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Letter from the Editor-in-Chief

Dear Reader:

The mission of the California Legal Studies Journal has been and is to provide a forum for undergraduate research relating to issues in the law—from philosophy to law and economics and legal theory to law and policy. Since the journal first began publication in 1983, its goal has been to encourage graduate-level research at the undergraduate level.

This year's publication marks the journal's first issue since 2010. It also marks the first year that the Berkeley Legal Studies Association has taken over the publication of the journal in its entirety and on its own. It has been a great challenge but a rewarding one all the same. We are proud to present a diverse array of topics ranging from current global issues to more domestic problems as well as enduring philosophical inquiries of law.

We hope that this year's issue of the journal is thought provoking and inspiring. We also hope that reading about the topics here will push you, the reader, to explore legal topics and issues that interest you.

We look forward to publishing many more issues and we invite you to be part of the process either through submitting your own work or becoming a staff editor! Please do not hesitate to contact us if you have any comments or questions regarding the journal itself and/or the topics discussed.

Good reading,

TABLE OF CONTENTS

Should the United States be
Considered a Safe Third Country?

From Individual to Collective: 14
The Ramifications of Prosecutorial Discretion

Genocide Prevention and Deterrence: 29
The Necessity of Complementarity
Between Legal and Political Rhetoric

Consumer Protection Policies and 37
Practice of Automobile Industry in China:
Explanations and Findings

Should the United States be considered a Safe Third Country?

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It is possible that someone fleeing their home country of say, Guatemala, may travel through United States to get to Canada where they ultimately claim refugee status. Although this person may be determined to be fleeing persecution because they are a member of a particular social group, they may not receive refugee asylum even though their government cannot (or will not) protect them simply because they used the U.S. as a route to Canada. This paper will explore the United States' interpretation of the 1951 United Nations Convention on the Status of Refugees. It will especially consider whether the U.S. can be considered a "safe third country" according to international standards in refugee law and according to the aforementioned Convention. It will primarily draw upon Canadian criticism of U.S. policy in their 2004 Safe Third Country Agreement and the subsequent legal proceedings surrounding it to argue that the U.S. does not fully comply with international law. The U.S. disregards and violates some basic human rights treaties, including the 1951 Convention, Convention on Torture, as well as generally having a poor human rights record. Thus, it should not be considered a safe third country for the purposes of asylum claims.

According to Article 1 of the 1951 Convention on Refugees, a refugee is a person who: "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it..."

In order to be considered a refugee, the applicant must fulfill all the aspects of this definition. An applicant who meets most, but not all of the definition requirements will be ineligible for asylum. States have a duty to allow potential refugees to *apply* for asylum. Article 14(1) provides that, "everyone has the right to seek and to enjoy asylum from persecution in other countries. This means that even if someone is ultimately denied refugee status, they still have the right to apply. Furthermore, Article 32 on the Convention defines: "...the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority." However, there is no corresponding duty for states to accept refugees. A claimant may apply and be rejected by the state through the asylum process. However, under international refugee law, signatories to the Convention cannot return refugees to states where their life or freedom would be threatened, no matter what the circumstances are or who the refugee is. Article 33 of the Convention states that "no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." This article can have no reservations (Article 42), meaning signatory

states cannot object to or disregard this article. The principal of non-refoulement is *jus cogens*, meaning it peremptory norm in international law that cannot be challenged.

While the international law mandating that states investigate and, where applicable, grant asylum status is clear, the issue of safe third country agreements is relatively new. The U.S.-Canada Safe Third Country Agreement came into effect December 2004. It stipulates that, when the port of entry is a land border, a person seeking refugee protection must make a claim in the first country they arrive in, unless they qualify for an exception. Exceptions to the safe third country rule, according to the agreement, include: applicants seeking asylum within the borders of the country, applicants who have a valid visa or do not require a visa to enter the other, unaccompanied minors may seek asylum in either country, and applicants with family members in the other country who are citizens, residents, students, refugees, asylees, or have asylum applications pending. If they do not fall within one of the above exceptions, they can only pursue asylum in the country where they first landed (i.e. only the United States or only Canada) (Less Safe 8). A safe third country status means that "asylum seekers who have travelled through other countries before reaching the country in which she or he is now claiming asylum will not have their asylum claim examined, but will be returned to the transit country instead" (Abell 63). There is no problem with this principal; countries do not want to have "asylum shoppers" who seek to get the best benefits they can. However, countries need to actually be considered safe country for refugees. Otherwise, refugees are still in danger. The Agreement only applies along the land border; those who enter by air or sea may still seek asylum in the other country as can those who are already in the country.

