Fifty-year-old Ma Guangjun, a defense lawyer from Inner Mongolia, accepted a controversial case he considered unjust—he decided to defend an impotent patient who had been accused of rape. Ma had found seven witnesses to testify for the defense. While witnesses almost never come to court in China, Ma did not want to rely solely on their written statements. “If I made notes and signed them,” he argued, “then the two witnesses who were not able to write could break their word and say the statement was written by me, the lawyer.” Well aware that law enforcement often prosecuted defense lawyers for forging evidence simply to maintain a high conviction rate, the always cautious Ma decided to make his witnesses testify orally in court.

His prudence, however, did him little good. The day after testifying, all seven witnesses were detained by law enforcement, tortured, and forced to change their statements. The witnesses now claimed that Ma had coerced them into lying, accusing him of the precise charge he had sought to avoid. Soon after their “admission,” Ma was detained and charged under the notorious Article 306 of China’s Criminal Law (CL). For over two hundred days, Ma was beaten and tortured for doing little more than defending his client.

The repeated abuse of Article 306 by prosecutors in China has largely intimidated the defense bar, rendering China’s criminal justice system dysfunctional. Article 306 is primarily used by prosecutors at the local level. Thus, understanding the reasons for its abuses requires detailed examination of the local incentive structure. I will argue that the abuse of Article 306 is in part a result of the cultural and institutional difficulties posed by the transition

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Rush Doshi graduated *summa cum laude* and Phi Beta Kappa from the Woodrow Wilson School of Public and International Affairs at Princeton University in 2011. He is currently a Fulbright Scholar in China.
from an inquisitorial system, in which the prosecutor was dominant, to an adversarial one that formally subordinates the prosecutor to judges and places them on equal footing with the defense. Within this climate of uncertainty, prosecutors are able to use their immense power against their adversaries without any real checks. As a result, repeal or revision of Article 306 will accomplish little if the local incentive structure that leads to abuse and the central politics that formed the structure are not addressed. This paper will examine the enabling factors and current incentives behind prosecutorial abuse. It will then examine what reformers might learn from the politics and history of China’s criminal reforms in the 1990s. It will close with a series of structural reforms that could alter the incentive structure at the local level and protect defense lawyers from suffering harm for merely representing their clients.

**THE PROBLEM**

At a glance, Article 306 may seem to be an inoffensive rule of law provision that criminalizes the subornation of perjury and the falsification of evidence. But when one looks more closely at the text, it becomes clear that Article 306 was likely written with the purpose of putting criminal defense lawyers in severe professional jeopardy. It states the following:

If, in criminal proceedings, a defender or agent ad litem destroys or forges evidence, helps any of the parties destroy or forge evidence, or coerces the witness or entices him into changing his testimony in defiance of the facts or give false testimony, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.

Where a witness's testimony or other evidence provided, shown or quoted by a defender or agent ad litem is inconsistent with the facts but is not forged intentionally, it shall not be regarded as forgery of evidence.
Because the opening clause of Article 306 singles out defense lawyers and later clauses on criminalizing evidence fabrication and perjury are so vague, there is widespread potential for it to be wielded unfairly against defense lawyers. Additionally, Article 306 is unnecessary. Article 307 of the CL, which already adequately addresses evidence fabrication and perjury, pertains to all participants in the criminal justice system equally rather than only to defense lawyers. It also has both more appropriate punishments and clearer standards.\(^3\) In contrast, at no point in Article 306 or in the mammoth CL and Criminal Procedure Law (CPL) is it stipulated what it means for a lawyer to “help destroy or forge evidence” or “coerce the witness or entice him into changing his testimony.”\(^4\) Such ambiguities have not been resolved through the court process because, as Terrence Halliday and Sida Liu note, China lacks a “satisfactory system of precedent where courts can settle the meanings of the statutory terms.”\(^5\) This has been a boon for the Procuratorate, a prosecutorial body charged with both prosecuting offenders and with supervising all members of the criminal justice system, including judges, police, and the defense. Article 306’s textual ambiguity and the structural impossibility of clarifying statutes through the courts leaves the Procuracy, tasked with enforcing Article 306, enormous leeway in defining the context in which the law can be used. For them, Article 306 is easily used to harass defense lawyers in criminal trials.

