; the second part is the statistic of empirical data and its instruction; the third part is a preliminary analysis of the data, by the roughly display of actual situation and outlook of judges in the courts of three levels, on the one hand, it verifies the effect of judicial reform measures taken by the Chinese Supreme Court; on the other hand, it points out a potential problem behind the reform; the fourth part builds a Chinese judge's expected utility function based on field data and existing institutional constraints, with it as the basis, this paper recollects and questions the dogmatic views of emphasizing “judicial independence” or “the independence of judges” regardless of time and occasion; the fifth part is a further analysis in a broad comparative perspective focusing on the "trade-off" between judicial selection and management (that is, between "selecting the right people" and "incenting people"), and by adding the important variable "working specificity", it refines and summarizes a general proposition that "for organization management, the level of working specificity is inversely proportional to the importance of ‘selecting the right people’, and is proportional to the importance of ex-post ‘incenting people’,” it

¹⁰ See, 理查德·A·波斯纳: “法官最大化些什么?”, 《超越法律》, 苏力译, 中国政法大学出版社 2001 年版, 第 134 页。

¹¹ In his new book *State building - the 21st century, national governance and world order*, Francis • Fukuyama, in accordance with specificity and transaction, divides the public sector performance evaluation into four quadrants, and the judiciary unfortunately is most difficult being supervised and evaluated located in the fourth quadrant, see, 弗朗西斯·福山: 《国家构建——21 世纪的国家治理与世界秩序》, 黄盛强、许铭原译, 中国社会科学出版社 2007 年版, especially, 第 56—59 页。

further discusses the tradition and history of Chinese judicial management system and the possible existence of "path dependence" from Chinese Communist Party's "concept of judiciary"; The last part is a brief conclusion. Starting from the theory extracted from this paper, it suspects the results of judicial personnel classification management reform in recent years. Since there is only a change in form but not in content, the reform may not turn out as they wish at all.

II Data and Relevant Instructions

To understand the basic situation of Chinese judges, first, we need to define what the judge is. This is actually not a problem, but in the context of China, it has become one because of the unique administrative transfer system in Chinese courts. Under this system, the trial (usually the judges), integrated management and executive staffs are in an existing or potential "mixed" relationship.¹² If the judge is defined as all the judicial personnel involve in trial, although in line with China's situation, it does not coincide with the general definition of judge, and is also difficult to operate; if it only means the existing trial staff, there may be a lot of judges who come from non-trial department, and may flow outward in the future. How to define the judge in China meets a "dilemma". For ease of operation, I choose the latter, that is, to define the judge as existing trial staff.¹³ Despite of its shortcomings, there is no other better choice.

As in another paper of mine,¹⁴ the empirical data in this also comes from the survey of judges of a research project in the summer of 2004. The sample courts include a High Court (S High), three Intermediate Courts (including G Intermediate Court located in southern China, C and L located in the southwest) and five Primary Courts (W and Q Primary Court under the jurisdiction of C, collectively referred to C primary; L, J, N under the jurisdiction of L, collectively known as L primary). In the 587 valid questionnaires, excluding the staffs in register, integrated management and executive department, 434 copies of questionnaires meet the above definition of judge, and among them, 131 copies are from S High, 123 from G Intermediate, 65 from C Intermediate, 11 from L Intermediate, 74 from C Primary, 30 from L Primary. the

¹² Empirical studies have pointed out and verified it. See, 艾佳慧: "司法知识与法官流动——一个基于实证的研究", 载《法制与社会发展》2006年第4期。

¹³ In fact, there are still difficulties. Many clerks are also involved in trial practices; do they count as a judge? In accordance with a recent change in a separate clerk sequence, the clerk is the clerk, he can not participate in the trial, of course, can not count as a judge. But my sample data is collected in the year of 2004, as far as I know, many clerks of the court at that time were law school graduates (including postgraduates), they had to participate in the trial and write reports and the judgments. The statistics of sample survey also confirms it (most of the judges under the age of 30 are clerks; they are also involved in the case of the first and second instance). So, I have to sample the clerk as a judge.

¹⁴ It means the article: "Judicial knowledge and the flow of judges".

questionnaire concerns with the judge’s age, educational degree, whether he is undergraduate of law, passing rate of judicial examination, route of entry to the courts, years of trial work, current monthly income, the amount of cases monthly concluded, whether he is satisfied with current income and what his expected income is, and the attitude toward the judge’s social status and so on. Here are some preliminary results.

1. Age distribution of judges

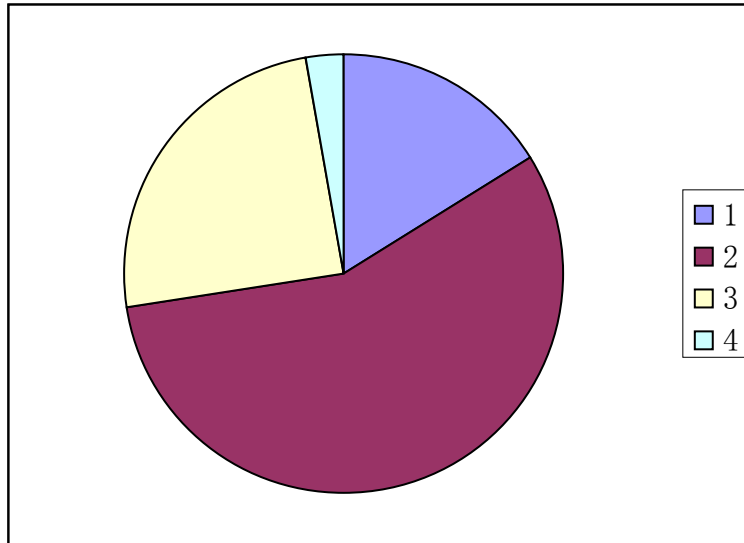
Table 1 List of age distribution of judges

Age Court	Under 30		30—40		40—50		over 50		Total
	(person)	(%)	(Person)	(%)	(Person)	(%)	(Person)	(%)	
S High	12	9.2	62	47.3	48	36.6	9	6.9	131(100%)
G Intermediate	17	13.8	82	66.7	24	19.5			123(100%)
C Intermediate	14	21.5	38	58.5	12	18.5	1	1.5	65(100%)
L Intermediate			7	63.7	3	27.3	1	10	11(100%)
C Primary	23	31.1	38	51.4	12	16.2	1	1.3	74(100%)
L Primary	4	13.3	18	60	8	26.7			30(100%)
Total	70	16.1	245	56.4	107	24.7	12	2.8	434(100%)

Source: questionnaires feeding back from the judges. If unspecified, all data in this article is from them.

It can be seen, the age distribution of judges in the courts of all levels is almost the same, the age group between 30 - 40 years old has the largest number of judges, representing half the total number of judges, in additional with the judges under 30, the judges under the age of 40 almost can be achieved 70% of the total number, but very few judges are over the age of 50. Here is a pie chart of the entire sample courts’ total age distribution percentage of judges.

Figure 1 Pie chart of age distribution percentage of judges



Note: 1 in the figure represents the judges under 30 accounting for the percentage of total number of judges , 2 is percentage of judges between 30 - 40, 3 is the percentage of judges between 40 - 50 and 4 represents the percentage of judges above 50.

2. Education degree of judges

Table 2 List of the judges' educational degree

X F	Junior college						College						Master	Doctor	Total
	P	H	Z	D	Y	Q	P	H	Z	D	Y	Q			
S	5	5				2	43	23	22	1	7	3	18	2	131
G	2			1		2	42		24	4	1	13	34		123
C1	2	3				1	24	23	1	1	1	5	4		65
L1							1	4	3		2		1		11
C2	9	1		1		3	32	9	5	3	4	3	4		74
L2	1					2	4	8	4	1	8	2			30
T	19	9		2		10	146	67	59	10	23	26	61	2	434

(Units: person)

Note: X represents the educational degree, F is the court, the line S, G, C1, L1, C2 and L2 represent the S High Court, G Intermediate Court, C Intermediate Court, L Intermediate Court, C Primary Court and the L Primary Court; the row 3 to 7, P, H, Z, D, Y and Q , respectively, refers to common universities, correspondence courses, self-study examination, TV universities, distance education and other means of access to get a junior college degree, and the row 9 to 13, P , H, Z, D,

Y and Q refers to common universities, correspondence courses, self-study examination, TV universities, distance education and other means of access to get a college degree, the "other means" both include the spare-time university founded by the court, and the legal education set up by the Party School; master and doctor respectively includes the incumbent and non-incumbent.

Based on the table, we find that no matter in high court, intermediate court, or primary court, the educational degree of judges are very heterogeneous, the sources vary from junior college, college education, and Master of Law from formal law schools, and even Doctor of Law. If four years study or more in formal law school can effectively act as a condition and prerequisite for the judgeship (seen from the conditions of foreign judicial selection, this is only the beginning of a very low standard¹⁵⁾, we will find half of the judges from the sample courts are not qualified. In order to highlight this situation more clearly, I will add up the number of judges with college, master, and doctor's degree, minus non-law undergraduate judges, then get a total number of judges who received formal undergraduate legal education or above, and the rest are the judges in junior college, college degree through other ways. Here is the simplified form.

Table 3 Simplified table of the educational degree of judges

Education Court	Formal legal education	Percentage in the court	Other means	Percentage in the court	Total
S High	54 persons	41. 2%	77 persons	58. 8%	131 (100%)
G Intermediate	64 persons	52%	59 persons	48%	123 (100%)
C Intermediate	23 persons	35. 4%	42 persons	64. 6%	65 (100%)
L Intermediate	2 persons	18. 2%	9 persons	81. 8%	11 (100%)
C Primary	26 persons	35. 1%	48 persons	64. 9%	74 (100%)
L Primary	3 persons	10%	27 persons	90%	30 (100%)
Total	172 persons	39. 6%	262 persons	60. 4%	434 (100%)

As can be seen from the table, the percentage of Chinese judges received formal legal education is low, less than four percent overall, and the percentages of different courts in the

¹⁵The judicial candidates in Germany must come from the college students with 4-5 years study of legal education, after passing the State Judicial Examination for the first time, they have to take a two-year practical professional training, and then only through a rigorous re-examination of the state, they can apply the qualification of judge, the judicial selections in Britain and the United States are more strict often only those experienced people can be the judges, law school educational degree is just the most basic condition. A detailed introduction of foreign judicial selection system, see, 关毅: “法官遴选制度比较”(上、中、下), 载于《法律适用》2002年第4、第5、第6期。

sample are close, while regional differences lead the distinction more obvious, this fact shows that, compared with the less developed regions (such as L city in the southwest), the developed regions such as the G city in the center of the Pearl River Delta region, its ability to attract law students is much stronger.

3. The passing rate of judicial examination

Table 4 List of judicial examination passing rate

Judicial Exam Court	Persons passing the exam	Percentage of judges in the court	Persons not passing the exam	Percentage of judges in the court	Total
S High	21	16%	110	84%	131
G Intermediate	24	19.5%	99	80.5%	123
C Intermediate	12	18.5%	53	81.5%	65
L Intermediate	1	9%	10	91%	11
C Primary	6	8%	68	92%	74
L Primary	1	3.4%	29	96.6%	30
Total	55	12.7%	369	87.3%	434

As can be seen from the table, the judicial examination passing rates of all sample courts are very low; the rate of G court, which is the highest, does not exceed 20%. But there is a difference that the rate in a higher-court is significantly higher than lower-court, and the passing rate in developed areas is higher than in the less developed areas.

4. Route of entry to the court

Table 5 List of route of entry

Route Court	Graduation Person %	Demobilize Person %	Cadres Person %	recruitment Person %	Transfer Person %	Other Person %	Total
S High	36 27.5	18 13.7	41 31.3	9 6.9	21 16	6 4.6	131 (100)
G Inter	90 73.2	5 4.1	18 14.6	4 3.2	5 4.1	1 0.8	123

							(100)
C Inter	21 32.3	10 15.4	24 36.9	6 9.2	3 4.6	1 1.5	65 (100)
L Inter	3 27.3	1 9.1	5 45.4		2 18.2		11 (100)
C Prim	22 29.7	5 6.8	20 27	22 29.7	5 6.8		74 (100)
L Prim	5 16.7	3 10	12 40		8 26.6	2 6.7	30 (100)
Total	177 40.8	42 9.7	120 27.6	41 9.5	44 10.1	10 2.3	434 (100)

Data in the table shows that Chinese judge's routes of entry to the court are heterogeneous, they enter into the court not only through graduation assignments (I also found in the survey that there are many graduation assignments even from secondary school, and even from high school such as some judges in G and S Court. The reason why the list did not show an high school degree is that they all got a college degree of law through a variety of means), but also large numbers through the demobilization from military, cadre recruitment, common recruitment, transfer or other means. G Intermediate Court's graduation assignment rate is relatively high, while L Primary Court is low, as for others, either in the High Court, Intermediate Court or the Primary Court, the graduation assignment rate is mostly around 30%, and the rate of cadre recruitment open to the public in many courts actually is in the first place.

5. Judge's current monthly income

Table 6 List of judge's monthly income

Income Court	Below 2000 Yuan (person)	2000—3000 Yuan (person)	3000—4000 Yuan (person)	4000—5000 Yuan (person)	5000—6000 Yuan (person)	Total
S High	69	61	1			131
G Inter	1	3	63	48	8	123
C Inter	40	25				65
L Inter	11					11
C Primary	44	25	4	1		74
L Primary	29	1				30

As can be seen from the table, there is a huge distinction of income in different regions, but

judges of different ranks in the same region are paid almost the same.

Table 7 List of the judge's expected monthly income

Expected Court	2000	3000	3000—5000	5000—8000	8000—10000	Above 10000	Total
	(person)	(person)	(person)	(person)	(person)	(person)	
S High		11	35	75			121
G Inter				25	47	28	100
C Inter		8	12	38			56
L Inter		4	2	5			11
C Prim	9	12	16	20	4		61
L Prim	14		7	7			28

Through the table, on the one hand, we can see the distinctions of expected income in different regions (this is more because of the current different monthly income), on the other hand, although current income of the judges of different ranks are almost the same, but their expectations are significant different. Specifically, the current monthly income of judges in S High Court, C Intermediate Court and C Primary Court is around 2,000 Yuan, but there are 9 people in C Primary Court expecting an income of only 2,000 Yuan (or even less, two judges' expected income are actually only 1,600 Yuan, but not reflected in the table), no judge in C and S Court expects monthly income of 2,000 Yuan, and the percentage of judges' expected monthly income over 5,000 Yuan in this two courts is much higher than in the C Primary Court.

Table 8 List of the number of judges dissatisfied with the current monthly income

Number Court	Satisfied	Percentage in	dissatisfied	Percentage in	Total
	(person)	the court (%)	(person)	the court (%)	
S High	10	7.6	121	92.4	131 (100%)
G Intermediate	23	18.7	100	81.3	123 (100%)
C Intermediate	9	13.8	56	86.2	65 (100%)
L Intermediate	0		11	100	11 (100%)

C Primary	13	17.6	61	82.4	74 (100%)
L Primary	2	6.7	28	93.3	30 (100%)
Total	57	13.1	377	86.9	434 (100%)

As can be seen from the table, the dissatisfaction rate is the lowest in G Intermediate Court, where has an relatively high current monthly income (but even so, there are still more than 80 percent of judges dissatisfied with the current income), and L Intermediate Court and L Primary Court, whose current income are the lowest, have the highest dissatisfaction rate. In addition, although the current monthly income distribution of C Primary and C Intermediate are almost the same, but the S High Court judges' dissatisfaction rate is also reflectively high, it is likely that the judges of Higher-Court consider that their income should be better than the judges of lower-court. In any case, it may be true that the Chinese judges generally are dissatisfied with their current income, seen from data of sample courts; the summing result is nearly 90 percent of judges are dissatisfied with current income.