In theory, since the both the United States and Canada were signatories to the Convention, they were supposed to apply

the law in the same way. Thus, refugees should only be able to make claims in the country they first landed in. If they qualified in one country, they would also qualify another. Safe third country agreements are meant to prevent "asylum shopping," where migrants "shop" for the best country to claim asylum in. There has been considerable discourse recently of asylum seekers not being genuine refugee seekers fleeing from persecution but rather those looking to advance their economic place in society (Macklin 382). However, given the relative prosperity of the United States and Canada, "it is more likely that the political or social environment influenced the decision" to settle in one country over the other (Sarbit 152). There may be legitimate reasons for genuine refugees to prefer settlement in Canada rather than the United States. For example, they may wish to "maximize the likelihood of acceptance, presence of kin or friends, language or cultural affinity, and better treatment pending the determination of status" (Macklin 382). All of these reasons would not be considered legitimate under the Safe Third Country Agreement. In addition, there are reasons to question the practical effectiveness of the Agreement. Before the agreement, refugee claimants would present themselves at the border. Now, claimants must cross the border irregularly (that is without proper documentation) to claim refugee status once inside the country since the agreement does not apply to those already inside the country and they cannot complain asylum at the land border if they passed through America. When Germany made a similar change the "principal beneficiaries of the safe third country agreement was smugglers and traffickers" (CCR-10 Reasons, 2). There is no logical reason to do this as it does not help those most in need.

In order for the United States to be considered a safe country (and thus for Canada to not investigate claims of refugee status for those traveling from the U.S. land border), it needs to adhere to international standards regarding the 1951 Convention,

among other international obligations. However, it does not. This paper will focus on the Real ID Act signed into law by President Bush in 2005 because it creates a system by which refugee claims are not treated in accordance with international law.

The Real ID Act expands those ineligible for refugee protection in the U.S. by expanding the definition from those who have "engaged in terrorist activity" to include also those who have provided the lesser standard of "material support" to a "terrorist organization" (CCR 2). While the 1951 Convention does allow for exclusion on the grounds of those who have "committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes" or those who have "committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee" or those who have "been guilty of acts contrary to the purposes and principles of the United Nations" (Article 1F) and for "compelling reasons of national security" (Article 32, 2), the United States interprets this exclusion very broadly under the Real ID Act. In fact, it expands it to exclude those whose "material support" for a "terrorist organization" was involuntary or coerced (CCR 3). "Material support" is a term not defined in the Real ID Act, allowing any support, no matter how minimal, to be considered support for terrorist activities. For example, the Canadian Council for Refugees cites a case where a Sierra Leonean woman was considered to have offered material support to terrorists after a group of rebels attacked her house, killed one family member, burned another and raped the woman and her daughter. Because the rebels remained in her house for four days, with the woman as their captive, she is considered to have given them shelter, which counts as material support (Less Safe, 10). Other cases of applicants denied refugee status in the U.S. because of their "material support" include a Colombian farmer who was refused

refugee status for having paid FARC his employer's 'war tax,' even though the money did not belong to him (*Arias v. Gonzales, 2005*) (Less Safe, 13) and the money paid as a ransom to the Liberation Tigers of Tamil Eelam by a man who had been kidnapped constituted material support (*Matter of R.K., 2005*) (Less Safe, 13). While the Act does provide a provision for asylum seekers who "can show that they could not reasonably have known that their material support was going to a terrorist organization" (Less Safe, 12), it places the difficult burden of proof of intent on the refugee. Many fleeing persecution do not have the time to ensure they have all the proper documents to prove their intent. These applicants were denied refugee status under the Real ID Act and returned to their countries of origin. This was in violation of the Conventions protection against refoulement under Article 33 since the Real ID Act broadens the exclusions clauses found in Article 1F.

In addition, the Real ID Act also creates new criteria to determine the asylum seeker's credibility, including the "the demeanor, candor, or responsiveness of the applicant or witness...any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim"(Real ID Act, sec. 101). This means a refugee can be denied asylum status because of subjective perceptions of the government official interviewing the refugee. This is in contradiction with the general practices recommended by the United Nations High Commissioner for Refugees. The UNHCR guidebook, while not a binding international law, states that "untrue statements by themselves are not a reason for refusal...it is the examiner's responsibility to evaluate such statements in the light of the circumstances of the case" (Handbook, 33). The Real ID Act's new criteria will have profound consequences. For example, it will especially affect women fleeing from sexual violence who are, understandably, not

always open with their entire story when they first arrive in the U.S. In addition, people fleeing for political reasons may be afraid to divulge their political affiliations at first for fear of retribution unless they are guaranteed to get asylum. The codification, by way of the Real ID Act, of practices contrary to both the spirit and letter of the 1951 Convention makes the U.S. an unsafe third country since it creates new criteria outside of the 1951 Convention.