The Magnitude and Costs of Abuse

In the last decade, the Procuracy has indeed taken advantage of the ease with which Article 306 can be used. Between 1996 and 2006, at least three hundred lawyers all across China have been charged under it.\(^6\) It is the favorite weapon of prosecutors—one study of seventy lawyers who had been criminally charged found that nearly 50 percent were charged under 306. No other legal tool was a close second.\(^7\) It is also a large problem for defense lawyers—Professor Zhao Bingzhi at Renmin University has found that 70 to 80 percent of the complaint cases that bar associations receive
from lawyers reference the threat or use of Article 306. Although a large number of lawyers are charged, investigated, or detained using 306—some for periods of years—only a small number are actually convicted. Out of a sample of fifty-six lawyers charged under Article 306, 70 percent were either found not guilty or were not prosecuted in court. This suggests that “evidence fabrication provisions are being used for the purpose of professional retaliation” and that “charges are dropped once the defense attorney is intimidated” and the prosecutor has secured a conviction.

If the purpose of Article 306 is to intimidate criminal defense lawyers, it has succeeded in doing so at a high cost. According to most observers, Article 306 is one the major factors contributing to the decreasing popularity of criminal defense work. The Legal Daily, a newspaper published by the Ministry of Justice, has noted with concern that the percentage of defendants with representation has decreased dramatically in spite of a market increase in the number of lawyers in China. Six out of ten defendants currently go without representation. In some counties, the number is as high as nine out of ten. For those who do remain in the field, morale is low and the quality of defense work continues to fall. As a result of prosecutorial intimidation, criminal defense lawyers have “adopted highly defensive measures to minimize their exposure to the police and procuracy,” and therefore avoid gathering evidence or vigorously questioning witnesses. Ironically, and perhaps not inadvertently, the CPL both guarantees defendants a right to counsel and contains, in Article 306, a clause that fundamentally undermines that right.

The Local Political Picture

Although Article 306 creates a significant problem plaguing criminal defense law in China, prosecutors have often abused lawyers through other legal avenues, such as charging them with corruption, malpractice, etc. Even without Article 306 in place, it is likely that prosecutors would still find ways to harass their professional adversaries. An understanding of the political and institu-
tional conditions at the local level that both enable and incentiv-ize abuse by the Procuracy is therefore essential. For the sake of conceptual clarity, enabling factors are the institutional and cultural factors that make abuse possible. The potential for abuse, however, does not make it certain. Prosecutors need a reason to take advantage of the institutional and cultural advantages that enable them to abuse. To understand their behavior, an analysis of the current incentives leading prosecutors to abuse their adversaries is worthwhile.

Enabling Factors

Perhaps the most significant enabling factor leading to prosecutorial abuse is the incompleteness of China’s shift from an inquisitorial to an adversarial criminal system. The inquisitorial system, which was derived from the civil law tradition, pursued justice through an extensive pretrial investigation conducted by prosecutors and/or judges. This, in turn, limited the role of lawyers and trials and expanded the discretion of prosecutors. In contrast, the adversarial tradition drawn from common law tries to pursue justice through competitive trials in which the defense and prosecution are equals under an independent judge who serves as umpire. Although both institutions are capable of protecting rights, the inquisitorial system is notoriously prone to abuse in part because the inequality between prosecution and defense makes the trial process a mere formality. Although the 1996 reforms to the CPL were intended to mitigate this power imbalance by shifting away from the inquisitorial model, they have actually exacerbated its effects. This is in large part because the Procuracy was able to successfully sabotage moves toward an adversarial system and retain its power.

China’s inquisitorial system was one in which prosecutors conducted investigations unrestricted by evidentiary rules, a defense bar, or judges. The switch to an adversarial system in the 1996 CPL brought defense lawyers and prosecutors into direct competition in the trial process and gave judges the power to pick winners, putting the two sides into sharper conflict than ever be-
Reforms that put lawyers and prosecutors into direct competition and formal equality failed to relieve prosecutors of their institutional advantages.\textsuperscript{18}