6. Amount of cases monthly concluded

Table 9 List of the amount of cases concluded per month

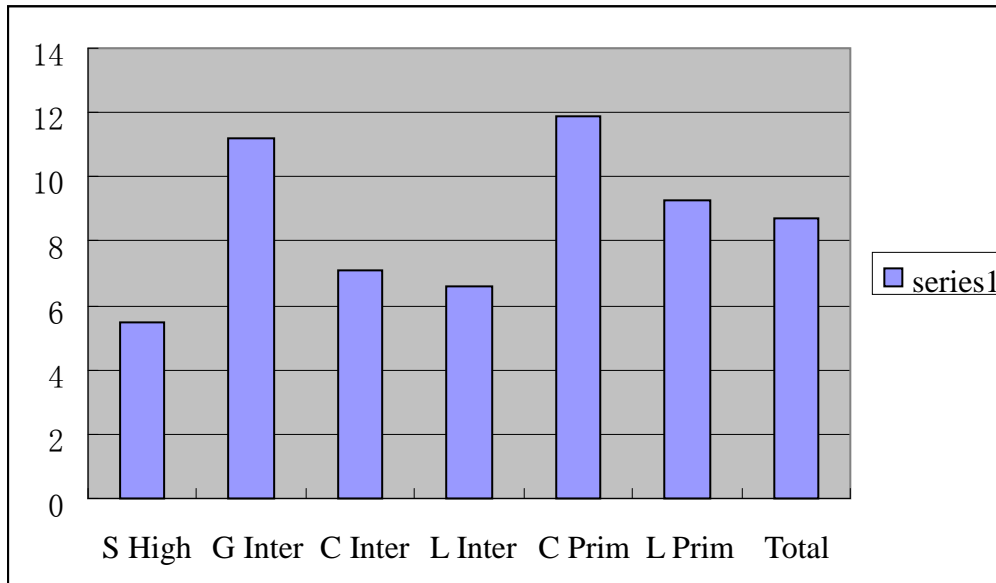
Court Amount	S High	G Intermediate	C Intermediate	L Intermediate	C Primary	L Primary	Total
First instance	216	412	183	23	883	280	1997
Second instance	501	965	281	50			1797
Total	717	1377	464	73	883	280	3797
Average	5.5	11.2	7.1	6.6	11.9	9.3	8.7

Note: as for the amount of cases concluded per month, the questionnaire is designed so: First instance cases monthly concluded: less than 5 (), 5- 10 (), 10 – 20 (), 20 -30 (), more than 30 (); second instance cases monthly concluded: less than 5 (), 5 - 10 (), 10 - 20 (), 20 -30 (), more than 30 (). Judges only need to tick in the corresponding brackets according to their workload. When calculating the total cases, I regard the number below 5 as 3, 5 - 10 as 8, 10 - 20 and 20--30 as 15 and 25 (no more than 30 cases), then multiply the number of judges who conclude the corresponding cases, each with the final total amount of first and second instance cases .

The data of the table shows that, no matter what level or region the court is in, the judge's

workload in fact can not be heavy, if we consider the factors of cases concluded by the collegiate bench, this number should also be cut down. This fact shows that the point of view about the heavy workload of judges is doubtful. Here is a more intuitive histogram of cases monthly concluded.

Figure 2 Histogram of cases the judge monthly concluded



7. Attitudes toward judge's social status

Table 10 List of attitudes toward the current social status of judges

View Court	High (person)	Percentage in the court %	Low (person)	Percentage in the court %	Unknown (person)	Percentage in the court %	Total
S High	21	16	98	74. 8	12	9. 2	131
G Inter	17	13. 8	96	78	10	8. 2	123
C Inter	15	23	45	69. 2	5	7. 7	65
L Inter			7	63. 6	4	36. 4	11
C Prim	20	27	40	54. 1	14	18. 9	74
L Prim	6	20	20	66. 7	4	13. 3	30
Total	79	18. 2	306	70. 5	49	11. 3	434

The table shows that most judges in sample Courts think their current social status is low, nearly 80 percent of judges in G Intermediate Court, as the highest rate, hold this view; and only a

few more than half of the judges in C Primary Court think so, it is perhaps because the judges in these two courts have more young judges. There is evidence showing that, the younger judges, who think their social status is high, share the highest percentage, while the older judges, including the presiding, vice-presiding judges often hold a negative attitude toward the current status of judges.

III Preliminary Analysis of the Data

As there are 210,000 judges in China¹⁶, these data perhaps may be just “one drop in the ocean”. Many people may suspect the representativeness of my data. But first, these sample courts are not chosen in advance, and even the judge’s questionnaire, to a large extent, is a product of chance, so the sample courts are actually selected at random;¹⁷ second, my data includes the courts of three levels except the Supreme Court, more importantly, these data has been initially demonstrated isomorphism of the judges of all ranks throughout China in certain degree, (not only the age structure, educational degree, low judicial examination passing rate, heterogeneous routes of entry to the courts, dissatisfaction of current income, but also including the low rate of cases monthly concluded and the low degree of acceptance of judge’s social status), to some extent, I infer the judges in other districts of China may also share these features; Finally, the "data is always incomplete. Nevertheless, after we gain the knowledge and methods, we must make use of the incomplete data resolutely to make judgments. This is the only resort." ¹⁸Pigou’s words to some extent provide the legitimacy for my following analysis.

According to the previous data and charts, we can find that the current situation of Chinese judges has the following characteristics and problems. First, the age structure of judges are getting younger, judges under the age of 40 have accounted more than 70%, and the percentage of judges over 50 is only 2.8%, there is even no judge over 50 in G Intermediate Court; accordingly, very few judges have 20 years of trial experience, which only accounts to 8.6% of the total number of

¹⁶ This is the data in 2002, with the reform in recent years, the number of judges may decline, but in any case, the huge base of Chinese judges is an indisputable fact. the data of 210 000 judges is from the introduction of Cao Jianming, the Vice-President of the supreme court in 2002, see: “学经历缺一不可，我国全力造就优秀法官队伍”，新华网，2002年9月6日。

¹⁷ Research topic of the court in the summer of 2004 is to collect the 10 years’ basic information of first instance economic disputes verdicts of three intermediate courts (G, C and L) from 1992 to 2001. Until the research team arrived at G city, I had begun to design questionnaire of judge. S High Court and five primary courts’ joining in are the later interim decision.

¹⁸ A•C•庇古:《社会主义和资本主义的比较》，商务印书馆1964年版，第79—80页(A•C•Pigou, “Socialism versus Capitalism”, 1938)

judges. This fully explains that with the phenomenon of professionalization and specialization of judges with academic's call, and then along with the implementation of the Supreme Court's Five Year Reform Outline, the "early retirement" project has shown signs of results, most of the old judges with full judicial experience, under the "movement-style" governance unique in China (it is also the point to understand the uniform of age structure of all courts), have passively or "initiatively" (because there are certain preferential policies) given their seats to those young people who graduated from law school.¹⁹ This is not so bad in a historical perspective, because young people will turn to be experienced judges. But the removal of experienced old judges indiscriminately in all courts in such a large scale may also have some problems, not only because the work of judge has a "late peakedness and continuous" nature, the judge's experience and knowledge show a positive relationship of "solid intelligence" (referring to a person's ability to reason based on the existing knowledge) with ages,²⁰ but also because the primary court is different from appellate-court who values legal trial, it has more mediations and often concerns about the facts, handling these work to experienced old judges may be more efficient. However, we find that there is only one over 50 among the 104 primary court judges in the sample data, this may be a problem.

Another unforgettable feature in the data is that all the sample judges, without exception, have a college degree or even higher, and most are undergraduate and graduate students, junior college degree only takes 4% of the total number. On the one hand, compared with the situation 20 years ago, even 10 years ago,²¹ it is definitely a huge step forward, it is sufficient to show the professional quality of Chinese judges is on fundamental change in some scholars' eyes. On the other hand, as I have already pointed out, the sources of these qualifications is actually very

¹⁹ Li sheng thinks the reason why old judges are very few in sample data is not just the implementation of the "early retirement" project, as the number of judges was not so huge judges 20 years ago, so the lack of old judges nowadays is reasonable. I admit this exception makes a certain sense, but it can not fully explain the fact that the percentage of judges over 50 years old in sample courts is only 2.8% of the total number.

²⁰ Therefore, few judges throughout the United States federal courts are under 40 years old; it goes in stark contrast to the situation in China. As for the "Dynamic intelligence" and "solid intelligence", the relationship between aging and judges, see 理查德·A·波斯纳:《衰老与老齡》,周云译,中国政法大学出版社2001年版, especially Chapter four, "一个假定有变化的老齡经济学模型" and Chapter eight, "案件审理与老齡".

²¹ In May 1983, when Jiang Hua was the president of the Supreme People's Court, after his visit to Sichuan, Yunnan he pointed out to the central in his report, Sichuan Province is the cultural center of southwest, among the judicial cadres in this province, only 498 people graduated from law school, accounting for 4.6%, while primary school education background accounted for 15%, in which is still a considerable number of illiterate and semi-literate. In Yunnan, the percentage of ethnic judicial cadres with primary school education accounted for 37%, with a higher percentage of illiterate and semi-literate." See, 江华:“关于人民法院在人、财、物方面的严重困难情况的报告”,《江华司法文集》,人民法院出版社1989年版,第307页。

heterogeneous, besides formal law school, more are from numerous Correspondence courses, TV University, Self-study examination, Part-time University, Night school, Party school, or Distance education set up by Law School for extra earnings nearly around the years.²² To some extent, the substantial increase of judge's educational degree is in fact the inevitable result of "Educational degree Project" with Chinese movement-style governance. But do judges' professional skills really improve like the "rocket" as their education degree rising? The answer is probably no. The point is that a lot of educational degrees are of no value, and with the main features of judgment, the judicial work needs a practical reason, without long-time judicial experience and corresponding accumulation of judicial knowledge, the professional skill might not improve, even if educational degree is increased, not to mention the degree is not equal to professional skill. So, in my opinion, the overall increase of judge's educational degree only means the increase of judge's professional skill on the surface, it can not be taken seriously. What we should really concern about is how to attract outstanding law school students to the courts, and to provide them with the system and environment to gain sufficient judicial knowledge and experience.

These two distinctive features verify the practical effect of the reform measures about construction of judicial groups by Supreme Court's Five Year Reform Program. In January 2006, Xiao Yang, president of the Supreme Court, pointed out at the National Conference of High Court presidents, "With the development of judicial work, the judicial group is also improving. The group's age, knowledge, professional structure has undergone profound changes, more than 115,036 judges are in or above college degree, including 6216 with a master or doctor's degree, respectively increased by 37.6% and 2.5 % than before, accounting for the proportion of total number of judges; initially formed a group of professional judges adapting to trial needs with firm political belief, skilled profession and honest character."²³ However, as is mentioned above, this

²² In 1985, the Supreme People's Court founded a part-time university for judicial cadres, providing them large-scale formal in-service trainings. Until 2000, 170,000 students with junior college degree and judicial profession certificate and 50,000 law undergraduates have graduated from this university. In 1989, the Supreme People's Court also made the "seven, eight, nine" personnel training plan during "Eighth Five-Year Plan" period, it means that by 1995, 70 % of the cadres, 80% of the trial staffs, 90% of the president, vice-president of all the courts must at least have a junior college degree; Education and training plan 1996-2000 was enacted in 1995, requiring all the judges to get college or higher degree, most of the high court judges to achieve the undergraduate or higher degree, master, doctoral students sharing a certain percentage to the year 2000. With such preparatory work, the Judges Law, introduced in 2001, upgraded the bottom line of educational degree from junior college to college. In the whole process, it is very obvious that the improvement of judge's educational degree (in fact, just the increase of the judge's professional quality on the surface) is with the characteristics of promoting through various styles of "movement"

²³ 肖杨：“在全国高级法院院长会议上的讲话”，文章来源：中国网，[http:// www.china.org.cn/](http://www.china.org.cn/)

seemingly rapid progress of "brilliant performance" is actually untrue, and also may not solve the real problem of Chinese judiciary.

The third phenomenon is the low judicial examination passing rate in all sample courts. For many jurists, the implementation of unified judicial examination can develop a "legal community" with common legal thinking, as long as related measures are developed, it will be able to effectively change the structure of judges and improve their quality in the future.²⁴ However, although the revised Judges Law clearly regard the passing grade of national unified judicial examination as a necessary condition for judges, the low passing rate actually shows how difficult it is to achieve this goal, the passing rate in G Intermediate Court accounts to two percent, even it owns relatively high level of economic development and the largest number of judges with formal legal education (there are a large number of postgraduate students). Moreover, scholars have been proposed reasonable doubts on the actual role and function of the unified judicial examination,²⁵ due to the statistical period is relatively short (the unified judicial examination had implemented less than three years when questionnaires are granted in 2004), my data can not show long-term effects the system might brought to courts at all levels, but according to the assumption that the judge is also involved in economy, he will seek profit and avoid disadvantages, according to the judicial management "hidden rule" that "the party is the leader of cadres" with "Chinese characteristics", I conclude: 1. under the premise that the judicial income is in great disparity, in big cities and economically developed areas, many people who passed the unified judicial examination would like to enter the court but they could not, in small cities and the Midwest, due to the emergence and increase of external opportunities, many judges who had passed the examination would seek better development (such as leaving the court to be a lawyer); 2. With the existence of income and "hierarchical capital", economically developed regions and higher courts will attract more law school students; compared to the "motley crew" in other courts, these students have stronger ability to pass the judicial examination.²⁶ So I predict the passing rate in

Chinese/law/1089559.htm, 最后访问时间: 2007年2月16日。

²⁴ 王晨光: "统一司法考试与法官素质和法官遴选制度", 《司法改革论评》(张卫平主编), 中国法制出版社 2001 年版。

²⁵ See, 苏力: "法官遴选制度的考察", 《道路通向城市——转型中国的法治》, 法律出版社 2004 年版。

²⁶ But in fact, it may not be so. During the research of the Y Court in Shandong Province, I found three judges who passed the judicial examination are not graduated from Law School, two are junior college students of Harbin Institute of Technology, and one is the junior college student of Laiyang Agricultural College. On the one hand, it verifies Suli's point of view that law school students are often reluctant to go to the primary courts, on the other hand, it proves the non-law majors also could meet the requirements of the Unified Judicial Examination. But this

higher-court will be better than in the lower, and is higher in developed areas than in the less developed. The data in my paper also confirms it.

Fourth, although routes of entry to the courts are different, the change is also evident in recent years, that is, more and more people have come to court through graduation assignments (about 40% of the total number), and the issue "demobilized serviceman into the court", which has been the focus of debate, appears not to be a big problem (only less than one percent of the total number),²⁷ even less than 10% in primary court. Another noteworthy phenomenon is that there are nearly 30 percent of judges entering through the channel of "Cadre Recruitment" open to the public, (in S High Court and C intermediate Court, this percentage actually is in the first place), many of them are law school graduate students, there are also some non-law majors and, of course there are a lot people entering the court through certain relationships or back-door dealings. It can be found that although the sample data contains the courts of three levels, the route of entry to the courts and its percentage are largely similar, except the percentage of graduation assignment in G Intermediate Court is higher compared with other courts. It verifies the isomorphism of Chinese courts from one side. Specialty of G Court is that the level of economic development of G city is obvious superior comparing with other areas that sample courts are in, in the situation that the other conditions remain unchanged, its ability to attract law school graduates is much stronger.²⁸

Fifth, although the income of all courts varies widely, but surprisingly, no matter the judges' current income is high or low, they are generally dissatisfied with it, and the dissatisfaction rate is nearly 90%, which is a surprising but reasonable result. It is surprising because such a court like G has an average monthly income of four to five thousand, there are still eighty percent of judges who are dissatisfied with the current income, it is reasonable because, according to Duesenberry's well-known "relative income hypothesis" in welfare economics, a person's own attitude towards the level of benefits does not depend on the absolute income, but on the relative income compared with others, in particular, on the comparison of income with the people who have close

data is not statistically significant. see, 苏力：“基层法院法官的专业化问题”，《送法下乡——中国基层司法制度研究》，中国政法大学出版社 2000 年版，especially, 第 338——347 页。

²⁷ He Weifang's essay "demobilized serviceman into the court" has caused a great uproar; a lot of controversies are around this issue. See, 贺卫方：“复转军人进法院”，《南方周末》1998 年 1 月 2 日；曹瑞林：“复转军人缘何不能进法院”，《中国国防报》1998 年 2 月 10 日；苏力：“基层法院法官的专业化问题——现状、成因与出路”，《送法下乡——中国基层司法制度研究》，中国政法大学出版社 2000 年版，

²⁸ In the year we conduct the research, there were more than 10 postgraduate students from Peking University, Zhongshan University, China University of Political Science and Law who voluntarily assigned to the G Intermediate Court. Among them there was a schoolmate of mine.

psychological relationships (known as "relationship group") with himself.²⁹ Therefore, on the one hand, the Chinese judges who received or are receiving a modern legal education are overstating the status of his own occupation in the subconscious, and thus comparing the revenue with their foreign counterparts, their current income will inevitably be dissatisfactory; on the other hand, the judges are dealing with lawyers every day, so the rich lawyers become a comparative object. And different from foreign judges in imagination, this comparison is not only more direct, but more specific. As a member of the same legal community, many judges and lawyers are classmates from the same school and class, and the high-income lawyers undoubtedly make the judges feel the gap. In welfare economics, even the income of judges has a small increase than before, as long as this increase is far less than lawyers' (the "relationship group" mentioned above) income growth rate, the judges will not be satisfied with their current income. Although compared to the civil servants in other government departments, their income is not low and even much higher than the average income of the region's population in some areas.