Another way in which the U.S. violates its international obligations and thus should be considered an unsafe third country is its use of torture. Prohibition of torture is considered to be *jus cogens*, a practice states engage in out of a sense of the highest legal obligation. It is a norm for the entire international community and no derogation from the norm is permitted. For example, the conduct of the victim of torture is irrelevant and no derogation can be made even in times of national emergency or war. While the prohibition of torture is *jus cogens*, it is also codified in multiple treaties and conventions: the Convention against Torture (CAT), International Covenant on Civil and Political Rights (ICCPR), and various regional treaties such as the European Convention of Human Rights and American Convention on Human Rights (which the U.S. signed in 1977 but has not ratified) all prohibit torture. In addition, the U.S. has domestic legislations defining and prohibiting torture.

The UN Convention on Torture, under Article 3, explicitly states that "no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture" and that "for the purpose of determining whether there are such grounds including...the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." This means that under the Convention, which both Canada and United States have ratified,

both countries are obligated to fully investigate whether the other fully complies with the treaty. If the United States does not, then Canada cannot consider the United States a safe third country and therefore cannot return refugees who are applying for asylum back to the United States, even if they entered the U.S. first. Resolving this means asking countries to pay more attention to the policies of their neighbors. If they do not investigate if their neighbors are safe, refugees remain vulnerable.

In addition to the issues discussed above, many U.S. practices as well as laws call into question the country's commitment to the prohibition of torture. The Military Commissions Act, signed into law by President Bush in October 2006, "denies non-citizens the right to habeas corpus, eliminates numerous protections from abuse to which detainees are entitled under the Geneva Conventions, provides officials with retroactive immunity from accountability for past abuses and allows for the introduction of evidence obtained through coercion" (Less Safe, 6). This blatant disregard for international norms and laws was described by the American Civil Liberties Union Executive Director Anthony Romero as nothing less than taking "away protections against horrific abuse, putting people on trial based on hearsay evidence, authorizing trials that can sentence people to death based on testimony literally beaten out of witnesses, and slamming shut the courthouse door for habeas petitions" (Less Safe, 35). U.S. policy leaves refugees vulnerable to torture without opportunity for redress.

The Detainee Treatment Act of 2005 (signed into law under Title X of the Department of Defense Authorization) explicitly prohibited torture. However, it also retroactively protects government officials who detain and interrogate aliens who "are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States" if they "did not know that the practices were unlawful." In

addition, it limits the appeals and jurisdiction of U.S. courts rule on cases (Jurist). Then-President Bush offered his official statement of the law, interpreting it to mean: "... in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks" (Jurist).

In response, Amnesty International issued a condemning report that demonstrated evidence of "widespread torture and other cruel, inhuman or degrading treatment of detainees held in U.S. custody" (Less Safe, 30). They reject the U.S. government's argument that the problem amounts to a "few aberrant soldiers and lack of oversight", finding that "there is clear evidence that much of the ill-treatment has stemmed directly from officially sanctioned procedures and policies, including interrogation techniques approved by Secretary of Defense..." (Less Safe, 31). While parts of this was later overturned by the Supreme Court's ruling in *Boumediene vs. Bush* (2008), it still demonstrates that the U.S. saw protecting detainees' human rights as second to protecting the United States against the War on Terror.

The last category where the United States fails to live up to is its international obligations, thus making it an unsafe third country, is its general human rights practices. Multiple examples demonstrate how the U.S. has failed to respect human rights and refugee treatment in a variety of ways and degrees. For example, the U.S. is only of the only countries that has not ratified the Convention on the Rights of the Child; the other country failing to do so is Somalia. Detention among those seeking asylum is common. Problematically, it is often based on race, nationality and group profiling. For example, "all Haitians who make refugee

claims in the U.S. are automatically detained," something that is not true of other nationalities (Sarbit, 146). In addition, after September 11th, the U.S. "detained hundreds of migrants of Arab or Muslim descent on "preventive" grounds, meaning that they were not suspected of any particular offense" (Macklin, 389). Refugees coming from these countries are vulnerable to racial profiling making a objective review of their application difficult. In some cases, even youths were detained in jails or jail-like facilities despite international standards requiring a minimum amount of (Less Safe, 17). Furthermore, for those in asylum hearings, there is no state funded legal aid (unlike in Canada). This can make a critical difference because asylum cases with legal representation are four to six times more likely to succeed than unrepresented ones (Macklin, 404). The U.S. Commission on International Religious Freedom, found that there is wide variation in acceptance rates of refugees depending on "where the claim is made and the official deciding the case" (Less Safe, 17).