Foremost among these myriad advantages is the Procuracy’s supervisory power over the judicial system. Indeed, the Procuracy not only “represents the interests of the State and the people,” but also functions as “the State’s legal supervisory organ” tasked with inspecting “the activities of the other participants as a neutral and objective referee.”\textsuperscript{19} This places the prosecutor in charge of complaints regarding procedural violations, extending Procuratorate authority over the police, lawyers, courts, detention centers, defendants, witnesses, and evidence.\textsuperscript{20} While American judges settle pretrial disputes between the prosecution and defense, here the responsibility falls to the Procuracy. The Procuratorate is thus a player and a referee in the criminal process. Current institutional safeguards that seek to avoid the conflict of interest by separating the supervisory and prosecutorial functions of each Procuratorate into two separate departments are ineffective. Officers that prosecute offenders are often close colleagues of those who are tasked with ensuring the fairness of legal proceedings and lateral transfers between departments remain common.\textsuperscript{21} The Procuratorate is functionally an integrated entity without external or internal checks on its supervisory power.

The absence of such checks means that the Procuracy can investigate and initiate cases against lawyers for fraud, coercion, or violation of Article 306 with impunity. From this perspective, the net effect of the CPL was to throw the weaker defense bar into a dangerous competition with the vastly more powerful and heavily entrenched procurator. Because this competition is “taking place in the context of great legal uncertainty, where rules are vague and their meanings unsettled,” the prosecution—as a judicial supervisor—has the ability and power to take unfair advantage of uncertainty, whether it be about evidentiary procedure, proper questioning of a witness, or Article 306.\textsuperscript{22}

The second major enabling factor is culture. China’s recent inquisitorial system is rooted in a long Confucian tradition.
Confucianism, historically at odds with Chinese and Western legalism, holds truth and social harmony as more important than legal procedure. The inquisitorial system China adopted from the Soviets conformed to this ideal, as the Procuratorate was charged with finding the truth—often through coerced confessions—and the defense was effectively irrelevant.\(^2\) Prosecutors, judges, and the public thus find it difficult to accept the values implicit in an adversarial system, where the judge is an impartial referee between the prosecutor and defense. Instead, they continue to see procedural safeguards as loopholes and legal etiquette, and view defense lawyers best as obstructionist and criminal accomplices at worst.\(^3\)

In this context, the rapidity with which the Procuracy has been made subordinate to the court and equal to the defense has left its professionals feeling they have lost face. As a result, they have fought a “series of petty but highly symbolic skirmishes, such as over whether prosecutors are required to stand up when judges enter the room and whether judges may sit at elevated podiums.”\(^4\) To add insult to injury, private lawyers often earn several times more than prosecutors, a fact that prosecutors find humiliating.\(^5\) Given this mixture of contempt and envy, the threshold for prosecutors to use Article 306 when it suits their interests is far lower than it otherwise might have been.

**Current Incentives**

While the previous *enabling factors* make misconduct more likely, they do not explain why prosecutors decide to abuse their position. For that, we need to examine the incentive structure operating at the local level, which pushes prosecutors to harass their professional adversaries. In the current structure, the costs of losing a case are high for prosecutors while the ability of the defense to win cases is rising as a result of the 1996 reforms. There are three major incentives preventing prosecutors from taking defeat lightly. As it stands, prosecutors *need to win*, and because it is getting harder for them to win, they are motivated to cheat.
First, the passage of the 1995 State Compensation Law (SCL), intended to make local government more accountable by allowing citizens to receive compensation when their rights are violated by the state or when they suffer undue harm, makes losing costly for prosecutors, both literally and figuratively. The law allows those wrongfully accused or detained to sue the Procuracy and police for compensation. Moreover, these cases tarnish the reputation of the prosecutors involved and can trigger an internal review. To avoid this situation, prosecutors have strong incentives to wield Article 306 to eviscerate a defense. A Shenzhen judge explained how these incentives shaped a recent trial by noting that, if the defense triumphed in court, “the Procuracy would have to compensate for the false detention of the subject ... [so] to prove the guilt of the suspect the prosecutor needed to prove that the lawyer had falsified evidence.” While the number of cases filed under the 1995 SCL is unknown, prosecutors fear the prospect of paying compensation and believe claims will rise if they do not maintain a tough line against them.