Compared to judges' high income expectation, their workload is not so much. The data in Table 10 shows that all sample Courts' judges only conclude 8.7 cases per month, the highest is 11.9 in C primary (11.2, followed by G Intermediate), and the lowest is only 5.5 in S high Court. If we consider the majority of cases are concluded in a collegiate system, divide the monthly concluded cases by 3, then this number will be smaller (because the judge in fact regards all the cases he involves in as his cases, otherwise, sample clerks will not fill out their data of cases concluded per month). Further more, as China's rapid social change and economic development, the proportion of civil and commercial cases is larger and larger accounting for the total caseload of the court, and according to existing research, civil and commercial cases accounted for half of the contract disputes, but most of them are relatively simple cases,³⁰ which to some extent, reduces the workload of judges. Therefore, taking into account that the G Intermediate Court is located in the economic center of Pearl River Delta region, many people may think its caseload

²⁹ About Duesenberry's "relative income hypothesis", see 张宇燕: "对国家兴衰问题的重新审视", 《经济发展与制度选择——对制度的经济分析》, 中国人民大学出版社 1992 年版, 第 286—287 页。

³⁰ Such research on economic disputes, see 张维迎、柯容住: "诉讼过程中的逆向选择——以契约纠纷的基层法院判决书为例的经验研究", 载《中国社会科学》2002 年第 2 期; 艾佳慧: "司法判决书中 '双高' 现象并存的一种社会学解释", 载《中外法学》2005 年第 6 期。Research on contract disputes accounting for the ratio of civil and commercial cases, see 冉井富: 《当代中国民事诉讼率变迁研究——一个比较法社会学的视角》, 中国人民大学出版社 2005 年版, 第 152 页。

should be a heavy burden, but the average rate of cases monthly concluded is also only 11,³¹ these empirical data in fact deny the existence of "cases backlog crisis" and the point of view that the judge has a serious burden.³² Although some people think that as China lacks a true sense of Summary Procedure, each case has a complex, lengthy procedure to go through, besides trials and making assignments, the judge also needs to write reports, fill out the scoring record, appraisal record and other internal documents, so the judges do have heavy workload.³³ However, this view is not convincing, not only because very few cases concluded each month in the courts, and because these jobs were within the judge's duty, not surprisingly. If the caseload of Chinese judges is compared to the U.S. Federal Court judges, we can discover the distinction. According to Posner's statistics, in 1995, per capita caseload of federal district court judges and appellate court judges was 470 and 330,³⁴ respectively nearly five times and four times higher than sample judges in this paper, and these cases are all cases with disputes of fact and law (90% of these cases have been resolved through pre-trial preparation procedures), and the judge must write a "judicial opinion" on each case, but more surprising is that Posner concluded that the Federal Court judges generally are not so busy.

Finally, 70 percent of the judges of different ranks think that they are in low social status, but the sample data shows a systematic difference between the young and old judges on the attitude towards their social status. For example, among 424 samples judges, there are 63 Presiding, Vice-Presiding judges (the question whether is the Presiding, Vice-Presiding judge in the questionnaire), only 7 people think that the current status of judges is high, accounting for 11%, and still lower than the total rate of 18%. In the Sample, the presiding judges in S and C all think

³¹ As there are 63 Presiding, Vice Presiding judges in my sample, for those who believe that Presiding judges do not hear cases, these data may be very inaccurate because 63 Presiding judges are put into the denominator artificially reducing the judge's average amount of cases monthly concluded. But I must point out that the Presiding judges do not hear cases is also an assumption without empirical survey, the sample data shows that except some individual Presiding judges in S High Court, all Presiding, Vice Presiding judges in the sample courts are involved in the cases, and their caseload is not lower than the ordinary judges.

³² As a result, the story heard by Suli that a judge concluded 803 cases a year is not very credible in my opinion (and there are dozens of similar judges!), Unless group litigation is split into many cases, this is actually a common way of court's statistics of annual data (I discovered the problem in the investigation in people's Court of Yutai County, Shandong Province, When I discovered that the annual amount of cases was in abnormal change, the director of research office told me that it was because they split group litigation into many cases), nowadays, the political achievements and advances are determined by data, the existence of this approach is reasonable, but researchers should have the alert to identify data. See, 苏力:《联邦法院——挑战与改革》译序,第X页,中国政法大学出版社2002年版。Other researches see, 何兵:“法院的案件危机和对策”,《法制日报》2000年11月26日;何兵:《现代社会的纠纷解决》,法律出版社2003年版;兰荣杰:“迷失的对抗与判定”,中国司法改革网,2005年1月8日, <http://www.chinajudicialreform.com/info/newsdetail.Php?newsid=1348>, 最后访问时间,2007年2月16日。

³³ 兰荣杰:“迷失的对抗与判定”,中国司法改革网,2005年1月8日, <http://www.chinajudicialreform.com/info/newsdetail.Php?newsid=1348>, 最后访问时间,2007年2月16日。

³⁴ This data comes from, 理查德·A·波斯纳:《联邦法院——挑战与改革》,邓海平译,中国政法大学出版社2002年版,第436页。

that the judges are in low social status, and even lower than in the past; and all the 7 Presiding, Vice presiding judges who think the current status of judge is high are young fellows around 30, which is also an indirect verification of this thesis. In addition, I also find that the judges under 30 in sample courts are almost undergraduates or postgraduates of law recruited in recent years, the majority of them were clerks at that time, but they tend to believe that the current status of judges is high. Systematic difference caused by age is very interesting, but why is there such a difference? Subjective beliefs of the social status of judges in fact largely reflect the investigated judges' attitudes toward social reputation of judges, and the construction or damage of reputation is the result of a long-game, and only the people live in it for a long time can feel the change. So, I guess, four years or more law school education likely give these young judges a too idealistic image about judiciary with slightly "rosy", tighter to the point, since one chooses to work in the court, he must be someone who holds a goodwill and enthusiasm of judicial work, this is a voluntary selection. Conversely, for the old judges who have worked for many years, the long time judicial experience not only enable them to feel the long-term changes of judges or the courts' social reputation (i.e., decline of reputation), and their actions are likely to be the reason of judge's decline of reputation (this is a non-malicious speculation, because the rise and fall of a group's reputation are inevitably related to group members' behavior). Applying this logic, I guess, as long as the corresponding current judicial system does not change, and the restrictions on the judges do not change, the judges who once thought their social status was high might change their minds in the future. If so, it is the tragedy of Chinese judicial system and the judges.

IVA Chinese Judicial Utility Function

According to the preliminary analysis, we can find no matter the age (almost no American judge is under the age of 40, while the majority of Chinese judges are under 40, although there are some young judges in other countries, but the judicial selection system is very strict, which is not the same with the situation in China³⁵), or educational degree (Throughout the world, four or five years of formal legal education is the minimum condition to select judges, but the educational degrees of Chinese judges are very heterogeneous);no matter the route of entry to the courts(British and American judges are mostly selected from outstanding lawyers, the German Judges are all the best students from the School of Law, while sixty percent of Chinese judges are from the army, recruitment, transferring and other means), or the income satisfaction degree, attitude towards the judicial profession's social reputation, Chinese and Western judges have circuitous different characteristics. The research is bound to be different with different targets. Therefore, the existing judicial economics researches according to U.S. judges do not apply to Chinese judges. We need to build the judicial economics on the basis of real Chinese judges to explain their behaviors.

³⁵ British judges are all selected from the lawyers, "being a judge is not the beginning of a new career, it is an honor and symbol of the peak of their career", so the average age of judges is certainly higher than the United States. To be the judges in Germany and the Netherlands, law school graduates have to go through a rigorous selection and lengthy training, the comparison of judicial selection systems in the world, see, "法官遴选制度比较"(上、中、下), 分别载于《法律适用》2002年第5、第6和第7期。

Careful readers may want to question, Chinese judges are not all in chaotic, among them, there are judges like Song yushui who handles intellectual property rights in big city, and Jin Guilan who solves a large number of rural disputes; there are not only first trial judges, but also appellate judges, how can you use a faceless "Chinese judge" to replace the individual different from each other actually with flesh and blood? My answer is, first of all, this is an integral research on Chinese judges, not on the individual, it is a methodological definition;³⁶ And in the analysis I have to remove those distinctive excellent judges, to discuss only those ordinary judges who are good at seeking profits and avoiding disadvantages, with Posner 's words, because there is no theory neither on genius nor on saints in economics; Second, the difference of the first trial and appellate judge is indeed very important, but in China, not only because the real first trial and appellate haven't formed, but on the whole, there is no such difference existed in my sample. As has pointed out in previous, a lot of structural differences of judges of different levels and regions in the sample essentially have been eliminated, across China, even among judges of all levels, there is a isomorphism in certain degree (it actually contains a big problem, because the theme and space are limited, it will not be discussed here). Based on this, I actually deliberately ignore the distinction among the courts of different levels. It is the issue about "human".

However, to discuss the Chinese judicial utility function, we need to know the status of Chinese judges in the real world, and also we have to study the formal and informal constraints of Chinese judges, and on this basis to understand the interaction and game between people and institutions. Because the success of the rule of law or legal system largely are depended on the incentives provided to the relevant agents (i.e. the judge, I call him the "legal procedure operator").³⁷

First let's see the formal system. Specifically, the 126th Article of the Constitution and the relevant contents of the Court Organization Law both stipulate a supervising and being supervised

³⁶ As for the relationship between quantitative research based on large amounts of data and qualitative research based on case, I believe that qualitative research is similar to the microscope, with its emphasis on going deep into case or fields, detailed description and study of many details and correlations, it tries to show the richness and complexity of the case, and find the problem and strive to make the theoretical interpretation and generalization; quantitative research, or more precisely the quantify research is more like the "telescope", whose role is to collect large amounts of data and information, standing as far as possible to depict and outline the hill feature and its changes, and then to explain its causes and the corresponding social function, the purpose is to find problems in the real world and explain, refine them. Although different scholars have different preferences, both empirical research methods are not in conflict but complementary. See,王赢、侯猛(整理):“法律现象的实证调查:方法与规范”,《中国社会科学》2007年第2期。

³⁷ 鲁门·伊斯拉姆:“司法改革:路向何方?”,徐菁译,载吴敬链主编:《比较》(第17辑),中信出版社,第136页。

relationship between the Supreme Court and local courts, the higher-court and lower-court; the Judges Law provides plenty of judge's appointment conditions, hierarchy, assessment, reward, discipline, resignation and dismissal system.³⁸ Moreover, the courts have a set of judicial performance evaluation index system in the name of "trial quality evaluation index", including the appeal rate, accuracy rate of the first trial, retrial rate, mediation rate, to assess the judge's quality, efficiency and overall capacity, and linking with the judge's income and directly rewards and punishments. This is a formal system. However, the formal system may not likely to be effectively implemented in practice, we must also examine a variety of informal or semi-formal judicial management system. First, the relationship between China's higher-court and lower-court namely is supervising and being supervised, in fact, is managing and being managed, which largely confirms the views of institutional economists: formal rules without effective implementation in fact can not form the system;³⁹ second, in my article "the judicial knowledge and the flow of judges", the court's internal administrative transferring system is displayed and demonstrated, which is a constraint of reality deeply hiding but having impact on judges;⁴⁰ third, the system that judicial income linking to the executive level is commonly applied in practice but not reflected in any formal rules. Although the Judges Law provides a hierarchy of judges, in practice, "what the judge's rank is" has little correlation with the vital interests of the judge, except for the function of "tagging"; on the contrary, whether you are in the section, department, or even ministerial level is directly linked to your salary and other benefits (such as housing size, whether providing you a car, etc). This is another good example showing that formal system is defeated by informal system.

It must be pointed out that the above description of Chinese judicial management system is not comprehensive and complete, at most could only be described as a rough figure. But this rough figure at least provides us two pieces of information; one is the isomorphism of Chinese judicial management system in the courts of all levels. Whether in the Supreme Court, High Court, Intermediate Court or Primary Court, almost all Chinese judges are faced with the same

³⁸ Concrete contents see, "Judges Law of the People's Republic of China ", "the judge's conditions" in Chapter 4, "the judge's level" in Chapter 7, "assessment" in Chapter 8 , "reward" in Chapter 10, "discipline" in Chapter 11 and "resignation and dismissal" Chapter 13.

³⁹ In the institutional economist Masahiko Aoki's view, the system is a social construct, on behalf of the basic features of the participants' endogenous, self-implemented action and decision-making rules, while formal rule is just the game's exogenous rules, if with effectively implementation, it will lead to institutional change, but itself is not the system. See, 青木昌彦:《比较制度分析》,周黎安译,上海远东出版社2001年版, especially, 第22页和第187页。

⁴⁰ Concrete contents see, 艾佳慧:“司法知识与法官流动”,载《法制与社会发展》2006年第4期。

administrative transferring,⁴¹ and the same evaluation, rewards and punishment mechanism, which is another Chinese character corresponding and echoing to isomorphism of judges; Second, we can feel the pressures experienced by Chinese judges and the tight and omnipresent judicial management system.⁴² Seen from the perspective of judicial incentives, these dense, complex and even trivial management systems have both a lot of carrots and sticks.⁴³ As for the relatively young, poor educated judges with complex composition and dissatisfaction of the current income in the sample data of this article, it should be the best and most effective areas for economic analysis to use the assumption of "rational man" and cost-benefit analysis to carefully examine the impacts of these carrots and sticks on them, and on this basis, screen some possibilities for the judicial utility function, and thus build a Chinese judicial utility function.

To conduct economic analysis, it first requires three assumptions. Firstly, Chinese judges are rational or economic man "seeking profits and avoiding disadvantages". Many people may not like the concept of "economic man", but this concept is just in statistical sense, which means experience has shown that people are like "so" in most cases, but it does not require people "should be so". Because when people have to decide in a number of choices that may affect their

⁴¹ Administrative transfer of the Chinese Supreme Court Justices, see, 侯猛: “最高人民法院大法官的流动分析”, 载《法律科学》2006年第2期。

⁴² But this may be just a feeling. In the judge's point of view, as long as you believe the judge's initiative and the interaction and game between human and system, we can see that these seemingly strict management systems, in fact, not only reinforce some of the existing system in practice, but also spawn a number of new systems, such as the original Judicial Affair meeting now the joint meeting of presiding judges, the President Approval system as well as referral system for cases in higher court, and judges in deciding cases more dependent on the judicial committee and so on. Although there is no legal requirement, but it has become a system of trial practice of all courts which substantially reduce the trial pressure on the judge. With regard to the court's administrative trial system, see, 苏力: “法院的审判职能与行政管理”, 《送法下乡——中国基层司法制度研究》, 中国政法大学出版社2000年版; cases referral system, see, 万毅: “历史、现状与走向——以最高法院为中心的考察”, 载左卫明编: 《最高法院研究》, 法律出版社2004年版; as for the judge is even more dependent on the judicial committee, according to my interviews of judges the summer of 2004, a lot of judges consider that in the current management system, they want handle their own cases to judicial committee, so that at least they will not have wrong cases. in my paper "judicial knowledge and the flow of judges" I point out that the Court's internal administrative transfer system, managing and being managed system between the higher and the lower courts, the cases referral system and cases approval system are a set integrated institutional arrangement with mutual support and strengthening, although it is not Pareto optimal arrangement.