Lastly, the United States requires claimants to demonstrate a 'clear probability' of persecution in order to be deemed a Convention refugee (*INS v. Stevic*, 1984). There is a lesser standard of proof in Canada; 'well-founded fear' of future persecution, and past persecution can establish a well-founded fear of future persecution (*Adjei v. Canada Minister of Employment and Immigration*, 1989). In Canada, it is believed that past persecution can establish a well-founded fear of future persecution and this is considered grounds of granting a refugee asylum. If a person has suffered in the past, their chance of future mistreatment is all the more likely. However, differences in interpretation mean, in practice, that refugees who apply and are denied asylum in the U.S. may actually qualify for asylum in Canada. However, because of safe third country agreements, the claimants' case would not be heard.

As the evidence makes clear, the United States cannot be considered a safe third country. After a review of the U.S. legislation and practices in regard to their interpretation of the 1951 Convention, the Convention on Torture, as well as general human rights practices, it has been shown that the U.S. does not live up to its international conventions to protect refugees. Refugees are in danger of unlawful detention, not having their cases fairly investigated, torture, and most alarmingly, refoulement to their countries of origin. Therefore, claimants seeking asylum at the Canadian-United States border should not be turned away simply because of the route they take to reach Canada. Instead, the Canadian government should analyze their specific situation to determine if they meet the Conventions' definition of refugee and are granted asylum in Canada.

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From Individual to Collective: The Ramifications of Prosecutorial Discretion

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In the Special Court for Sierra Leone (SCSL), as in any court, the prosecutor plays a key role in the transitional justice process. The prosecutor, based on the evidence, builds his case and selects the charges based on applicable national and international case law. The process by which the prosecutor achieves this is often referred to as prosecutorial discretion. This paper argues that the prosecutor in this case exercised his discretion recklessly at the SCSL. The prosecutor exercised his discretion irresponsibly in three regards. First, the prosecutor attempted to join all the allegedly accused in a single indictment in the name of Justice. Second, the prosecutor drafted ambiguous indictments. Finally, the prosecutor plead a joint criminal enterprise that was not criminal. The ambiguity and generality of the indictments collectivized and criminalized two organizations, the Armed Forces Revolutionary Council (AFRC) and Revolutionary United Front (RUF). Michael Ignatieff presents an important reason to emphasize individual guilt rather collective guilt in transitional justice, "the essential function of justice in dialogue

between truth and reconciliation is to disaggregate individual and nation" (Ignatieff, 116). The prosecutor detracted from these transitional justice imperatives of individualizing guilt; instead he convicted individuals through the criminalization of their participation in the AFRC/RUF. Of the four trials conducted by the SCSL over the last decade, all have ended with convictions. Justice Bankole Thompson in his partially dissenting opinion in the case of Prosecutor v. Sesay, Kallon, and Gbao wrote:

"It is an established principle in international law that crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced" (Trial Judgment, 701).

With the tribunal now getting ready to shut down it is imperative to reflect on Justice Bankole Thomson's words and ask whether the SCSL has helped Sierra Leone achieve transitional justice? To answer this question, this paper analyzes how the prosecution indictments shaped the historical narrative of the Court, and considers whether, contrary to the goals of the court, they in fact collectivized rather than individualized guilt.

From 1991 to 2002 Sierra Leone was plagued by violent conflicts that devastated the country. The heinous crimes committed by all sides to this conflict were inhumane and ruptured the social fabric of Sierra Leone. The use of child soldiers in the civil war in Sierra Leone, as well as the controversial issue of blood diamonds, attracted international interest and concern around the world. After a decade of bloody battles, foreign governments began to take an active role to help Sierra Leone end the war and initiate disarmament. After a successful disarmament, the government of Sierra Leone and the Secretary General of the United Nations drafted a treaty agreement "for the establishment of a Special Court for Sierra Leone" (Agreement, 1).

The Special Court was innovative for two reasons; it was located in the midst of post-conflict Sierra Leone and it was meant to be a “hybrid” court, which would incorporate elements of international and domestic criminal law. The Court was to be governed by a specially drafted statute [“SCSL Statute”] that attempted to prosecute “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Article 2-4 of the present statute shall be *individually responsible*” (Statute, Sec. 6.1). These goals of the court are fundamental to the transitional justice process, including individual responsibility.