Secondly, on an institutional level, the pressure on law enforcement to crack down on crime is greater than ever. China’s vast economic transformation and the attendant social disruptions have produced a surge in crime that has increased six-fold since 1979. Since instability threatens the party’s legitimacy, the CCP has publicly made social order a key objective. It has done so by dedicating itself to several high-profile and effectively never-ending campaigns against crime, known as “Strike Hard” campaigns, during which, as even the government-run China Daily notes, “police usually take tougher measures against crime and judicial authorities hand down swifter and harsher penalties.” Since local law enforcement agencies are assessed based on the number of convictions they secure, especially during these campaigns, they have strong incentives to push through as many convictions as possible. As securing convictions in court grows more difficult, the police and public security bureaus face an uncomfortable dilemma: they “will bear much of the blame for failing to curb crimes while at the same time suffering diminished powers to fight the war.” In this light, Article 306 pre-
vents irksome defense lawyers from interfering with institutional objectives.

Finally, individual prosecutors have strong professional incentives to target their opposition, even when compensation is not at risk. This is largely because law enforcement agencies are themselves assessed by their total number of convictions and reward prosecutors who help agency-level quotas. The current bureaucratic structure is one in which pay and promotion are often directly impacted by a prosecutor’s win-loss record, creating strong incentives to avoid losses no matter the details of a case.33

The pressures caused by the 1995 SCL, China’s “Strike Hard” campaigns, and career have mounted on prosecutors while, at the same time, the chance of losing in court has increased, giving prosecutors a greater incentive to circumvent the system altogether. Two main developments toward the rule-of-law have, ironically, led to prosecutorial abuse. First, China’s increasingly independent judges are willing to declare a defendant not guilty on procedural grounds and have given defense lawyers some success in depriving prosecutors and police of techniques upon which they have long relied.34 Secondly, the trial is no longer a mere formality. Before reform, judges were part of the investigatory process. Because they were familiar with all of the prosecutor’s evidence, they made decisions before the trial. This changed after the 1996 reforms. As one judge wrote, “I now have little knowledge about the case … As a result, I have to listen to their arguments more seriously and sometimes I intentionally encourage the defense to advance attacks on the prosecution’s case, so as to help me examine the case from a different perspective.”35 Although prosecutors have the clear balance of power on their side, an increasingly independent judiciary is giving the defense a chance.

In an environment where defeat is possible, China’s prosecutors “find themselves feeling frustrated, embarrassed, and humiliated” because they are “ill-prepared to face the unprecedented challenges” caused by the 1996 reforms.36 They therefore prefer to cheat rather than to play by the rules. A defense lawyer’s exculpatory evidence must have been “forged,” his key witnesses must have
been “enticed,” and the withdrawal of his client’s confession, though extracted under torture, must similarly have been “coerced.” In this way, prosecutors generate convictions by circumventing the judiciary and arresting their opponents, thereby forestalling the slow move toward procedural justice. Moreover, with only a few high-profile uses of Article 306, prosecutors can “lock-in” the gains by creating the impression that defense work is futile, thereby avoiding the need to combat the defense or adjust to the reforms of the 1996 CPL. And, as explained above, prosecutors can get away with this because the current institutional structure and cultural attitude facilitate precisely this sort of behavior. As one researcher puts it, “It is indeed the overall political structure that should be blamed most for the failure of the CPL revision in 1996.”

THE CENTRAL POLITICS OF REFORM

If the current local political and institutional structure can be blamed for the abuse of Article 306 and the failure of reforms, then an investigation into how that structure came about is essential to understanding how to push for further reform.

In the 1990s, the main impetus for legal reform was the self-interest of the CCP. By the early 1990s, the Tiananmen uprisings and the decreasing salience of communist ideology left the CCP without a basis for its legitimacy. To remain in power, CCP elites turned to economic performance as a new justification for their rule, and began to promote the rule-of-law. First, CCP elites believed that the rule-of-law would create stable institutions that protected contracts and encouraged transactions. Second, they hoped that law could supplant the death of communist ideology and ground the state in the Constitution rather than decaying concepts such as “Mao Zedong Thought.”

It was within this context that internal criticism from lawyers and academics gained influence. Reformers pushed for revisions to the old legal codes that had failed to provide adequate procedural protections. Law professors, academics, and researchers were the initial drafters of the 1996 CPL and 1997 CL, and, citing human
rights standards as the impetus for legal reform, included the presumption of innocence, participation of defense in all stages of trial, and the inadmissibility of evidence extracted under torture in these new frameworks. In the initial phase of reform, CCP interests drove the process while internal criticism directed it toward liberal purposes.