⁴³ This is the biggest difference from the judge of the United States, especially federal appellate judges. Posner pointed out that the laws of the United State have made a lot of efforts to strip away the incentives of the federal appellate judge, except for a small carrot (it refers that Federal Supreme Court Justices are often appointed from the federal appellate judges), we can say there neither a carrot, nor big stick. See, 理查德·A·波斯纳: “法官最大化些什么?”, 《超越法律》, 苏力译, 中国政法大学出版社2001年版, 第128—129页。

benefits, they are more willing to choose the programs that can bring more benefits to them, rather than the reverse.⁴⁴ “It is human nature to seek profits and avoid disadvantages”, Guan Zhong actually had understood this truth 2000 years ago; secondly, the Chinese judges are risk-neutral or risk-avoidance individuals. In fact, as "where there are people, there is a classification of left, middle and right" (Mao Zedong's words), the judges would have the same modes of risk-preference, risk-neutral and risk-avoidance, but my research shows that a long-term active flow of judges (including voluntarily resigned and being sentenced) already excludes the judges with risk-preference.⁴⁵ Although there are still some potential risk-preferences in probability, but it does not affect my assumption here; thirdly, the Chinese judge's preference is stable, and it meets the requirements of complete, transitive, continuous and alternative axioms of preference.

Then let's consider the carrots and sticks that Chinese judges have to face. In short, the rewards system in Chapter 10 and the punishment system and dismissal system in Chapter 11, Chapter 13 of the Judges Law are actually the carrots and sticks reflected in formal rules. If the judge's work reaches and meets the requirements of Article 30, then there is “Citation for Meritorious Deeds”, “Merit Citation Class III”, “Merit Citation Class II”, “Merit Citation Class I”, and “a title of honor” as attractive "carrots" in front waiting for you; Conversely, if the judge implements any action in Article 32 or there is a situation in article 40, then a warning, demerit, demotion, dismissal, expulsion and dismissal, and such ruthless "big sticks" will play to the judge. However, as ordinary judges rarely achieve these conditions, the "carrots" are beyond reach, the "sticks" can not hit the body, they are not so influential for the ordinary judges. The only useful methods for ordinary judges are the specific internal assessment of reward and punishment system in each court, and all sorts of informal administrative management system. Specifically, due to the direct link with income and appraising, the assessment index of appeal rate, miscarriage rate⁴⁶

⁴⁴ Although economic researches on many occasions have abandoned the assumption of "full rationality" or "Pure rationality", and instead accepted the "bounded rationality", but "bounded rationality" is only more insistent with the rational assumption “seeking profits and avoiding disadvantages” under the premise of understanding the limitations of human. Even the "bounded rationality", “limited willpower” and “limited self-interest” that Law and Economics of Behaviorism have proposed are not revolutionized the traditional rational choice theory. Assumption on the human nature of Law and Economics of Behaviorism, see, 克里斯丁·杰罗斯, 凯斯·R·桑斯坦, 理查德·H·塞勒: “行为法律经济学的进路”, 载凯斯·R·桑斯坦主编: 《行为法律经济学》, 涂永前、成凡、康娜译, 北京大学出版社 2006 年版, 第 17—19 页; Some of the rebuttals on the view of Law and Economics of Behaviorism, see, 理查德·A·波斯纳: “行为主义法律经济学”, 《法律理论的前沿》, 武欣, 凌斌译, 中国政法大学出版社, 2003 年版, 第 260-298 页。

⁴⁵ See, 艾佳慧: note 6 above.

⁴⁶ Or the “accuracy rate of cases of first instance”, the miscarriage rate is the sum of commuting rate, remand rate, and reversal rate of second instance; the accuracy rate of cases of first instance is on the contrary, it is (1-second

and mediation rate can not only bring delicious carrot to the judge, but also allow the judge suffer the stick (the most extreme, If two consecutive years of annual examination incompetent, the judge will face the danger of being forcibly dismissed⁴⁷); in addition to these assessment index, there is such an approach in practice," in some places, the courts of second instance give score to the cases concluded by the courts of first instance, then feed back to the court of first instance through the scorecard. The court of first instance assesses the judges based on their scores."⁴⁸ Under this scores assessment, the bonus and appraising of judges, as the carrot and the stick, undoubtedly will be able to influence the judge's behavior and decision-making; more importantly, because of the existence of the judicial "hierarchy" and judge's administrative level, the promotion inside the court is a strong incentive, a "carrot" each judge is seeking for. In the Chinese context of frequent internal administration transfers, if a judge does not listen or is disliked by the leadership, he would face such a big stick as being transferred to the "edge" or the powerless position.

There are a lot of sticks and carrots that are impossible and unnecessary to be fully pointed out. In these simple outlines, we will try to examine the factors that may contain in the utility function of Chinese judges.

Leadership impression This is a great judicial preference with Chinese characteristics. As the president of the Court is in the central position of judicial management system (the appointment and removal of vice president, members of the judicial committee, the presiding judge, Vice-presiding judge and other judges are brought to National People's Congress of same level by the president, the President is also the director of the Judicial Evaluation Commission, and even has the final right to decide the court's personnel and internal transfer), so we can imagine that any judge or quasi-judge would like to enter or have entered the court in order to have a foothold and improve, he must strive to ensure a good impression in the minds of the leadership, or through a variety of ways to maximize the leader's impression. This is the "trail" one must go through, but not the only way. As the president is likely to have his cronies and "descendants", and with the existence of vice president in charge of all areas, there might be some infightings hidden in the leadership group, the judges can choose a leader as target according to

instance commuting rate-second instance remand rate-second instance reversal rate).

⁴⁷ 1st Paragraph, 40th Article, the Judges Law.

⁴⁸ 王宏、王明华：“法官内部考核机制研究”，载《山东师范大学学报（人文社会科学版）》2006年第51卷第1期，第57页。

their preferences, and then start to maximize the leader's impression by figuring out the his intention and hitting on what he likes. However risk still exists, once the leader is in accident or transferred, the previous maximizing activities are likely to turn into obstacles for future development. Maximization of leadership impression is a very unstable game equilibrium afterwards, but it is the optimal strategy that the judges have to choose in advance.

Avoiding miscarriage or minimizing the cause of it, this is a very important factor of judicial utility function. Although in theory we can say there is no single correct answer in a lot of legal cases, and the commuting and reversal of second-instance court are just the judge's different understanding and interpretation of the law, and even different fine-scale, we can not certainly say that the judge of first instance does miscarriage. However, the Chinese judicial practice has been adhering to the principle and concept of "facts as the basis and law as the criterion", and the judges believe more procedure reduces error, hope to strengthen the management of first instance judge through the results of the second trial. Therefore, in practice, the commuting rate, remand rate and reversal rate of second instance are very important in the evaluation of judges; the miscarriage investigation system, which exists in reality,⁴⁹ helps the judges to keep their own income and appraising qualifications, and to take various measures to minimize their miscarriage rate. In addition to the measures such as reporting to the President, the Presiding judge to put their case to judicial committee, and so shirk their responsibility, transfer the risk, the judge's preference also directly leads to many formal and informal case referral systems in practice. The abuse of this system in the courts of all levels not only makes the miscarriage investigation system a "counterproductive system",⁵⁰ but also in fact cancels the two-tier trial and appeal system.

Reputation As long as there is the possibility of repeated games among people, reputation is a preference that people will seek. The judge is no exception. Here I want to define and distinguish three kinds of judge's reputations. The first is the reputation of judge in his colleagues' eyes (both

⁴⁹ Although some scholars have conducted in-depth critics on the miscarriage investigation system, but in reality this system is still popular, some courts have changed to call it the accuracy rate of first instance cases. In my research, I had interviewed a judge, he complained as long as there are three miscarriages in a year, it is necessary to cancel the court's appraising qualification. Some scholars' critics, see, 王晨光: "‘错案追究制’的误区: 兼谈法律运行的不确定性", 载张卫平主编: 《司法改革论评》, 中国法制出版社 2001 年版; 李建明: "错案追究中的形而上学错误", 载《法学研究》2000 年第 3 期; 陈东超: "现行错案责任追究制的法理思考", 载《法商研究》2000 年第 6 期。

⁵⁰ The "counterproductive system" is the opposite of the suitable system, meaning that the maximizing behavior of individuals is contrary to the effective allocation of social resources, emphasizing the divergence between individual choice and collective consequences. Concrete contents, see, 张宇燕: 《经济发展与制度选择——对制度的经济分析》, 中国人民大学出版社 1992 年版, 第 273—278 页。

including the judges in the same court and other courts, in short, the group of judges). As Robert • Erickson calls the court a "closely mixed" group, the judges see each other everyday, the court would have a lot of social norms to maximize the overall welfare of judges.⁵¹ To obtain a good reputation in the court, and even in the judicial system, the judge must obey these social norms, and demonstrate his abilities in different aspects (such as eloquence, writing good judgments and research articles, etc.) to obtain the recognition and respect from other judges. The second is judge's reputation in lawyers and litigants' eyes. Because there is little possibility of repeated games between judges and litigants, and because "few judges care whether they are popular with the litigants themselves, virtually every decision produces a happy winner and an unhappy loser."⁵² Judges tend to be more concerned about their reputation in the lawyer group. This reputation also needs to be obtained by the efforts of the judge, such as being familiar with legal provisions, enhancing understanding and application of law, and abiding by the code of conduct for judges, etc.

These two kinds of reputations are largely a function of the judge's level of effort, the implication is that as long as the judge works hard enough, his reputation in the legal community will improve,⁵³ and it is a discussion of reputation from a positive sense. But in fact there are good and bad reputations, facing with China's reality, researchers need to pay attention to the judge's pursuit of reputation of corruption. with the existence of long-term game among judges, and between the judge and lawyer, and as the judiciary is hard to be supervised, the judges are generally dissatisfied with their income, in practice, the judge " can not only convey the biased corruption signal by 'jamming', 'dragging', 'entrusting' and other means"; He can also punish the litigants who do not bribe to obtain the reputation of corruption in the second game, and "automatically obtain the group reputation of corruption due to other judges' reputation of corruption. "⁵⁴ Seeking the reputation of corruption may be a preference of Chinese judges.

The third kind of reputation is the group of judges' reputation in the society. The first two

⁵¹ "Closely mixed " groups and social norms theory, see, 罗伯特•埃里克森:《无需法律的秩序——邻人如何解决纠纷》, 苏力译, 中国政法大学出版社 2003 年版。

⁵² 理查德•A•波斯纳:“法官最大化些什么?”,《超越法律》, 苏力译, 中国政法大学出版社 2001 年版, 第 136 页。

⁵³ Although Posner points out that, "reputation is a function of effort, but, for the judge of ordinary abilities, only of a minimum level of effort. Effort beyond that level will not make an ordinary judge great", but for Chinese judge, this judgment is applicable. 理查德•A•波斯纳: note above, 第 138 页。

⁵⁴ See, 何远琼:“站在天平的两端——司法腐败的博弈”, unpublished.

kinds of reputations are discussed from the perspective of a single judge with the persistence of methodological individualism. But the judges are in a group, there is also a repeated-games relationship between the group of judges and the society (although there is only a one-off game between a single party and judge in many cases), and thus the society has a basic judgment on the behavior of judges. From the perspective of ordinary people, we can feel that the group of Chinese judges have very low evaluation and poor reputation in the whole society, and even the judge himself has such widespread recognition (as evidenced by the data that 80 % of the sample judges think they are in low social status). In this situation, as a judge's good behavior is difficult to change the group's status in society, according to the free-rider theory in collective action,⁵⁵ I deduce that Chinese judges are unable and unwilling to make efforts for the group of judges' social reputation. Social reputation is not a rational judge's preference.

Leisure leisure-seeking is one of the judge's preferences. In fact, the law school graduates choose to be a judge, in a certain extent, are on the implicit consideration of leisure (compared with the busy lawyer, the judgeship is obviously a much easier job). Although there are many voices telling us that Chinese judges have heavy workload, but the sample data in this article has provided the contrary evidence. In their daily work, the judges are willing to take all kinds of ways to reduce their own workload in order to obtain more leisure. Due to moral hazard problems caused by information asymmetry, the judge's "wasting of time" and slack can not be effectively supervised or verified, this is a challenge in large part posed to the development of effective judicial management system. Another example, the Court Organization Law expressly provides the collegiate system, but in reality the undertaking judge system has become very popular, resulting in a fact of "integration without discussion", collegiate system is almost in name only.⁵⁶ Different scholars may have different interpretations on this phenomenon from several different perspectives and positions, but in my opinion, the undertaking judge system brought by practice may be created for the judges to reduce their workload, and to gain more leisure time. Thus, the judge can have a decent performance in annual workload statistics, but his actual workload has

⁵⁵ "Free rider" issue in collective action, see, 曼瑟尔·奥尔森:《集体行动的逻辑》, 陈郁、郭宇峰、李崇新译, 上海三联书店, 上海人民出版社 1995 年版。

⁵⁶ In September 2006, the Beijing First Intermediate People's Court held a symposium about exploring the establishment of law enforcement responsibility system, and the effective implementation of judge's trial responsibility", the Court introduced the next step of the reform is to establish undertaking judge's responsibility system, let the judge who undertake the case take full responsibility, which further overhead the collegiate system.

reduced three times. What a clever creation!

The following are two most important and critical factors in Chinese judicial utility function.

Promotion In the current judicial system of China, judges are rarely selected from a lower court, so the promotion here only means in court itself. As is already pointed out that the Chinese courts have the "hierarchical"⁵⁷ character, as tenure, (in the Chinese context is the official position or executive level) the judge's status, authority and income in the court are closely related, because of the complex administrative management system in Chinese courts, a judge has to spend a mind to consider how to get promoted if he wants to "make a difference" (I also have a detailed analysis on this issue in another paper from the perspective of judge's flow⁵⁸). Besides excellent professional skill (this condition may be unnecessary in some time), the judge also needs to consider what the leadership wants, do what he likes, the judge should not only be obedient, and sometimes he even has to send gifts. The purpose of doing this is nothing more than to win the hearts and minds of the leadership, to obtain possible future promotion through the establishment of a stable link between the supervisor and the supervised. In this sense, the previous analysis of the "leadership impression" is largely a function of "official-position promotion". Chinese people always have the "official standard" tradition and the tendency of power worship; "judge" is translated as "judicial officer", which implies these features.⁵⁹ But there are many "officers" above the judicial officer, with the existence of this fact, there is no wonder the judges, who seek their own interests-maximizing, pursue the promotion of official position with strong and widespread emotions. As a result, "bureaucratic logic" is naturally smooth in the judicial field.

Income For the Chinese judges who are generally dissatisfied with their current income in the sample data, income should be the most important factor in the utility function. But how do they maximize their income? Here I divide the judge's income into two parts; one is the legitimate

⁵⁷ The court of civil law countries have hierarchical characteristics, Dharma Ziska once tried to seek the interpretation of judicial-bureaucratization from the 11 century Roman Catholic Church Unity Movement, because "the term *hierarchia* could not originally be seen in Greek, it was invented by ancient Syrian monks in order to express the perfect structure of the kingdom of heaven, and the ideal organization of the Holy See." See, 米尔伊安·R·达玛什卡:《司法和国家权力的多种面孔——比较视野中的法律程序》, 郑戈译, 中国政法大学出版社 2004 年版, 第 45 页。But the tight hierarchy in the court is probably unique in China.

⁵⁸ Concrete contents see, 艾佳慧:“司法知识与法官流动——一个基于实证的分析”, 载《法制与社会发展》2006 年第 4 期。

⁵⁹ The United States are different. See the description of Tocqueville: "when I have arrived in the U.S, I was surprised to find a galaxy of talents among the ruled, while very few celebrities among the ruler. Now, in the United States, a common phenomenon is that the most remarkable people seldom want to be an officer." 托克维尔:《论美国的民主》(上卷), 董果良译, 商务印书馆 1988 年版, 第 223 页。Although nowadays the situation is different, but the citizen's general desire of being an officer is not strong, which is still a fact.

income, which also includes two parts: a relatively fixed salary and bonuses as well as legitimate moonlighting income; the second is the gray income related to judicial discretion. As the judge's salary, bonuses are largely linked to official level and position, evaluation of reward and punishment system, a reasonable inference is that, in the foreseeable future, in order to obtain a higher income, the judges will fully mobilize all resources and abilities to fight for the promotion and good performance in evaluation. Two latent chain of causations are hidden here, first is that close contact with leadership is to win the trust and favor, good leadership impression may also bring a promotion, and the promotion finally brings an increase of expected income, the former factor is the independent variable, and the latter factor is the dependent variable; Second, close contact with the higher-court judges is to avoid and reduce the incidence of miscarriage, and low miscarriage rate and zero miscarriage rate will bring a good performance in evaluation; and finally a good result of performance appraisal of judges directly leads to the increase and preservation of bonuses. In this analysis, we will see "leadership impression", "avoiding miscarriage" and even "job promotion" that previously analyzed, to a certain extent, are the increasing functions of judicial income.