First, by attempting to join all criminals in one indictment, the prosecution exercises his discretion recklessly and from the inceptions of the case begins to weave a collective identity. The Prosecution claimed that creating a joinder indictment for all the criminals would be beneficial since, “the crimes alleged against the accused Sesay, Brima, Kallon, Gbao, Kamara, and Kanu are crimes which formed part of a common scheme to gain effective control of the territory and population of Sierra Leone” (Motion for Joinder, 3). The argument for common plan or scheme that the prosecution presents is essential to the case, but it does detract from the Statute’s need to establish individual responsibility. The prosecutor framed all the charges in the indictment under one criminal organization, the AFRC/RUF. The joinder indictment, according to the prosecutor, would provide justice; the prosecutor argues that creating one single indictment would, “reduce the risk of contradiction, inconsistencies or discrepancies in decisions rendered in separate trials” (Motion for Joinder, 3). Inconsistencies, however, will arise since each person must be held accountable for their own individual responsibility in the furthering of the common criminal plan or their leadership role in that plan. The prosecutor’s emphasis on developing one narrative through a single judgment and based on the actions of a single

criminal organization must be disentangled. Moreover, the Chamber denies the single joinder of all the accused because the prosecutors' allegations only legally prove section B of Rule 48 of the Rules of Procedure and Evidence of the Special Court: "the criminal acts to which the acts of the accused are connected must be capable of specific determination of time and space" (Motion for Joinder, 11).

Furthermore, the judge's decision on the prosecution's motion for joinder had a startling effect. The Chamber dismissed the prosecutors' motion to collectively join all the accused of the RUF and AFRC under a single indictment. Instead, they decided to form two joint indictments based on the group the individual accused pertained to. The court justified the creation of two joinder indictments because, "(i) there was a common scheme or plan; and (ii) that the accused committed crimes during the course of it" (Motion for Joinder, 13). The court admits to seeing an association within the individuals and the organization they pertained to. Whether the association was inherently criminal is not an argument the court takes into account, but it is one that the Prosecutor attempts to prove. The result is that the joinder perpetuates a collectivization of guilt indirectly. Through the joinder they take three individuals: Sesay, Gbao, and Kallon and try them in a collective trial which comes to be referred to as the "RUF Case." Further, the judges in an attempt to be "fair and efficient" form two joint indictments that become symbolic of the entities that the members represent. The joining of accused into collective or joint trials perpetuates a collective mentality of guilt by association. The joinder produces a collective entity as can be seen by the lack of reference to cases of individual defendants, rather by the organization they pertain to.

An indictment tells a story of how a crime occurred and presents the framework for the case and delineates the role of the individual accused. The prosecution, in drafting the indictments

for the SCSL, failed to do either. The prosecution recklessly drafted indictments that did not provide clear and specific information about the nexus between the crimes and the individuals responsible. The prosecution drafted ambiguous indictments that failed to individualize guilt. Four ways in which the indictment perpetuated ambiguity were: (1) the use of the RUF/AFRC rather than the individuals being accused, (2) incorporating broad time frames, (3) incorporating a broad geographic scope, and (4) abstaining from naming victims. A close text analysis further exposes the ambiguity and generality of the indictments. The RUF and AFRC indictments are full of paragraphs, which illustrate the lack of specificity of the role of the individual in the crime. For example, at paragraph 46 of the RUF indictment it says:

“Bo District

46. Between about 1 June 1997 and 30 June 1997, AFRC/RUF attacked Tikonko, Telu, Sembehun, Gerihun and Mamboma, unlawfully killing an unknown number of civilians” (Consolidated Indictment, 10).

The prosecution’s recklessness in drafting the indictment can be seen by the lack of reference to the individual accused. Rather, than referring to the specific individual the prosecutor chooses to focus on the organization. The use of AFRC/RUF takes the place of those that were allegedly individually responsible. The subject, “AFRC/RUF,” is reiterated in the charges at minimum 51 times while the names of individuals accused is mentioned roughly 10 times. Issa Sesay, for example, one of the accused, is only mentioned 10 times by name.

The disparity in numbers is staggering. Refraining from using the names of the individuals being accused induces a view of collective criminal responsibility, rather than individual responsibility. The RUF and AFRC, for example, represent and

take the place of the individuals accused. To an even greater extent, when referring to the organization it is not only the RUF or the AFRC, rather a union of both the AFRC/RUF. The associative use of AFRC/RUF introduces the factions as one single entity. There was a relationship between the factions during the conflict in Sierra Leone, but they never became one entity. According to Sareta Ashraph's account of the history of the events in Sierra Leone, "Even at its most cordial, the AFRC—RUF alliance was less a merger than factions working side by side. The extent that they were able to do so depended on how well the commanders on the ground got along" (Ashraph, 2). However, the desire of the prosecution to establish the RUF and AFRC as a single entity takes on a new form by how the indictments reference to the AFRC/RUF as one entity. Further, through the constant repetition of AFRC/RUF the association of individuals to the organization is strengthened. Therefore, since it requires less to prove an organization participated in these crimes, the stronger the connection between the individual and the organization the easier it becomes to criminalize the individual for the collective guilt.