Although academics exercised a great degree of influence on the initial reform documents, bureaucratic politics determined most of the subsequent law. The 1996 CPL and 1997 CL are filled with tradeoffs, indicating that the disjointed documents seek on the one hand to commit China in a formal way toward the rule of law, while simultaneously using local discretion and law enforcement to prevent reform from going too far. Lacking a coherent set of goals and philosophies, these laws are instead the product of horse trading and political competition “so fractious that it involved almost every major player in the Chinese bureaucracy.”

The Ministry of Public Security (MPS) and the Supreme People’s Procuratorate (SPP) stood to lose most from reform and were successful in watering down the reforms, maintaining their power, and creating obstacles for defense lawyers. They were also successful in delaying the reform process, launched in 1981, for several years. The Party relies on the MPS and SPP for day-to-day social stability, so when protests flared or the economy slowed, it only strengthened the position of hardliners who could then make a convincing case for retaining the machinery of social control in pristine shape and weakening the hands of reformers.

This is not to say that reformists did not have their own advocates in the process. The Ministry of Justice (MOJ), an initial proponent of China’s shift to an adversarial system, is generally opposed to restrictions on lawyers’ autonomy because the Ministry is most relevant when lawyers are relevant. The MOJ opposed the inclusion of Article 306 when it was introduced by the SPP and PSB, and failing in that, successfully secured the addition of a second clause to Article 306 so that unintentional violations would be exempted from prosecution. The increasingly independent National People’s Congress (NPC) was also an ally. During the
1996 reform process, three thousand NPC delegates vociferously objected to a MPS amendment supported by party elites that would make any discharge of a police firearm in the line of duty a legitimate act of self-defense in all cases, regardless of the circumstances. Ultimately, reformers were successful in ushering in a formal shift to an adversarial system, with protections for defendants, a foundation for an increasingly independent judiciary, and a greater role for the defense bar.

As a result of bureaucratic contestation, the 1996 CPL is profoundly ambivalent on the question of reform. While reformers were successful in winning many formal protections for the defendants and securing a greater place in the trial for defense lawyers, they were unable to ensure these new provisions would be implemented. In contrast, hardliners were successful in ensuring that the SPP and PSB remained vastly more powerful than their adversaries, the defense lawyers. Ultimately, the CPL created provisions that allowed the defense lawyers to stand up in the criminal process while ensuring prosecutors had the power to knock them back down by leaving the local political structure intact. The lesson of the reform process is that textual or formal reform which leaves unaffected the power imbalance between prosecutors and defense lawyers is ineffective. For this reason, the reform of China’s criminal laws in the 1990s remains an unfinished project.

RECOMMENDED REFORMS FOR CHINA

If the local political structure is at fault, then the question becomes how to reform it. Reforms can take three main forms. The first type seeks to remove the potential for abuse by revising the legal and textual problems in the language of Article 306. The second type seeks to make abuse less likely by addressing the enabling factors and the structure which permits prosecutorial abuse. The final type seeks to address the current incentives which lead prosecutors to misuse their authority. While legal reforms are unlikely to prove effective and structural ones are unlikely to garner political acceptance, the final type of reforms might be non-threatening to
prosecutors and reduce the likelihood of abuse.

Ideal Solutions: Technical/Textual Reforms

On a technical level, the solutions to the dilemma posed by Article 306 seem relatively straightforward. First, the National People’s Congress (NPC) ought to repeal Article 306. Article 307 of the 1996 CPL already sufficiently addresses perjury and the fabrication of evidence by judicial officers and pertains to all participants in the criminal justice system equally. In contrast, Article 306 applies only to defense lawyers, has vaguer standards, and carries heavier penalties.48

Secondly, the NPC could raise evidentiary requirements for convicting lawyers of having fabricated evidence by establishing a de minimis requirement so that minor testimonial discrepancies would not justify prosecution.49 Additionally, the NPC might require more than one witness to demonstrate that a lawyer was guilty of engaging in or assisting fabrication. Revisions that reduce prosecutorial discretion over Article 306 by clarifying vague phrases like “entice” and “assist” might also make abuse less likely.