As for the legitimate moonlighting income, the Judges Law expressly prohibits judges as lawyers or legal representatives, for some judges with strong ability of research and academic, writing books or lecturing in the university after work are the two main paths to get moonlighting income. But it has to take the judge's leisure time; we can infer that there may be a conflict between the income and the judge's preference for leisure in a reverse-function relationship. It also should be noted that not all the judges can have or are expected to have such income, only a small number of specific judges are relevant.

The last is the gray income relevant to judicial discretion. As only a small number of specific judges has a legitimate moonlighting income, and the limited growth rate and the relative fixity of salaries and bonuses, their current income is generally highly dissatisfied (in this sample data, the majority of judges' expectations are twice or more than their current income), Chinese judges certainly need to find other ways to increase income. With the high transactional and low specificity of judicial affairs, judicial discretion is difficult to be supervised, which makes it possible for a judge to take the party and lawyer's invitation to dinner and take bribes as possible options to increase income quickly. Furthermore, according to He Yuanqiong's analysis of judicial

corruption, due to "corruption is not only derived from profit-seeking motives, but more is the result of people's rational strategy under the system where they live, the consideration of their income in the long-term social life, and copying the successful strategy of other people,"⁶⁰ As long as the parties and lawyers adhere to one faith that bribing judges will have the payback, or have a benign expectation on bribery, the party's bribery and judge's accepting bribes is a Nash equilibrium with mutual satisfactory. If the parties' accusations do not constitute a credible threat, this self-enforcement bribery contract will be in the state of self-assurance that "God knows, you know, I know, nobody else knows".⁶¹ Due to the judges' general dissatisfaction of income, judicial oversight and highly stable judicial corruption equilibrium, we can infer that the pursuit of gray income or illegal income is a consequent factor of current Chinese judicial utility function, and to some extent, is in a positive correlation with the judge's reputation of corruption.

Finally, let's talk about "voting". This is the most valued preference for U.S. federal appellate judges, but in China, because the judicial profession ethics and the judge's sense of "judicial game" are not fully established, voting is not in the judge's utility function. Although there will be some discussions and biased opinions in the joint meeting of the presiding judge and the Judicial Committee, but they do not form a substantial vote, and basically could be negligible.

Next, if U is the utility of judge, t_j is the number of hours per day that the judge devotes to judging, and t_i is the time he devotes to leisure, then I_a is the total amount his salaries and bonuses, I_b is his moonlighting income, I_c is his gray income and illegal income, R_a is the judge's professional reputation, R_b is the reputation of corruption, S is job promotion, X represents leisure, L is the leadership impression, B is avoiding miscarriages, we get the following utility function of Chinese judges.

$$U = U (t_j, t_i, I_a, I_b, I_c, R_a, R_b, S, X, L, B)$$

According to above analysis, B and S is the increasing function of I_a , and L is the increasing function of S , t_i and X is the decreasing function of I_b , R_b is the increasing function of I_c , therefore, the above function becomes

$$U = U \{ I_a[B, S(L)], I_b(t_i, X), I_c(R_b), R_a, S, X \}$$

Therefore, if the judges want to maximize their own utility $\text{Max}U$, they must

⁶⁰ This is the institutional interpretation of corruption using the view of new institutional economics and evolutionary economics, relevant literatures see, Ellen M. Immergut, "The Theoretical Core of the New Institutionalism," *Politics and Society*, Vol. 26, No. 1 (1998), pp. 5-34; Ajit Mishra, "Persistence of Corruption: Some Theoretical Perspectives," *World Development* Vol. 34, No. 2, pp. 349-358, 2006. 转引自何远琼: "站在天平的两端——司法腐败的博弈分析", 未刊稿。

⁶¹ In-depth analysis of corruption, see, 何远琼:

$$\text{Max} (I_a[B, S (L)] + I_b (ti, X) + I_c (Rb) + Ra + S + X)$$

Without complex mathematical derivation, the most intuitive impression on the above function is that "income" in the utility function of Chinese judges occupies the most important position; except for the professional reputation in peers and lawyers, the pursuit of other preferences are related with income more or less, although the job promotion and leisure still have their own independent value. This is a Chinese version of utility function that is quite different from the summary of Judge Posner.

In the analysis of Chinese judicial utility function, I have some doubts with the point of view indiscriminately promoted in China such as "judicial independence" and "the independence of judges".⁶² Because, despite the "judicial independence" has long been the most unshakable and sacred principles of judiciary to Chinese people sense western law came eastwards, but no pure principle exists in the world. "Judicial independence" is not an idea and institution from heaven (it is only a social need and requirement of judicial specificity in the process of transformation and development of modern society), and the existence and implementation of "judicial independence" must rely on the satisfaction of a number of socio-economic and institutional conditions. If it is under the Western modern constitutional and judicial system, the perfect judicial life tenure system and developed professional ethics ensure the "judicial independence" we aspire to, especially the independence of judge. But in China, for those ordinary Chinese judges in the ubiquitous administrative management system and desire of income-maximizing, how can you expect them to be independent? And how can we be relaxed if they had the independent judicial power? Moreover, in the current Chinese context, many judges do not actually want the independent judicial power, (not only because of the ability, but also because they can not afford the negative consequences brought by "independent judiciary"). Thus, Posner's insight here is still smart: as for judicial independence, or even the independence of desire for freedom, free from blame and criticism of the legal community, "only when the money is not a major factor, it will be

⁶² In fact, comparing the Supreme Court who speaks highly of "judicial independence" with some scholars, in practice, some judges have reservations on the "independence of judges" in China, although the reason is not comprehensive. A judge in Shanghai Intermediate People's Court believes that we do not have the conditions of independent judicial power in China," the quality of judges are different, while exercising judicial power independently demands theoretical knowledge and cultural literacy, and we still can not achieve this requirement. See, 高其才、王晨光、冯择周：“程序、法官与审判公正——上海等地法官访谈综述”，载《法学》2000年第8期，第9页。However, with a more ruthless eye towards the Supreme Court who aggressively pursue the "judicial independence", they may indeed do not really care about whether the ideal of "judicial independence" in China can be achieved. In the Chinese context, this "sacred" principle may in fact just a powerful tool to find breakthroughs and promote vested interest of the courts headed by the Supreme Court in the established political landscape. This instrumentalization of purpose actually confirms the insights of Foucault: "The rule itself is empty, violent, there is no ending purpose; they are impersonal and can be used to complete any purpose." (see, 福柯：“尼采·谱系学·历史学”，苏力译，李猛校，《社会理论论坛》1998年第4期) The scholars who act as "sidelines" and "speculators" may be just "too simple".

a strong incentive".⁶³ Because "when the moral cost is very low, people's behaviors seem very ethical, but in the case of cost increasing, people will respond to the incentives, therefore, a way to encourage ethical behavior is to reduce the cost of this behavior, in judicial field, is to make the judicial decision do not depend on the incentives."⁶⁴ This is a solution, but will it be possible in China?

As a result, Fukuyama's words about the rule of law are worth considering: "Many people talk about 'the rule of law', they regard it as an either-or situation. In fact, the specificity of the legal system is in medium or low level, but the amount of transactions is huge. The rule of law requires a lot of infrastructures, not only legal construction, but also the construction of courts, judges and lawyers' associations, and national law-enforcement systems. Establishing such a system is the most complex administrative task that the builders of State-Building need to accomplish".⁶⁵

Further Analysis

If this article only proposes a special Chinese judicial utility function starting from the empirical data, and specifically discusses what Chinese judges maximize, then, the above description and analysis have been considered basically completed the task. However, an article with theoretical pursuit should not just end here. We need to make a detailed inquiry about the cause of difference of judicial utility functions between China and America and the judicial selection and management behind it, more generally, the theoretical implication between "selecting the right people" and "incenting people".

Judge Posner extracts and summarizes U.S. federal appellate judges' utility function in his article "What do judges maximize?" His analysis shows that income, reputation, voting and leisure are the preferences of U.S. judges.⁶⁶ Different from the utility function of Chinese judges, as the

⁶³ As a result, although the exercise of judicial power are more stressed that the court in particular, the judges' 'autonomy' is determined by the inherent laws of the judicial work, it is the necessary guarantee of justice", but if it does not meet the prerequisite, the protection of judicial autonomy will not necessarily bring us hope of justice, and even lead to more serious injustice. Relevant discussions, see, "人民法院管理体制改革的几点思考", 载《法学研究》2002年第3期, especially, 第16页。

⁶⁴理查德·A·波斯纳:《法理学问题》,苏力译,中国政法大学出版社2002年版,第245页。

⁶⁵弗朗西斯·福山:《国家构建——21世纪的国家治理与世界秩序》,黄胜强、许铭原译,中国社会科学出版社2007年版,第59页。

⁶⁶ The formal model of this utility function, see,理查德·A·波斯纳: note above, 第157页。This model is very simple, but with Posner's in-depth analysis of voting and leisure in the former text, then it is very inaccurate. Not only the preference of "voting", which the U.S. federal appellate judges care most, is not in the utility function, but also in my opinion, the so-called preferences of "popularity", "Prestige" are just the function of "reputation", they should not be parallel. The existence of this negligence is likely because "what do judges maximize" is just a

income of U.S. judges is fixed, Judge Posner thinks that the income will not have any impact on the unity of trail and leisure, but the judges' moonlighting income may affect the leisure and some judge's judicial efforts. In the comparison of unity functions, the difference is quite clear. Except leisure-seeking has a commonality, the American judges are more likely to maximize the unity of reputation and voting (for those extraordinary judge, reputation is a more overwhelming force), while their Chinese counterparts care more about the maximization of income and official position.

Both are the judges who resolve disputes, achieve the governance of rules, why is there such a big difference in the utility function? The answer is: First, the composition of judges is not the same. In the United States, the judicial selection system is harsh and strict, excellent performance and judicial experience in the legal profession is of course a prerequisite. Those people who are willing to be judges (that is, to meet their "participation constraints"⁶⁷) and meet the requirement of selection through screening procedures apparently prefer to play the game which Posner called "judicial game" (this is, to some extent, the function of American traditional judicial professional ideology)⁶⁸, and more enjoy the unity that "voting" brings to them. Judicial profession means more to them as an honor and responsibility. On the contrary, in China, over the past ten years, there is almost no judicial selection system (the system has been emphasized since the judicial reform, but in practice the effect is unknown), as long as you are human being, then have some relationships, you are able to enter the court. Therefore there are different kinds of people in the court with different abilities (the data of composition and qualifications of judges proves it).⁶⁹ Not only the excellent judicial experience, but also the basic college degree of law can not be the basic condition of selecting Chinese judges. These judges are obviously very difficult to have a sense of Posner's "judicial game"; they could not be expected to value the judge's honor and social reputation.

Second, the judicial management systems are not the same. If it is only because of different

speech, not formal article, so he didn't check it carefully.

⁶⁷ It appeals to him of being a judge, that is, the expected utility of being a judge is greater than its total costs.

⁶⁸ 理查德·A·波斯纳: note above, 第 155—156 页

⁶⁹ So, there are reports about "dancer judge", "three-illiterate judge" ("three-illiterate" refers to illiteracy, legal-literate, and rogue). See, 陈海: " '舞女' 法官和她的同事们", 载《南方周末》2001年11月22日; more reports about the "three-illiterate judge" Yao xiaohong, see, " 绛县法院副院长姚晓红被撤职", 载《光明日报》1999年1月24日; 郭高中: " 重访山西三盲院长姚晓红案: 姚案土壤依然存在", 载《了望东方周刊》2005年9月29日; other reports see, 高一飞: " 法盲、流氓、文盲: 河北三河法院的 '三盲' 特征", 载《法制日报》2005年7月26日。

people, let the U.S judges after strict selection come to China, the utility function should not have much change. But this is not a convincing hypothesis, and also in return explains the importance of system. In the United States, efforts to strip away incentives of federal judges are up to the most, the judge's life tenure, fixed wages, less judicial management are the evidences.⁷⁰ Even if to response the burden of growth of cases, Judge Posner proposed to strengthen the management, but the measure is only to count the performance of judge and make it to the public and pay attention to cited rate of cases, in our view, in fact, it is still less strict. In China, the situation is completely different.⁷¹ As is already pointed out that the variety of formal, semi-formal and informal management systems supervising and managing Chinese judges everywhere as their "shadow", apart from this, there are as well as external supervisions from the Party Committees, People's Congresses, media and the public, as they do not trust the group of Chinese judges. It can be said that for the judicial supervision and management, the systems of China and the United States are almost in two completely opposite extremes.

Therefore, in a broad comparative perspective we find two completely different images of judicial administration. One is the American image (also British, in a lighter degree including the image of Germany, France, the Netherlands and other countries of Europe) with careful judicial selection coupled with relatively loose management and supervision; the other is Chinese image (and the countries lack of judicial tradition of the rule of law), which has low barriers of entry together with very fine, strict and discrepant management and supervision. Regardless of their effectiveness, the two images of judicial management seem coordinated, in other words, these two completely different, while mutually supported judicial selection and management systems are respectively a complementary institutional arrangement, and relatively stable, because "the interdependence of synchronic between systems may come out as a balanced result of each game domain."⁷²

Despite of the internal coordination between the two overall institutional arrangements, their

⁷⁰ As Judge Posner has pointed out, "a federal judge can be lazy, lack judicial temperament, mistreat his staff, berate without reason the lawyer who appear before him, be reprimanded for ethical lapses, verge on or slide into senility, be continually reversed elementary legal mistakes, hold under advisement for years cases that could be decided perfectly in days or weeks, leak confidential information to the press, pursue a nakedly political agenda, and misbehave in other ways (that might get even a tenured civil servant or university professor fired), he will retain his office." See, 理查德·A·波斯纳: note above, 第 128 页

⁷¹理查德·A·波斯纳: "加强管理", 《联邦法院——挑战与改革》, 邓海平译, 中国政法大学出版社 2002 年版, 第 234—251 页。

⁷² (日) 青木昌彦: 《比较制度分析》, 周黎安译, 上海远东出版社 2001 年版, 第 229 页。

social effects are different. As has always been occupied by respected lawyer and jurist with superb knowledge and morality, the U.S. judges, particularly federal judges are in high status in the eyes of American public; people respect them and trust their decisions and judicial opinions, as Tocqueville says "the aristocracy of America is on the bench and at the bar." In a sense, the United States is ruled by the judges, because "in the United States, almost all political issues sooner or later will become a judicial issue", the judicial authority, although is difficult to be supervised, it can be "extended to the whole society, deep into every class, pushing the society forward in the dark, silently impacting, and finally shaping the society according to their wishes."⁷³ How about Chinese judges? Twenty years of reform and opening up policy and the consequent social changes bring great social conflicts and disputes, under this background, the importance of courts and judges also come to the fore. However, on the one hand, the people's demands for judiciary are growing; on the other hand, the absence of strict judicial selection system not only makes the low-quality judges can not cope with this demand, but also causes many judges using statutory judicial discretion "to gain advantage from both sides". The resentment of "judicial unjust" and "judicial corruption" also makes the ruling party further strengthen the management and supervision system which had already been very strict. If the strict, dispersed management system can effectively restrict the low-quality judges with strong preference of income, it is just fine to solve the problem. Unfortunately, the judicial activity is in low specificity and difficult to be supervised, these measures may be deformed in practice, and often do not work.

Where is the problem, and how do we explain the different social effects of the two judicial systems? Fundamentally it is specificity of judicial work and the information issue.