Another way in which the prosecutor was reckless about drafting the indictments concerned how he incorporated broad and imprecise time spans in the charges. The broad scope of time creates a hazy narrative as seen in paragraph 71 under Count 13: Abductions and Forced Labor, "between about 14 February 1998 to January 2000, AFRC/RUF forces abducted hundreds of civilian men, women and children..."(Consolidated Indictment, 10). The time spectrum is extensively large, nearly reaching two years. The broad time span prevents the possibility of applying individual guilt for the crime. The long period of time to charge a crime does not fairly determine the individual's involvement in perpetuating a crime. The extensive amount of time raises many questions as to how the individual guilt can be assessed for Sesay, Gbao or Kallon fit in the wide-range time intervals. Defending these accused

becomes difficult because the charges are framed in a two-year period. The defense is forced to present a counter narrative to account for the accused during the entire time period of the charge. In a scholarly analysis of judicial time frames, James Cockayne writes, "temporal jurisdiction results in an arbitrary jurisdiction between those who will be punished and those who will walk free" (Cockayne, 641). Although, Cockayne's emphasis is on the temporal jurisdiction of the Court, it helps delineate the arbitrary jurisdiction the prosecutor has in selecting the broad time frame. The broad time span used in the pleading of charges generates a shift in the view of an individual criminal action to a presence of collective criminal action.

Moreover, the lack of specificity of the location, similar to the vagueness within the time spans, perpetuates vagueness in the role of the individual accused, and emphasizes the collective guilt of the organization. In charges 6-9: Sexual Violence, paragraph 55 of the indictments, offers another example of the unwarranted prosecutorial discretion in drafting the indictments. The broad geographical scope and the lack of specifically identified victims as: "an unknown number of women and girls [who] were abducted from various locations within the District and used as sex slaves and/or forced into 'marriages'" (Consolidated Indictment, 13). The broad geographic scope expands the guilt because it is not one action in one location. The broad geographic scope implies the possibility of multiple crimes being committed at various locations at the same time. However, the multiplicity of the crimes fails to establish a direct link between the ambiguous charges and the Individuals responsible. Further the pleading also states, "an unknown number of women and girls" (Consolidated Indictment, 13). The lack of specificity to identify the victims, besides their gender, in the indictment instigates an image of collectively committed crimes.

If the victims cannot be identified and the number of victims is unknown, the charges deviate the focus from the nexus of the individual and the victims. The lack of material facts to identify the victims raises further questions about the individual's responsibility. The reference to "unknown number" suggests that this was a collective action because it frames unknown, as being so large that an exact number cannot be derived (Consolidated Indictment, 13). The image of the collective is perpetuated further by the charges not providing the material fact to clarify the individual responsibility of the leaders in connection to the abductions. The ambiguity in the charges produces a criminal collective entity as well. The interpretation of the collective that the charges produce is rhetorically engrained in the minds of people. The collectivization of guilt that occurs through the indictments puts the underlying principles of the statute of "individual responsibility" (Statute, Art. 6, Sec. 1) in danger. The indictments produce a narrative that hazes the events of the Sierra Leone civil war, and those involved. The ambiguity creates an unconscious method of association between these crimes and the organization the accused belong to. Vagueness, in turn, shapes the narrative that the trial produces.

However, vagueness was not the only reason for how guilt was collectivized. Crane, the senior prosecutor of the SCSL, used Joint Criminal Enterprise produced a narrative that criminalized everyone in the RUF even though he only prosecuted a few as "those most responsible" (Statute). Ironically, this extended rather than constrained the reach of the guilty associations. Joint Criminal Enterprise is not a crime; rather it is a mode of liability. To effectively plead JCE, the prosecutor must be able to clearly outline the intent (*mensreus*) to commit a common criminal plan. In the core of the indictment the prosecutor must be very specific in outlining both the *mensreus* (bad intent) and *actusreus* (bad act) that members partook in the furtherance of the "criminal"

common plan. Crane, the prosecutor at the SCSL, claimed that the common purpose or plan was “to take any action necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas” (Crane, 135). Furthermore, the prosecutor plead the third mode of JCE. JCE (III) emphasizes only the need of (mensreus) bad intent in committing the common plan. However, in avoiding proving bad acts (actusreus), the liability is extended to all crimes that were foreseeable. The foreseeable crimes are crimes outside the common plan, but can still be linked and included in the indictment because the accused was part of the common plan. The prosecution pleads a crime outside the common plan (JCE I) but inherently foreseeable to the common plan (JCE III) in the alternative for all crimes. The prosecutor did this by stating, “the crimes alleged in this indictment...**were either** actions within the joint criminal enterprise **or** were a reasonably foreseeable consequence of the joint criminal enterprise” (Crane, 135). Crane engaged in alternate pleading, by charging for crimes that were either within or outside the common purpose. The root of the problem stems from the fact that the prosecutor pled a non-criminal JCE, and lowered the requirement to bring in all the accused under a different common plan.