Unfortunately, textual reforms will not be enough to change the status quo. Without an attempt to change the institutional structure and current incentives, legal reform will go nowhere because prosecutors can always find new tools for harassment, like Article 307 of the CL and Article 38 of the CPL. Worse, those who push for textual reforms may actually harm the reform effort. Randal Peerenboom argues that prosecutors might prefer a debate framed in terms of Article 306 rather than one over whether they should be held personally liable for wrongful prosecution or whether their supervisory role should be given to disciplinary committees.50 Pushing for the abolition of Article 306 may thus squander the political capital of reformers.

Changing the Power Structure: Addressing Enabling Factors

Meaningful reforms will require increasing the power of oth-
er actors at the local level relative to the prosecution and creating a system of checks on prosecutorial power. In this vein, the first reform might be to strip prosecutors of primary responsibility over Article 306 and transfer it to China’s bar association, the All China Lawyers Association (ACLA). This would reduce local abuse while simultaneously strengthening the professional identity of lawyers. While the ACLA is controlled by the MOJ, this proposal is unlikely to backfire because the MOJ risks irrelevance when lawyers are not autonomous and has thus often combated efforts to restrict lawyers’ autonomy. Alternatively, prosecutors could maintain primary responsibility for Article 306 while the ACLA or courts are given appellate powers to prevent local prosecutorial abuse.

Secondly, if prosecutors retain power of Article 306, reformers should advocate structural provisions that deter its abuse. Creating a separate financial penalty for the false accusation of lawyers under the 1995 SCL might deter use of Article 306 by making it more costly. Holding prosecutors legally culpable and civilly liable for the harassment of defense lawyers would change the cost-benefit analysis for all prosecutors. Finally, an internal reform that orders the withholding of promotions or bonuses for prosecutors who misuse Article 306 might also prove effective.

On an institutional level, reformers should try to divide the Procutorate’s supervisory and investigatory functions so that the institution would not be both the player and referee in the criminal system. Banning transfers between the supervisory and investigatory departments or creating a dual leadership system with one chief from each wing might help solve this problem. Similarly, reforms that incentivize the supervisory wing to take an active role in overseeing its investigatory counterpart might create a check on abuse.

While it might be ideal to abolish the supervisory function of the Procurate outright, this is likely to be unrealistic given that its supervisory role is mandated by the Chinese Constitution and Criminal Law. As one author proposes, “a more feasible proposal at this stage is to introduce earlier judicial involvement and to channel the majority of pre-trial procedural issues” away from the Procurate and to the courts. Prosecutorial control over the
pretrial process, the phase in which evidentiary disputes between prosecutors and the defense often emerge, makes defense lawyers exceptionally vulnerable to Article 306 and gives prosecutors the ability to deny defense lawyers fair access to the client or evidence. Giving judges control over the pretrial process would reduce the potential for abuse. The relatively straightforward nature of pretrial disputes means that less experienced judges and recent law school graduates could be assigned with such responsibilities without dramatically increasing the court’s workload.57

Non-Threatening Reforms: Addressing Current Incentives

But the textual reforms outlined above are not enough. While such solutions would be effective, they would not secure the political support of the Procuracy, which stands to lose power. However, there are reforms that would address the current incentives for abuse without directly undermining the Procuracy’s power. These reforms can be thought of as “non-threatening reforms” because they offer the possibility of change without attracting the political opposition of law enforcement.

First, reformers could push for the revision of the 1995 SCL, which holds the Procuracy liable if an individual defendant is found innocent. This law motivates prosecutors to fight harder for conviction even when the evidence points to the defendant’s innocence. If the law were revised to reduce or eliminate prosecutorial liability when the prosecutor ended legal action against an innocent defendant, the pursuit of justice would be aligned with the interests of prosecutors. Additionally, raising awareness about the SCL might reduce the stigma that prosecutors face internally when served with a compensation claim and also decrease the impetus for retaliation against claimants.58

Second, the Procuracy’s compliance with anti-crime campaigns should be assessed not on the number of convictions secured, as is current practice, but rather on the crime rate. The current basis for assessment is both legal and cultural. Bureaucrats believe that the greater the number of convictions, the safer society
is. Thus, they incentivize prosecutors to collect the usual suspects and charge defense lawyers under Article 306 if they threaten the conviction rate. Shifting the assessment criteria to the crime rate will reduce the pressure on prosecutors to pursue meaningless convictions. Finally, the standards for internal promotions, based in large part on a prosecutor’s conviction rate, could be altered so as to be based on qualitative factors and performance reviews. Such reforms would probably garner support for the Procuracy while simultaneously changing the situation for criminal defense lawyers.