First let's see the information issue. Any organization must face the issue about "how to select the right people" and "how to incent people" due to information asymmetry between the employer and employee, the court, as a "nonprofit organization", is certainly no exception. This is human resource management issue that the court is committed to solve. The first is "how to select the right people", in fact, it is the judicial selection system that we often say. We want to select a judge with good ability and morality, but how to choose the most suitable candidate from many applicants is not an easy task. As there is opportunism before the contract is signed, in the case of information asymmetry, it is not easy to select a person with good ability or morality, not to

⁷³ (法)托克维尔:《论美国的民主》,董果良译,商务印书馆1988年版,第310—311页。

mention with the both. Each person's ability, morality, and motive of entering the Court are different. This information asymmetry makes the applicants may understand their situation but the court may not, sometimes even the applicant himself may not understand what he could do, whether he likes or suits the judgeship. This ex-ante information asymmetry, also known as hidden information, can easily lead to adverse selection of "Bad money driving out good money".⁷⁴

So how do we select the right people, or how can we solve the adverse selection problem brought by ex-ante information asymmetry? In a word, "solving this problem depends on the design of mechanism to enable people's benefits of telling truth outweigh the gains from lie",⁷⁵ and economics studies have shown that it is possible to design this mechanism, in practice, there are also many ways to mitigate and resolve this difficulty.⁷⁶ The first important mechanism is signaling, such as educational qualification or educational degree, which can pass the signal of personal ability, so that an educated person can demonstrate his ability in the labor market. The behavior of sending gifts can also play the function of signaling and enhancing cooperation;⁷⁷ the second mechanism is information-screening, it refers that a party without information(such as the employer or the seller in insurance market), can design a menu to let the other side to choose, and then to screen the other's information through his choice;⁷⁸ the third is reputation mechanism, as long as there is a possibility of repeated game, reputation is an effective mitigation of information asymmetry, an important means to promote cooperation;⁷⁹ the last one is the government

⁷⁴ Initiative studies of "adverse selection", see, Akerlof, G., 1970, "The Market for 'Lemons': Quality Uncertainty, and the Market Mechanism", *Quarterly Journal of Economics*, vol-84, issue 3, pp 488-500; Some of the other classic literatures include, Rothschild, M., and J. Stiglitz, 1976, "Equilibrium in Competitive Insurance Market", *Quarterly Journal of Economics*, 90, pp 629-649; Wilson, C., 1980, "The Nature of Equilibrium in Markets with Adverse Selection", *Bell Journal of Economics* 11, pp 108-130; Wilson, C., 1977, "A Model of Insurance Markets with Incomplete Information", *Journal of Economic Theory* 16, pp 167-207; Spence, A.M., 1973, "Job Market Signaling", *Quarterly Journal of Economics* 87:355-74; Spence A.M., 1974, *Market Signaling*, Harvard University Press.

⁷⁵ 张维迎:《产权、激励与公司治理》,北京大学出版社 2005 年版,第 44 页。

⁷⁶ The following theoretical summary is from Professor Zhang Weiyong's book, see, 张维迎: note above, 第 44—47 页。

⁷⁷ Related important essay, See, Spence, A.M., 1973, "Job Market Signaling", *Quarterly Journal of Economics* 87:355-74; Spence A.M., 1974, *Market Signaling*, Harvard University Press; Eric A Posner, 2000, *Law and Social Norms*, Harvard University Press. Posner's book has a Chinese version, see, 埃里克·A·波斯纳:《法律与社会规范》,沈明译,中国政法大学出版社 2004 年版。

⁷⁸ This is Rothschild's important theoretical contribution, see, Rothschild, M., and J. Stiglitz, 1976, "Equilibrium in Competitive Insurance Market", *Quarterly Journal of Economics*, 90, pp 629-649; Stiglitz, J., and A. Weiss, 1981, "Credit Rationing in Markets with Imperfect Information", *American Economic Review* 71, pp 393-410.

⁷⁹ With the introduction of game theory, foreign academics (economics, sociology, law and political circles) had a lot of researches on the reputation mechanisms and social norms with outstanding results, including some classic literatures, see, Merry, Sally Engle, "Rethinking Gossip and Scandal", In *Towards a General Theory of Social Control*. Vol. 1, *Fundamentals*, edited by Donald Black, pp 271-302, New York: Academic Press, 1984; Schelling, Thomas C., "Promises", *Negotiation Journal* (April 1989), pp 113-118; Bensen, Bruce, "The Spontaneous Evolution of Commercial Law", *Southern Economic Journal* 55 (January 1989), pp 644-661; Ellickson, Robert C.

regulation aiming at those commodities and markets with high degree of information asymmetry, such as the information disclosure system at stock market, as well as the strict supervision in pharmaceutical productions and sales.

Specific to the judicial selection, almost in all countries (may be some post rule-of-law countries who lack a judicial tradition are the exceptions), the candidates are required with the most basic college degree of law, the degree is one strong signal that it spends the cost of the candidate and therefore displays the ability of the selected; due to the existence of legal profession community and judicial services market, the ability and morality of candidates can be reflected in the long-term judicial practice, in other words, their professional reputation can effectively reduce information asymmetry during the process of judicial selection; Finally, the existing judicial compensation system is able to exclude the lawyers who believe the opportunity cost of being a judge is too heavy, fixed judicial wage, in a way, is an effective screening system. Therefore, in addition to government regulation, various institutional designs for the mitigation of ex-ante information asymmetry have embodied in foreign judicial selection system. For example, in the United States, federal judges are selected from lawyers, jurists, or other lawyers with long-term judicial or judicial-related work (of course they have a college degree of Jurisprudence, also known as Doctor of Law (JD), this is an essential prerequisite for judicial work); due to the presence of relatively developed legal services market and legal profession community, the reputation built up by long-term judicial work will be able to play the function of signaling, thereby reduce the information asymmetry between courts and candidates; Moreover, after many years, a person may understand more clearly about his own preferences and ability than his young period, once when choosing to be the judge, it will not be easily shaken, and he/she is not very susceptible to the temptation of money and material interests (because previous judicial practices let them have a good material condition, in Posner 's words, is that the "moral cost" is already low).This way may be easier to solve the problem of information asymmetry faced in judicial selection.

Order Without Law: How Neighborhoods Settle Disputes, Cambridge: Harvard University Press, 1991; Greif, Avner, "Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders", *Journal of Economic History* 49 (December 1989), pp857-882; Macauley, Stewart, "Non-Contractual Relations in Business: A Preliminary Study", *American Sociological Review* 55(1963), pp55-69; Migrom, Paul R., Douglass C. North, and Barry R. Weingast, "The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs", *Economics and Politics* 2 (1990), pp1-23.

In addition to the United States, the judicial selection systems in European countries are also very strict. In Germany, according to the German Judiciary Act, people who expect to engage in judicial work first must learn 4-5 years in college, and then participate in two unified judicial examinations of the state. The candidates who pass the strict preliminary test must take two-year judicial practice training, and then participate in re-examination of the state, including a written examination up to 40 hours (eight written tests, each 5 hours) and 5-hour interview. When passing the second test, he can apply for the qualification of judges, but only 15% of the candidates with outstanding and excellent passing grade may be selected. In addition, in order to know the candidate's morality better, the applicant also must receive a series of interviews before he is appointed as a judge. Finally, even if the candidate has been appointed as a judge by the Ministry of Justice, He only gets the qualification of novitiate judge initially, during the three-year novitiate, as long as there are indications that he is not the suitable candidate for judicial profession, he could be removed from the judgeship with out any notice.⁸⁰ Although Germany is the civil-law countries with the traditional of judicial bureaucratization, it also establishes a strict judicial selection procedure and system in accordance with the basic principle of signaling, Screening and reputation mechanism in order to solve ex-ante information asymmetry effectively.

Therefore, "how to select the right people", in fact, is an issue about how to effectively solve the "morality" and "ability" of the candidates. With this understanding, we look back to China's judicial selection system. Putting aside the judicial selection before the judicial reform (there was almost no selection at that time), in the case that the moral standard and ability of candidates are difficult to be known, the existing Chinese system (accurate to say, it should be the ideal system) is ability-standard, which refers to the selection of candidates from those who pass the judicial examination (actually it is more likely to recruit from law school graduates). But at present, China lacks the tradition of judicial professional ethics,⁸¹ neglecting the investigation of candidate's

⁸⁰ The above German judicial selection system, see, 关毅: "法官遴选制度比较"(上), 载《法律适用》2002年第4期。In addition to Germany, the paper also details the specific judicial selection procedure and system of the United Kingdom, the United States, and Canada, the Netherlands and other countries and the European Judicial Committee.

⁸¹ A perfect tradition of judicial professional ethics, to some extent, is a substitute for formal judicial management system, so these norms and ethics with the judge's "self-implementation", could partially compensate for the neglect of investigation on candidates in the process of judicial selection. Fukuyama also pointed out that many organizations "do not get the best performance through rigorous assessment and accountability systems, and the complex personal incentives, but on norms to seek to from the work with low specificity." "Relying on the combination of institutionalized mechanisms and informal norms is quite important to improve the low specific job's performance." See, 弗朗西斯·福山:《国家构建——21世纪的国家治理与世界秩序》, 黄胜强、许铭原

"morality" is actually very serious consequences, it may not only lead to a cost escalation of judicial ethics, but also, to some extent, indirectly create the judicial corruption problem which is difficult to be solved. To make matters worse, even the judicial examination, such an imperfect judicial selection system, is difficult to be actually implemented and be effective in practice. On the one hand, it is the matter whether fresh law school graduates who have passed the judicial examination are willing to enter the courts (or whether the entering meets their "participation constraints"). Nowadays, all kinds of works are in competition with personnel, the judgeship with small income, high responsibility and risk may not be attractive for the people who have ability and more earning opportunities;⁸² on the other hand, taking this opportunity, a lot of judges in the court who have passed the judicial examination have left the court, forming a "reverse flow" that the judicial examination system designers did not expect. Under the current constraints, how to effectively select the lawyers both with excellent ability and morality is the most difficult but also the most important issue of Chinese judicial selection system.

Then let's see "how to incent people". Once the judge entered the court, how to develop the system and rules to encourage the hard work of him has become another important problem in judicial human resource management. If "How to select the right people" faces ex-ante information asymmetry, and solves the "morality" and "ability" problem caused by adverse selection, then "How to incent people" faces ex-post information asymmetry, the "diligence" and "performance" issue caused by moral hazard are the problems need to be solved.⁸³ Fukuyama points out the core issue in the organizational management theory, "a lot of organization theories are centered on only one issue, that is, the discretion conferred by law. The difficulty of

译, 中国社会科学出版社 2007 年版, 第 44—45 页; professional ethics, see, (法) 爱弥尔·涂尔干:《职业伦理与公民道德》, 渠东、付德根译, 梅非、渠东较, 上海人民出版社 2001 年版, in particular, the Chapter I, Chapter II and III on the discussion of professional ethics. A brief discussion of the judicial professional ethics, see, 张薇薇: “法治背后的人治——职业法律家阶层存在条件探析”, 载《北大法律评论》(第 4 卷第 1 辑), 法律出版社 2001 年版, 第 194—196 页。

⁸² There are more than 180 students in the 2001 Master of Law class of Peking University, where I graduated, and finally only 2 entered into the court, most people have gone to law firms, banks and large corporations, which is an example.

⁸³ Simply, "moral hazard" refers to the opportunism after signing of contract, in the case that the employer's expected employee-behavior is difficult to observe. Economists have a lot of excellent researches on ex-post information asymmetry caused by moral hazard. Some of the classic literatures, including, Alchian, A. , and H. Demsetz, 1972, "Production, Information Costs and Economic Organization", *American Economic Review* 62, pp 777-789; Jensen, M. , and W. Meckling, 1976, "Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure", *Journal of Financial Economics* 3, pp 304-360; Fama, E. , 1980, "Agency Problems and the Theory of the Firm", *Journal of Political Economy* 88, pp 288-307; Holmstrom, B. , 1982b, "Moral Hazard in Team", *Bell Journal of Economics* 13, pp324=340; Shapiro, C. , and J. Stiglitz, 1984, "Equilibrium Unemployment as a Discipline", *American Economic Review* 74, pp 433-444; 张维迎:《企业的企业家——契约理论》, 上海三联书店, 上海人民出版社 1995 年版。

organization theory is that although the efficiency requires granting discretion in decision-making and power, but every authorized action may bring the issue of control and supervision."⁸⁴ On the one hand, the effective functioning of organization must have appropriate authorization, on the other hand, with a lot of opportunistic behavior and moral hazard, the supervision of employees' hard work, as well as the assessment of working performance are very difficult. In this context, the management and supervision system which can effectively reduce or solve the moral hazard issue (or the agency issue) becomes more important.

Which system can effectively solve moral hazard issue caused by ex-post information asymmetry? Economists have given some answers, such as reputation mechanism in the organization, promoting of employees according to their past efforts and degree of trustiness; risk-sharing contract, that is the option system, making the consistency and convergence of the interests of employees and employers; boil-in-oil Contract, that is, if corporate dividend reduces, it will dismiss the agent; efficiency wage, making the agents fear of losing jobs, paying them wages beyond their ability or higher than market price; theory of tournaments, several agents competing for a job, the winner taking the office; supervision, refers that the principal (employer) hire consultants to evaluate the performance of agents, etc.⁸⁵ Specific to judicial management, due to the judgeship, to a large extent, has a feature of state monopoly (lack of competition in the market), the option system, theory of tournaments and boil-in-oil contract could not be applied; and due to the low-specific character of judges, or to say as the difficulty of being supervised brought by judicial discretion, hiring consultants to evaluate the performance is also impossible. Therefore, the effective system to strip away judicial "moral hazard" may only be the reputation mechanism and efficiency wage system in the court.

As a result, when we compare the foreign judicial management systems, one of the most obvious finding is that whether it is in Britain and the United States or Europe, a high judicial wage is the common situation. In addition to the importance of the judicial work itself, underlying its compensation system arrangements, it may also reflect the truth of "efficiency wage" in economics. Another discovery is also universal, that is the court's internal promotion system

⁸⁴ 弗朗西斯·福山：《国家构建——21 世纪的国家治理与世界秩序》，黄胜强、许铭原译，中国社会科学出版社 2007 年版，第 44—45 页。

⁸⁵ These solutions are from Rasmussen's summary, see, 艾里克·拉斯缪森：“道德风险专题”，《博弈与信息——博弈论概论》，姚洋等译，北京大学出版社 2003 年版，第 229 页。

supported by judge's reputation mechanism. Needless to say in Europe, even for American federal judges, there is neither carrot nor big stick, although the probability is small, but a promotion from federal district judge to federal appellate judge, as well as from federal appellate judge to the Supreme Court Justice are still a few "carrots" and incentives hanging in front of them. But overall, due to the strict and effective selection system has selected some judges who have good ability, work habits and ethical standards, ex-post information asymmetry issue is not too serious, so they need less management and constraints (although we can not say it totally unnecessary, reputation is an effective binding mechanism). "Independence of judge" could only be possible under such condition and background.

In China, due to the absence of strict and effective judicial selection system, when the judge entered the court, if there was no supervision and measure on his working efforts and performance, the judge's moral hazard problem would bound to be very serious. Therefore, in practice, the current Chinese judicial management system is a strict, civil-servant-type and hierarchical management, they use administrative management system and trial quality assessment index system, which have been detailed analyzed in this paper, to control the judge and measure their working ability and degree of efforts. This approach, to a certain extent, is able to solve judicial moral hazard problem.

In summary, due to the universality of information issues, if we use the theoretical vision of "adverse selection" and "moral hazard" to compare Chinese and Western judicial management system, we can draw a general conclusion:

Proposition 1.1 Ex-ante judicial selection system is more effective, ex-post judicial management and incentive systems are less, also less important; on the contrary, less effective the ex-ante selection system is, more strict, meanwhile more important the ex-post management and incentive systems are.

In fact, this is the "trade-off" between "how to select the right people" and "how to incent people", also is the substitution of each other between judicial selection and management system, this proposition is the theoretical summary of Chinese and American judicial management images that previously described (it looks coordinate inside, but is completely different). Furthermore, this theory not only applies to organizations and judges, as all organizations must face the constraints of "humanity" and "information" (in a large part, these two constraints are actually the

eternal limitations that human of “limited rations” must face with), to a large extent, the theoretical implication behind it is universal. Therefore, there is the following general proposition.

Proposition 1.1 Ex-ante personnel selection system is more effective, ex-post management and incentive systems are less, also less important; on the contrary, less effective the ex-ante personnel selection system is, more strict, meanwhile more important the ex-post management and incentive systems are.