Pleading a JCE that was not criminal had a drastic effect on the narrative and where guilt was placed. The Chambers judgment in the RUF trial completely altered the definition of what constitutes a criminal common purpose for the doctrine of JCE. The chamber stated, “this, the chamber finds, shows that in implementing their objectives, all means geared toward achieving this goal of ‘to procure arms for a broad based struggle so that the rotten and selfish government is toppled’” (Trial Judgment, 120). The shift in the common plan to include procuring arms for a struggle shifts from non-criminal to criminal. The trial chamber through its discretion attaches criminal intent to the common plan.

Alternative pleading, gave the prosecutor the ability to connect a vague indictment with a vague form of liability and convict few individuals, while collectivizing the guilt. The Trial Chamber's positive interpretation of JCE can be illuminated by the convictions of members of the RUF and AFRC. However, in convicting the individuals JCE offered the prosecutor a method by which to shape a narrative, according to Justice Fisher, the interpretation of JCE as a liability "for membership in an organization" (Appeals, 513).

The effect of collectivizing guilt is counter-intuitive in international law and the ability to have transitional justice. Prosecutorial discretion afforded Crane the opportunity to shape a narrative that was able to portray the RUF and the AFRC as organizations that were inherently criminal. David Crane has said, "the operative word is 'greatest'" (Crane, 135). The adjective, greatest, makes the work of the Court achievable in a reasonable time frame. By inserting this word the number to 'most' responsible and the number of indictees rises dramatically to 50-100" (Crane, 135). Crane viewed the collective AFRC/RUF as criminal and he attempts to justify his actions through the court's decision to use "greatest," notwithstanding from the fact that Crane did not see a small group as responsible or an individual. Crane's view of the AFRC/RUF as inherently criminal is further reflected by the ambiguity within each indictment. The ambiguity leads one to conclude that Crane saw the RUF as an inherent criminal organization. Charles Jalloh comments that the discretion that Crane has in reducing the number of potential cases from 30,000 individuals to about 20 is frightening: As Jalloh concludes, Crane "insinuates that all combatants in the Sierra Leone war could have been prosecuted" (Jalloh, 404). The collectivization of guilt that Crane was able to achieve from the onset of the Court must be noticed. Crane's initial attempt to join all the accused under one indictment help shed light on his own personal view.

Crane believed the AFRC/RUF was one large criminal group attempting to overthrow the government. Moreover, the ambiguity of the indictments specifically the constant use of AFRC/RUF added to the collective guilt mentality.

Finally, the ability to plead JCE on three of the four cases and obtain three convictions through JCE all illustrate the power of the prosecutor to create a narrative. Michael Ignatieff has said, "the most important part of War crimes trials is to 'individualize' the guilt, to relocate it from the collective to the individuals responsible" (Ignatieff, 116-117). Crane, in the case of the SCSL did the opposite. He used individual responsibility to relocate to the collective and develop a narrative that condemned participation in the RUF. Crane accomplished his goal to convict the entire AFRC/RUF as one criminal organization. The conviction, however, was not through the legal arena. Rather it was through the narrative that the trial chamber produced. Wayne Jordash, the Defense attorney for Sesay, and Penelope Van Tuyl, a court monitor for the SCSL, present the initial curiosity of this research: "under the SCSL's new JCE standard, there is no threshold requirement that a shared criminal plan, design or purpose is intended by the JCE members; it is sufficient that they share a lawful common objective" (Jordash & Van Tuyl, 599). The Trial Chamber extended the arm of guilt. People can now be convicted for simply rebelling or trying to overthrow an unjust government. Individual responsibility is an essential principle in international law because of the benefits it presents such as achieving transitional Justice. Stressing individual responsibility reduces the ability for prosecutors like Crane to shape a narrative of the facts, that criminalizes entire groups like the RUF and AFRC. Further, the collectivization of guilt, as can be seen in the narrative constructed by Crane, does not help achieve transitional justice. Collectivizing guilt produces a fragmentation of the social fabric as it occurred in Sierra Leone and condemns groups of people for

their participation in the organization, as occurred with the members of the RUF and AFRC.

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Genocide Prevention and Deterrence: The Necessity of Complementarity Between Legal and Political Rhetoric

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In the preface to *A Problem from Hell*, Samantha Power claims that “we have all been bystanders to genocide” (Power xvi), choosing to look away while knowing that atrocities against other human beings took place. Although legal rhetoric has focused on furthering human rights, political rhetoric in the U.S. has played a major role in swaying public opinion in favor of not taking a stance against genocide. It has done so by portraying the violence as two-sided instead of one-dimensional, by insisting that U.S. response would not be beneficial, and by avoiding the word “genocide” altogether. The U.S. stance on genocide can be summarized by the following sentence: “Pursuing justice... would delay peace” (Power 483). Yet, when the political arena has been successfully mobilized, it has worked in conjunction with legal rhetoric to pursue and achieve justice with regard to genocide. This has been demonstrated in the Yugoslavia, Rwanda, and Cambodia genocide prosecutions, where political and legal rhetoric have been mutually supportive. It has not occurred in the

Iraqi genocide, where political rhetoric was not in favor of prosecuting the perpetrators. In this paper, I make two claims. First, that by coining the term "genocide," Raphael Lemkin hoped to prevent and punish its future instances; and second, that a symbiosis of legal and political rhetoric is necessary to achieve this goal.