While the mere repeal or revision of Article 306 is unlikely to alter the political imbalance on the ground, the aforementioned reforms work toward changing the political structure and incentives that lead to abuse.

CONCLUSION

The promise of the 1996 CPL and 1997 CL was dashed by the realities of politics. Hardliners at the center kept the Procuratorate powerful by using local discretion to undermine reform, thereby creating a system in which prosecutors and defense lawyers are officially but not actually equal. Article 306 is a manifestation of China’s incomplete transition from an inquisitorial to an adversarial system. Defense lawyers are now responsible for clients and may even have a chance of winning, but prosecutors are left with enough power to arrest their adversaries and avoid defeat.

Prosecutorial abuse is enabled by the fact that the Procuratorate is both the referee and player within the criminal process and can therefore arrest lawyers with impunity. Cultural factors, such as a belief amongst prosecutors that they have lost face by being made formally equal to defense lawyers as well as a belief that such lawyers are obstructive, also lower the bar for abuse. But although abuse is possible, it is not certain. Prosecutorial abuse is incentivized because law enforcement agencies face pressure to generate convictions. With individual careers dependent on win-loss records and lawsuits resulting from defeat, the path to abuse is thus incentivized. At the same time, China’s criminal justice reforms are
making it harder for prosecutors to generate convictions as judges are now independent and legal procedure becomes more accepted. Article 306 offers prosecutors a way out of defeat even if the trade-off is a miscarriage of justice.

Textual solutions, such as clarifying vague terms or including *de minimis* standards, might make a small difference, but it would not be enough. Real reform must address enabling factors like the Procuratorate’s power advantage. Giving bar associations power over Article 306, dividing the Procuratorate’s investigatory and supervisory powers, or establishing penalties for Procuratorate abuse would protect defense lawyers. Such reforms, however, would be challenged by the Procuratorate. Reforms that mitigate current incentives for abuse rather than curb the power of the Procuratorate might be more welcome. Amending the State Compensation Law and assessing law enforcement agency prosecutors on a metric other than their conviction rate would reduce the impetus for abuse.

Unfortunately, the road to substantive reform is a long one. China is now in the midst of a four-year crackdown that began during the Olympics and became semi-permanent after the financial crisis. Chinese elites are deeply concerned about the rise in mass protests, which have increased from 8,700 in 1993 to nearly 83,600 in 2005—the last year figures were made available by the Ministry of Public Security. These factors have created an atmosphere of profound anxiety among CCP elites while simultaneously calling CCP legitimacy into question, thus making reform less likely but more necessary than ever.

Although China has made steps away from reform in the last four years, that does not mean outsiders should despair. Forty years ago, China was a totalitarian state in the grips of the Cultural Revolution with a nonexistent legal community. That China will dramatically change once again in the next forty years is undeniable; how it will change remains the central question. It is in the interest of the world and the Chinese people to steer that change toward judicial reform and more respect for human rights.
Notes

9 Ran, “Criminals,” p.1024.
12 Congressional-Executive China Commission, p. 6.
13 Ibid., p.6.
15 For more information on other forms of abuse and how often they are used, see Fu, “Lawyers,” p.5–6.
18 This is not a uniquely Chinese problem. According to a Crowley Mission report on Mexico, the incompleteness of reform led to a hybrid system that ’embodied the worst elements of the inquisitorial and adversarial systems’ because continued prosecutorial dominance rendered the formal role for defense lawyers and judges meaningless. The same analysis applies equally well to China.
20 Ibid.
21 Ibid.
22 Fu, ”Lawyers,” p. 35.
24 Ran, ”Liberal Moment?” p. 1008.
25 Peerenboom, China Modernizes, p. 203.
26 Ran, ”Liberal Moment?” p. 1009.
32 Peerenboom, China Modernizes, p. 202
33 Ibid.
34 Ibid., p. 40.
35 Ibid., p. 31.
42 Hecht, Wrongs and Rights, p. 20.
44 Halliday and Liu, pp. 87–88.
47 Hecht, Wrongs and Rights, p. 20.
49 Congressional-Executive Committee, p. 8.
51 CECC, p. 9.
52 Ibid.
55 Sheng, “A Promise Unfulfilled,” p. 15.
56 Ibid.
57 Ibid.
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