The proposition implies multiple equilibriums may exist in organizational management, that is, in a specific design of organizational system, to balance and consider between strict ex-ante selection and strict ex-post management in the general principles of cost-minimizing according to their characteristics and information. Meanwhile, it verifies Francis Fukuyama's thesis to some extent, "Whether it is in private or public department, there is not best organizational form. No universal rule in organizational design, which means that public management is certainly not only science, but also has artistic value."⁸⁶

But the problem still exists. the theoretical proposition also needs further expansion and correction, not only because of the different social effects of integrative arrangements between Chinese and American systems that previously pointed out, but also because the nature of work required by different organizations is likely quite different. First look at the characteristics of judicial work, it has already been mentioned several times that the judicial discretion leads to the low-specific feature of judicial work, or the difficulty of being supervised. With the absence of strict and effective judicial selection system, the presence of this feature will inevitably make the ex-post information asymmetry between courts and judges very serious, even ex-post judicial supervision and management system is strict, this problem may still be difficult to be solved. This is China's current predicament. Although we have established a set of detailed and complex system which can solve some problems of moral hazard on the surface,⁸⁷ but because of its ignorance of the particularity of judicial activities and low specificity of the trail, these institutional arrangements not only reinforce the administrative management of court which needs to be weakened, also make the judges shirk responsibility and working risks in many ways to keep

⁸⁶ 弗朗西斯·福山：《国家构建——21 世纪的国家治理与世界秩序》，黄胜强、许铭原译，中国社会科学出版社 2007 年版，第 44 页。

⁸⁷ The moral hazard problem on the surface refers to the case that information asymmetry can be appropriately stripped with strict ex-post management, such as, judge's attendance punch card can stimulate him to work on time, and jurisdiction limits system can spur on judges to conclude cases in time, and so on.

their salaries and bonuses, such as more relying on the existing cases approval and requesting system, and even the judicial committee system. Such strict management can not reduce the moral hazard of judicial work,⁸⁸ in return, it is not conducive to the acquisition and accumulation of judicial knowledge (for the Chinese judges, such judicial knowledge is very important and necessary), finally it is likely to form a "vicious circle", in this circle, various systems are set up to solve the problem of moral hazard, while the systems lead to the strengthening of internal judicial administrative management, this administrative management is not conducive to the accumulation of judicial knowledge, the judges who lack the judicial knowledge will be more dependent on the existing administrative system. As a result, the Chinese court's low barrier of entry, together with strict ex-post management system structure, has its balance and stability, but it is not Pareto optimal. This is also the root of its social effect that quite different from the American system.

With the instance of Chinese judicial system, we find that there is not only a "trade-off" between "how to select the right people" and "How to incent people", and their respective importance is of great relevance to the level of working specificity. In particular, for a work with high specificity or a industry with better supervision, personnel selection system is not very important (or even need not a selection), but ex-post management and supervision are very strict; and for the work with low specificity or difficulty of being effectively supervised, ex-post management and supervision are no so useful or important, while the ex-ante selection must be strict and cautious. Therefore, coupled with the important variable "working specificity", the previous theoretical proposition can have the following expansion and correction:

Proposition 2.1 higher specificity the work has, less important the personnel selection or "selecting the right people" is, while more important the ex-post effective incentive and management are.

Proposition 2.2 lower specificity the work has, more important the personnel selection or "selecting the right people" is, and less important the ex-post effective incentive and management are.

Integrating the above two propositions, there is a very universal and general theory:

⁸⁸ Moral hazard in the trial refers to the case that information asymmetry can not be stripped by ex-post management due to the presence of the judicial discretion, such judicial work is impossible to be supervised and managed, for example, giving heavy sentence or lenient sentence within the statutory range, considering aggravating or mitigating circumstances, accepting an important evidence or not, and so on.

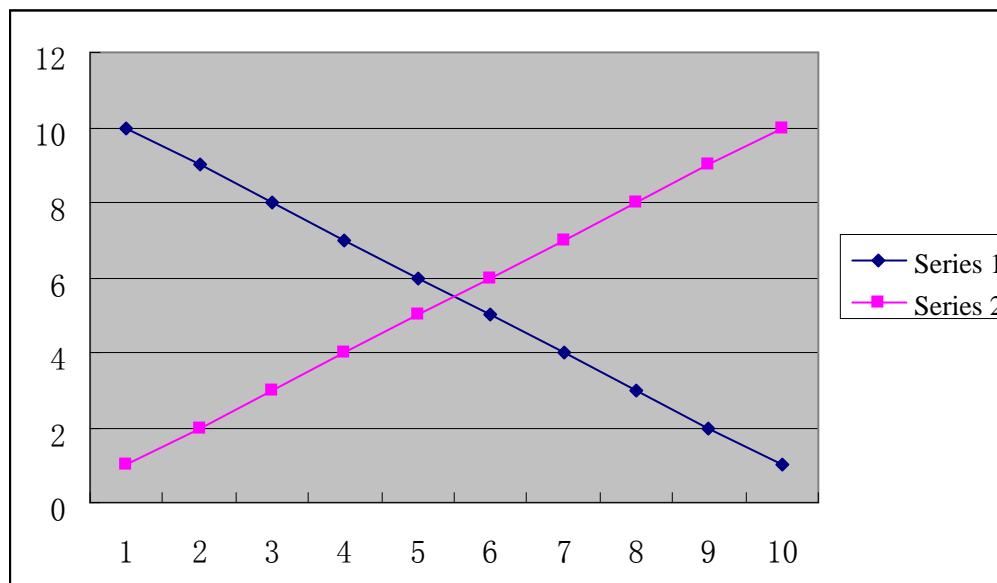
Proposition 2 For organizational management, its level of working specificity is exactly inversely proportional to the importance of personnel selection system or "selecting the right people", and is exactly proportional to the importance of ex-post supervision and management system, or "incenting people".

This theoretical proposition can also be expressed more intuitively in the following form.

Table of the relative importance of organizational management system

	Selecting the right people	Incenting people
High specificity	Important	Less important
Low specificity	Less important	Important

To better display the level of working specificity and the continuous change between the system of "selecting the right people" and "incenting people", the following plot may be helpful. The horizontal axis indicates level of working specific, more to the left, lower specificity the work has, more to the right, higher specificity it has; the longitudinal axis on the left side indicates the importance of personnel selection system, or "selecting the right people", higher up, more important personnel selection system is, lower down, less important it is; the longitudinal axis on the right side indicates the importance of ex-post incentive and management systems, also is higher up, more important, lower down, less important; and series 1 indicates the curve of importance of personnel selection system, series 2 indicates the curve of importance of management and supervision system



Plot of the relative importance of organizational management system

The above figure shows how the importance of "selecting the right people" and "incenting people" are changed with the level of working specificity. For example, for ordinary workers in the manufacturing sector, due to its work on the production line is highly specific, so "selecting the right people" is not so important, as long as they have a good health, a little education (or even without education), there is no need to have any personnel selection procedure or system.⁸⁹ But for the workers entering the plant, the ex-post management and supervision mechanisms are fairly strict, the Taylorism, built on the basis of division of labor, dividing production into small and simple but highly routine tasks (typically is the assembly-line work), is the highest stage of development for such supervision.⁹⁰ The excellent performance of Charlie Chaplin in "Modern Times" is the vivid footnote of this system or Taylorism. With working specificity gradually increases, personnel selection system gradually becomes important, and accordingly, the importance of ex-post management and supervision are weakening. To the midpoint of the horizontal axis (moderate working specificity), the curves of importance of personnel selection system and ex-post management and supervision system exactly intersect, which means that for most of industries whose specificity is not too high or too low, the ex-ante personnel selection, and ex-post management and supervision are equally important, a rational institutional design should be appropriately chose in the principle of cost-minimizing according to ex-ante, post information. Therefore, we find that Proposition 1.2 is a special case of Proposition 2, only when working specificity is in the middle, the ex-ante personnel selection and ex-post management and supervision are almost as important as the same, the "trade-off" between "selecting the right people" and "incenting people" is justified.

Finally, for the personnel management of judges, professional managers, lawyers, and even college teachers, as the work of judicial trail, business management, legal service, teaching and research are in low specificity, according to Proposition 2 and above figure, strict or even critical personnel selection procedures and systems are essential, but ex-post supervision and management system are less important (because such work is generally difficult to be supervised). For such

⁸⁹ So we see a group of peasant workers with little education flock to Shenzhen, Shanghai and other manufacturing-developed regions, and they are often brought to work in the factory by their fellow-villagers.

⁹⁰ Taylorism or Scientific Management Theory, see, Taylor, Frederick Winslow, 1911, *The Principles of Scientific Management*, New York: Harper Brothers.

work valuing the right of personal judgment, relying on personal consciousness, as the problem of ex-post information asymmetry is difficult to be solved (the reasonable existence of judicial discretion and “business judgment rule”⁹¹ are the evidences), “carefully selected personnel coupled with relatively loose ex-post management and supervision” is the support system in line with the laws of science and could be effective in reality. However, even they are all the works with low specificity, due to judicial profession is state-monopoly and lacks competition, ex-post information asymmetry between the courts and judges almost has no other solutions to rely on, so we need strict and long-term ex-ante selection for the candidates. On the contrary, although managers and lawyers’ work are difficult to be supervised, but for lawyers, due to the existence of competitive legal services market, “survival of the fittest” in the market mechanism is able to pass the signal of their professional ability and automatically price them, in a very large extent, it reduces ex-post information asymmetry between law firms and lawyers, lawyers and parties; as for professional managers, the perfect manager market is also able to pass the signal of managers’ ability and price them, in a large part it is an effective constraint on their ex-post decision-making behaviors.⁹²

Therefore, due to the statutory absence of judicial market, because of the universality and large quantity of judicial discretion,⁹³ even in all low-specificity works, judicial profession’s ex-post information asymmetry is most serious and difficult to dispel. But on the other hand, “all of the functions of judiciary have been transferred. The performance of state-will in judicial decision and judgment is, the judge’s inherent subjective sense of justice as a means to get an impartial decision, effective measure of the party’s interests as a guide, and in the light of the

⁹¹ “Business judgment rule” refers to the right of business judgment that professional managers make in ever-changing market according to their experience within their own power. Unless it is proved that the manager has obvious fault, the court generally will not support shareholder’s litigation. Relevant discussions, see, 张维迎: “业务判断规则”, 《产权、激励与公司治理》, 经济科学出版社 2005 年版, 第 193—200 页。

⁹² By the same logic, we can predict, for university teachers who are difficult to be supervised and evaluated, if there is a national and even international university teachers (or professors) market, it is able to quickly and effectively pass the professors’ signal of ability and level of efforts in all fields, and then price them according to it; A professors market with good liquidity could not only solve ex-ante information asymmetry in college’s selection of teachers, but, to a large extent, also form a strong constraint on professors, creating serious ex-post information asymmetry between university and professors.

⁹³ The judge is not only the decider, in many cases, is also the “effective explainer of meaning of law and order in society”. As for the loophole and shortcoming of legislation, in Cardoso’s words, the judge “must provide those ignored factors, correct those uncertainties, and through method of free decision- “looking for it scientifically and freely” - so that to make the mutual harmony of trial, result and justice.” See, 本杰明·卡多佐: 《司法过程的性质》苏力译, 商务印书馆 1998 年版, 第 5—6 页。

controversial transactional views widely popular in the community,”⁹⁴ "Therefore, the court has a great power in its hands, and -- like all the powers -- can easily be abused in the long run, 'except for the judge's Personality', Ehrlich said, 'there is no other things to ensure the realization of justice.’”⁹⁵ This actually proves the necessity of strict judicial selection system from another angle, and effective support judicial management system must be the organic integration of this system, tradition of judicial professional ethics and ex-post reputation mechanism (an ex-post supervision and management system).

According to the theoretical construction and analysis of this paper, and then looking back to today's China, we can not help but find that "low barriers of entry plus very strict and meticulous ex-post management and supervision system" is actually the judicial management system that entirely contrary to the character of judicial profession (it applies only to the management of manufacturing workers with high-specificity, such as peasant workers). With regardless of judicial work's low-specificity and the seriousness of ex-post information asymmetry, this institutional structure can only effectively enhance the structure of internal judicial administrative management system which is already strong, but can not attract excellent lawyers in practice, and even can not be truly effective to the supervision of judicial trial (the other way provides a wide range of institutional tools for optional violations of independent judicial jurisdiction). Further, in such a institutional structure, Chinese judges can only maximize their "official position" and "income" (or "money", "office" and followed by "cars"), the popularity of "bureaucratic logic" is naturally very normal, and the “repeated” and “intensified” judicial corruption no wonder makes civilians lose their confidence in judiciary more and more,⁹⁶ the low reputation and status of judges in society is predictable.

⁹⁴ See, Gremlin, “Sociological Method”, 英译, *Modern Legal Philosophy Series*. 第9卷, 第131页。Cited from, 本杰明·卡多佐:《司法过程的性质》苏力译, 商务印书馆1998年版, 第45页。

⁹⁵ Cited from, 本杰明·卡多佐:《司法过程的性质》苏力译, 商务印书馆1998年版, 第6页。

⁹⁶ It is based on facts to say that civilians lose their confidence in China's judiciary more and more. I have interviewed several villagers in a village in Y County, Shandong Province. As the loss of lawsuit against 520 acres of reed in the first instance, and the lawsuit against the must-win land annual inspection fee in the first instance and second instance, the villagers are very disappointed at the courts now, they said that "there is even no place to reason now," some villagers concluded that "the law is 'power line' for farmers, 'rubber band' for the court, while is 'insulator' for the judge", and they said if there were disputes, they would not go to the court any more. This is the evidence of individual case. The macro evidence is that the caseload of Civil and Commercial cases of the courts throughout the country has decreased year by year since 1999; the implied meaning is everybody is not willing to go to the court if they have any affairs. Relevant data, see, 《中国法律年鉴》。Analysis of this phenomenon, see, 冉井富:《当代中国民事诉讼率变迁研究——一个比较法社会学的视角》, 中国人民大学出版社2005年版; 贺欣:“运作不良的基层法院?”, 载苏力主编:《法律与社会科学》(第1辑), 法律出版社2006年版。

To trace the source on this issue, we need a further questioning. How does such unreasonable, unscientific judicial selection and management system take root in China? The Chinese Communist Party's view of judiciary has to be mentioned. In fact, at the beginning of the amendment of laws in late Qing dynasty, there already had the Organic Law of Court and Judicial Examination Appointment Provisional Constitution, they not only had preliminary division of judicial power and executive power in the court, also clearly defined that the professional judges could only be recruited by examination from new "law school" graduates, 118th and 119th article of the Organic Law of Court also provided that existing lawyer can obtain the qualification of magistrate in Senior Trial Office (that is the qualification of judge), five years of work experience is needed in Senior Trial Office, and ten years of experience is required in the Supreme Court.⁹⁷ These are the approaches that care about judicial selection and moderately reduce the judicial profession's problem of information asymmetry.

But the Communist Party is different. As it was on the road of "Countryside Encircling the cities" (traditional rural areas in China do not need too much "governance of rules"), the law (including the judge) was not so important for the Communist Party at that time. At the "conquering" period, effective social mobilization was its basis to ensure the legitimacy and effectiveness of governance, other system must focus on social mobilization mechanism, judiciary, of course, is no exception. With the "Ma-xiwu-style trial" as a model, "the Communist Party regards judicial trial or mediation as most effective place or pipe for social governance, through judicial mediation, its political intention or ideology are effectively conveyed to the public. In this new power configuration, the operation of judicial technology, or to say law as the matching parts, must comply with operating principle of whole machine; judiciary must obey the communist party's purpose of social governance." "In this context, there is no more fundamental distinction among the nature of court, executive branch and public security, they also do not have necessary division of work, and judicial trial would not have its own independent operating logic and unique requirement of specialization."⁹⁸ This judicial management must make the communist party incognizant of the particularity of judicial work. More importantly, the information issue that

⁹⁷ The above contents are from Huang zhongzhi's introduction, see, 黄宗智:《法典、习俗与司法实践:清代与民国的比较》,上海书店出版社2007年版,第33-34页。

⁹⁸ 强世功:“权力的组织网络与法律的治理化”,《法制与治理——国家转型中的法律》,中国政法大学出版社2003年版,第123页和第129-130页。

brought about by this kind of low-specific judicial work might not be too serious at that time, because the policy was law, especially with the ideological control of Communist Party (in a way, it is also a kind of effective system to reduce information asymmetry, regardless of ex-ante and ex-post), they just needed to find some party members and cadres who take the correct view of politics and were good at "from the masse to the masse", and they would be able to complete the tasks assigned by the party .

Therefore, at the "conquering" period, or even in the early days of "controlling", urgent demands of social mobilization and social control made the Communist Party disregard judiciary and the specialty of judicial work, certainly would not pay more attention to judicial selection system.⁹⁹ Disputes in traditional peasant society were simple, coupled with the Communist Party's tight ideological control of party members and cadres, the problem of information asymmetry in judicial activities was not too serious, policy of the Communist Party was also able to carry out effectively in judicial practice, its driving force of institutional reform and innovation was of course inadequate. But today, since the beginning of reform and opening up, economic development and social transformation brings a huge amount of social disputes, modern industrial society mainly consisting of stranger-contacts needs "governance of rules", rapid social transformation and change, as well as the problems they bring about, force the judicial system began its long and difficult tour of "judicial reform" under the leadership of Chinese Communist Party. But, although "conquering" has become "controlling", "Revolutionary Party" has become "ruling party", because of the stable and complementary characteristics of nested systems, and especially as the "inertia" of system or "path dependence"¹⁰⁰, there is little substantive change in Communist Party's view of Judiciary.¹⁰¹ Therefore, emphasis on judicial administrative

⁹⁹ There is another reason, the old judicial officers were cleared in the 'judicial reform' movement in 1952, new China's judicial system was actually very difficult to find the sufficient support of lawyers; the People's Court was the dictatorship of the organs, its main task was to suppress the resistance of hostile class, and to consolidate the nascent regime; meanwhile, because the highly centralized system formed in the war period of the was difficult to change immediately", so the appointment of party and government cadres with high political consciousness and low educational level (not to mention the judicial level) as the judge was relatively the optimal choice of the Chinese Communist Party, the administrative management of judicial cadres could also be logical. Relevant contents, see, 刘会生: "人民法院管理体制改革的几点思考", 载《法学研究》2002 年第 3 期, 第 16—17 页。

¹⁰⁰ Path Dependence, see, 道格拉斯·C·诺斯: 《制度、制度变迁与经济绩效》, 刘守英译, 上海三联书店 1995 年版。And see, David, P., 1985, "Clio and the Economics of GWERTY", *American Economic Review* 75, pp332-337; David, P., 1994, "Why Are Institutions the 'Carriers of History'?: Path Dependence and Evolution of Conventions, Organizations and Institutions", *Structural Change and Economic Dynamics* 5, pp205-220.

¹⁰¹ The emphasis on people's jury system in recent years is an example, but some academics have already pointed out that the essence of this democratic judicial system conflicts with the professionalization and specialization of

management and ignorance of ex-ante judicial selection are natural, and from this perspective, we can have a "sympathetic understanding" on numerous kinds of supervision and evaluation systems. But the times has changed, "things have already changed", on the one hand, the characteristics of modern society and the emphasis on "governance of rules" let judges have much more judicial discretion than the "base times", accordingly, ex-post information asymmetry or agency issue is much more serious than before; On the other hand, the Communist Party's useful ideological control on judges do not work very well in today's diverse values (especially money worship), although all the judges are party members, and from time to time they are told to follow the "three stresses" and "eight Dos and Don'ts". In such basic changes, we find that although the ruling party always pay attention to the control and supervision of judiciary, placing great emphasis on "judiciary serves people", but if they ignore the fundamental constraints of "humanity" and "information" in institutional design of, ignore the low-specificity of judicial work, the judicial management and supervision can not be truly effective (no matter how prosperous and lively the judicial reform program has made), ultimately, "judiciary serves people" is likely to become "judiciary harms people". This is what the ruling party needs to alert and guard against.

VI Concluding Remarks

Starting from the data of Chinese judges collected from field research, this article summarizes several realistic characteristics of Chinese judges since the judicial reform in 1999, and discusses the preferences of Chinese judges under various existing formal and informal constraints of judicial management systems, and gives a preliminary Chinese judicial utility function. Compared with the utility function of American federal judges that Judge Posner has summed up, this utility function is extremely with Chinese characteristics, or in other words, the difference between Chinese and American judicial utility function is enormous. But why is there such a big difference? With the help of information economics and organization theory, which have a great explanatory power on this issue, and together with the attention on characteristics of judicial work, this paper abstracts a general theory, "the level of working specificity is inversely proportional to the importance of personnel selection system, and is proportional to the importance

judiciary. See, 胡凌: "人民陪审员制度的多面向解释", 载苏力主编:《法律与社会科学》(第2辑), 法律出版社 2007 年版。In addition, detailed analysis and criticism on People's judiciary mass line of Chinese Communist Party, see, 李斯特: "人民司法群众路线的谱系", 载苏力主编:《法律与社会科学》(第1辑), 法律出版社 2006 年版。

of ex-post supervision and management system". According to this theory, the root of difference between Chinese and American judicial utility function is that, the two countries' institutional arrangements in solving ex-ante and ex-post information asymmetry between court and judges are different, with the widespread of judicial discretion which is difficult to be supervised, unlike the Anglo-American systems (to a lighter degree, or even European) who care more about ex-ante selection rather than ex-post supervision, Chinese institutional structure ignores ex-ante selection and stresses on administrative supervision, and will inevitably bring up a group of judges who maximize income and official position. To solve the difficulties that Chinese judicial system can not cope with the needs of society, the ruling party must change its notion and idea.

The idea is seemed to be changing. In 2006, the Central Committee of Communist Party issued "the provisions on further strengthening the work of people's court, people's procuratorate", directly pointing out, "with fair law-enforcement as the core, construction of specialization as the aspect, strengthening the construction of people's court, people's procuratorate, we must constantly improve the judges and prosecutors' political, professional and moral quality", and demanding, "establish the classification management mode on judges, prosecutors and support personnel, set up judges, procurators' separate duty sequences, realize reasonable allocation of judicial resources."¹⁰² This idea of classification management not only has concrete manifestation in the Supreme Court's Second Five-year Reform Outline,¹⁰³ in practice, there also starts a wave of experimental explores of judicial professionalization mainly on the personnel classification management and judicial assistant system.¹⁰⁴ As the saying of "judicial professionalization" Contains the particularity of judicial profession and the consensus of requirement of high-quality professional judges, this emphasis reflects the ruling party's awareness of judicial profession which is characterized in "professional" and "autonomous". On the other hand, for current courts

¹⁰² Cited from, 张志铭、李学尧：“论法院人员分类改革——以法官职业化为指向”，载《法律适用》2007年第1期，第45页。

¹⁰³ 34th and 36th Articles of People's Supreme Court on the Second Five-Year Reform Outline. Specifically, article 34: Promote the personnel classification management of People's Court, formulate management approaches on judge, assistant judge, clerk, executive officer, judicial police, judicial and administrative personnel, judicial and technical personnel and so on, and strengthen construction of judicial professionalization and other personnel's specialization. Set up the judicial duty sequence which meets regular pattern of trial work and character of judicial profession. By summing up the pilot experience, gradually build up the judicial assistant system. Article 36: According to People's Court's level and region of jurisdiction, caseload, security conditions and other factors, investigate and formulate quota program of judges in people's courts of all levels, and gradually implement it. Resource from, 最高人民法院：“最高人民法院关于印发《人民法院第二个五年改革纲要》的通知”，2005年10月26日。

¹⁰⁴ On the experiment of judicial professionalization, see, 任鸣、蒋继业、卢云云：“法院队伍建设的必有之路：法官职业化——全国法院法官职业化建设院长论坛综述”，载《法律适用》2006年第12期，第80—82页。

with large amount of mixed judges, judicial personnel classification management is a good entry point not only can clean the old debts in history, as well as open up a new road for subsequent reforms.¹⁰⁵ It is an institutional concept that “looks so beautiful”.

However, if the institutional framework of administrative management in Chinese courts does not change, the popularity of “bureaucratic logic” in the court does not change, this seemingly reasonable and feasible reform program will not likely to achieve the desired goals of system designer, and may even go the opposite: the selected professional judges may not be very “professional”, and fierce competition for this scarce and high valued judgeship may even strengthen the court's internal administrative management that should be weakened, creating a new level of complex administrative hierarchy in the court.¹⁰⁶ In fact, according to the previous theoretical analysis in this article, as there have been 21 million judges in Chinese courts, selecting a large-scale of excellent lawyers from public to be the judges is not so feasible under this premise and context, and also too wasteful; so selecting the excellent candidates among existing judges through strict selection standards and procedures is a good choice. If the judicial selection outside the court is a kind of “external selection”, then the selection in the court is “internal selection”, to a large extent, it is also an institutional design that can effectively reduce ex-ante information asymmetry between court and the future professional judges. But in reality the problem is “who selects”, “what the selection standard is” and how to set up the “selection process”. If there is an internal mechanism in Chinese courts which can effectively evaluate the judges’ working ability, conduct and reputation, there is a set of open, transparent, scientific selection process, plus “a relatively independent Professional Committee(or directly titled as the Committee of Judges)¹⁰⁷ composed of legal counterparts to screen, assess or evaluate the qualification of professional judges”, This “stock reform”, based on the reality of China, might be able to complete the task of

¹⁰⁵ Some scholars believe that the basic logic of Supreme Court’s Second Five-Year Reform Outline is: judicial professionalization is the origin, forward is personnel classification reform of the court, backward is support security of judicial profession. Therefore, judicial personnel classification reform is the foundation and prerequisite of independence of trial, job security, remuneration and other follow-up reforms. See, 张志铭、李学尧：“论法院人员分类改革——以法官职业化为指向”，载《法律适用》2007年第1期。

¹⁰⁶ Previous reforms have some lessons. A few years ago, many courts had a reform on the selection of presiding judge in the principle of “independence of judges” and “judicial professionalization”, but the selected presiding judge in fact was added with an informal official level besides the judge and President, Vice-President. This once again confirms the insights of Foucault: “The rule itself is empty, violent, there is no ending purpose; they are impersonal and can be used to complete any purpose.” Cited from, 福柯：“尼采·谱系学·历史学”，苏力译，李猛校，《社会理论论坛》1998年第4期。

¹⁰⁷ 张志铭、李学尧：“论法院人员分类改革——以法官职业化为指向”，载《法律适用》2007年第1期。

selecting outstanding professional judges from the internal court.

The problem is that these conditions and ideas are very difficult to practice in reality. As all Chinese courts are in fact under the control of official leadership leading by president, vice president of the court, as is determined that qualification of professional judge is followed by elite judge's high-income and life tenure,¹⁰⁸ how can the leaders easily give such a good opportunity to another person? Therefore, some pilot courts' reform experience directly is, "professional judicial sequences are composed of the president, vice president, the Judicial Committee, Presiding judge, Vice-Presiding judge and the selected judges, the judges are only different in ranks, their jurisdiction is fully equal."¹⁰⁹ As a result, in the current institutional background, "who selects", actually is the leader selects, the selection standard probably is just the leadership's preference (for ordinary judges, to maximize his leadership impression is even more important), Selection process is actually dispensable (or just becomes a post-justification for selection results). We find that as long as the logic of "official standard" in Chinese judicial system does not loose, and the administrative management system does not change, the classification reform (or is called the judge's internal selection system) implemented by Supreme Court is likely to be distorted in practice. It may be impossible to select excellent professional judges (in fact, it does not matter whether he is good or not, anyway, he would be provided with high-quality judicial assistants¹¹⁰), and may also strengthen the existing "bureaucratic logic" in judicial system. I predict that, if such judicial personnel classification management reform is further promoted and expanded, the real excellent lawyers in the court will flow away, and the best law school graduates could not be attracted in the future (in fact, it largely brakes the path of personnel selection outside the court).

At this point, I can feel more about the difficulties and protracted nature of Chinese judicial

¹⁰⁸ "Assuming annual growth of existing wage level is 10% in the next three years, which means that the court's total payroll will grow about 46%. If we distribute the majority of 46% total wage growth to professional judges accounting for 20% -40% of existing staffs of the court, their wage growth will be considerable." 张志铭、李学尧: note above, 第 46 页。

¹⁰⁹ Experience of Luzhou Intermediate Court, Sichuan Providence, see, 任鸣、蒋继业、卢云云: "法院队伍建设的必有之路: 法官职业化——全国法院法官职业化建设院长论坛综述", 载《法律适用》2006 年第 12 期, 第 81 页。And even some knowledgeable scholars also believe that if the judges we are talking about only include the members of Judicial Committee of all levels, which means the President, Vice-President of the court, presiding, Vice-Presiding judges and a small number of senior judges, the quality of judges will immediately improve greatly." See, 刘会生: "人民法院管理体制改革的几点思考", 载《法学研究》2002 年第 3 期, 第 19 页。

¹¹⁰ Criticism on the Supreme Court's implementation of the institutional reform of judicial assistant, see, 苏力: "法官遴选制度的考察", 《道路通向城市——转型中国的法治》, 法律出版社 2004 年版, 第 258—264。

reform. As initial institutional conditions can not be changed, with the system's "inertia", and the powerful forces of vested-interest groups, it is too difficult to find a breakthrough in Chinese judicial institutional structure which pays attention to and emphasis on ex-post administrative supervision and management. Under its omnipresent shadow, we could only wait to see the "deformation" and "withdrawal" of judicial selection system (either external or internal) which is critical important to the court, to see it continuously bring up the group of judges who maximize income and official position, while the judicial authority and judge's reputation would have gradually fallen in the game and reincarnation between "judicial corruption" and "anti-corruption".

However, starting from empirical data, the theoretical discussion of this paper still has its value. Because, although "essence of theories do not lie in their own, and do not directly guide people to useful, practical conclusions", it is important that we can apply them to explain the confusing real life.¹¹¹

Appendix: questionnaire of judge

- 1、Age: under 30 ()
 30—40 ()
 40—50 ()
 over 50 ()
- 2、You are currently in the department of: register ()
 trial ()
 integrated management ()

¹¹¹ This is a summary of Marshal Keynes's point of view, see, J. M. 凯恩斯: “纪念阿尔弗雷德·马歇尔 (1842—1924)”, 载《经济杂志》, 1924。Cite from, (英) 克莱夫·W·J·格兰杰: 《经济学中德经验建模——设定与评价》, 洪福海译, 赵坚毅校, 中国人民大学出版社 2005 年版, 第 43 页。

executive ()

3、 Your last educational degree: below junior college ()

Junior college

Concretely, colleges and universities ()

correspondence ()

Self-study Examination ()

TV university ()

distance education ()

other ()

College

Concretely, colleges and universities ()

correspondence ()

Self-study Examination ()

TV university ()

distance education ()

other ()

Master

Concretely, incumbent ()

Non-incumbent ()

Doctor

Concretely, incumbent ()

Non-incumbent ()

4、 If your last degree is college or above, the major you have learned in college is:

law ()

non-law ()

5、 if you are currently in trial department, and also have a college degree, whether the business you are engaged in concedes with the major you have leant:

Yes ()

No ()

Originally Yes, subsequently No ()

Originally No, subsequently Yes ()

6、 Do you have a transfer experience in your court, if you have, you are transferred from:

Trial to the integrated management ()

Integrated management to trial ()

Higher-court to lower-court ()

Lower court to higher-court ()

In particular, in the trial department, whether you have a transfer experience:

Yes () No ()

7、Have you passed the Unified Judicial Examination? Yes () No ()

8、Route of entry to the court: Graduation assignment ()

Demobilization ()

Cadre recruitment ()

Recruitment ()

Transfer ()

Other ()

9、You have engaged in judicial work for : less than 5 years ()

5—10 ()

10—20 ()

More than 20 ()

10、Present position in the court: Clerk ()

Assistant judge ()

Judge ()

Presiding judge (or vice) ()

President (or vice) ()

11、Are you the member of Judicial Committee: Yes () No ()

12、Current level of monthly income (including all monetary income and other non-monetary income discount)

Less than 2000 Yuan ()

2000—3000 Yuan ()

3000—4000 Yuan ()

4000—5000 Yuan ()

5000—6000 Yuan ()

More than 6000 Yuan ()

13、Cases of first instance monthly concluded: Less than 5 ()

5—10 ()

10—20 ()

20—30 ()

More than 30 ()

Cases of second instance monthly concluded: Less than 5 ()

5—10 ()

10—20 ()

20—30 ()

More than 30 ()

14、 You are() with your currant profession: Very satisfied ()

Satisfied ()

A little satisfied ()

Dissatisfied ()

Indifferent ()

15、 You are()with your currant income: Very satisfied ()

Satisfied ()

A little satisfied ()

Dissatisfied ()

Indifferent ()

If not, how much average monthly income do you think is more appropriate for your current occupation? ()

16、 You think current social status of judges is: Very high ()

High ()

Low ()

Very low ()

unknown ()

17、 You think current social status of judges has ()than before: Increased ()

Decreased ()