"Like law, rhetoric invents; and, like law, it invents out of something rather than out of nothing" (White 66). This constitutive view of law perceives it as meaning-making and community-building. Raphael Lemkin, the Polish international lawyer who witnessed the horrors of the Holocaust, also questioned his community and language. When he commenced the search for the perfect word that would give "the crime without a name" (Power 29) a name, he knew the word must serve as an umbrella, encompassing physical, biological, political, social, cultural, economic, and religious assaults against a specific group. The crime would not be confined to mass extermination, but would also include mass deportation, the separation of men and women, economic exploitation, and purposeful starvation (Power 40). The word would invoke moral judgment and indignation from all who hear it. The new word was "genocide." Lemkin had studied the Armenian Genocide, lived during the Holocaust, and wanted to make sure that these atrocities would never recur.

The law can serve as ideological power, controlling the definitions of and access to knowledge (Turk 44). Lemkin wanted to use his new word to rebuild the law and restore its human rights values through ideological power (Power 48). Hitler had used the law to commit genocide. Lemkin could use the law to prevent and punish it. Lemkin's aim was twofold. First, he wanted to make genocide an internationally prosecutable crime and to hold those who committed it responsible for their actions. Second, he hoped that eventually, this new international crime would have the power to deter future perpetrators, thus preventing genocide

altogether. Lemkin relied on fundamental rights theory in advocating for the Genocide Convention. Fundamental rights theory claims that promoting justice and human welfare is more important than the need for predictability and stability (Edwards 231). Lemkin claimed that people have a fundamental right to life, and lawmakers should use this principle when signing and ratifying the Genocide Convention. This was the moral and aspirational component of Lemkin's genocide project. He hoped that by incorporating the morally apprehensible crime of genocide into international law, future genocides would be prosecuted objectively, and not ignored subjectively based on political preferences. As Herbert V. Evatt, the United Nations General Assembly President at the time of the passage of the Genocide Convention stated, "Intervention of the United Nations and other organs which will have to supervise application of the convention will be made according to international law and not according to unilateral political considerations" (Power 60). Though, as future events demonstrate, in order for genocide intervention to be successful, nation states' unilateral political considerations would have to favor it.

During the post-World War II Nuremberg trials, high-ranking officials responsible for the atrocities committed against the Jewish, Polish, Roma, and other "undesirables," were tried on counts of crimes against humanity. Lemkin perceived the trials as insufficient because the Nuremberg court prosecuted only those crimes committed *after* Hitler invaded Poland. Thus, had he not invaded Poland, Hitler could have wiped out the entire Jewish population, and he would not have been held accountable for any crimes against humanity (Power 49). This would be a repetition of the Armenian Genocide, for which the Turkish government was not held accountable, since the genocide was committed within Turkey's sovereign territory. Lemkin fought for making violence targeting certain groups within, *as well as outside of*, a country's

territory illegal. The Nuremberg decision, however, did not include any mention of genocide, and convicted the Nazi defendants only of crimes against peace, war crimes, and crimes against humanity. This came as no surprise, as genocide was a freshly-coined word, a novel concept, and an unchartered crime. Genocide had not yet been embraced by the formal written law and had not been part of any treaty or customary law at the time of the Nuremberg trials. Prosecuting the Nuremberg defendants for genocide would have constituted a gross violation of legality, or the principle forbidding retroactive application of penalties for crimes (International Criminal Law & Practice Training Materials 214).

Lemkin knew that in order for the Genocide Convention to be signed and ratified by the UN member states, he had to use political rhetoric, in addition to legal rhetoric, to make the UN delegates feel as if they were protecting their domestic interests and channeling the wishes of their citizens while simultaneously protecting human rights abroad. Lemkin framed genocide as a state security issue and not just a human rights issue, emphasizing the fact that it can happen anywhere, at any time, and its ramifications would lead to a great loss of the world's culture (Power 53). Lemkin contributed to the "universalization of the concern for human dignity" (Teson 379) by taking a stand against cultural relativism (Rorty 245). Only after these two types of rhetoric jointly endorsed Lemkin's genocide cause could the Genocide Convention garnish a nation's support. Through the joint mobilization of political and legal rhetoric, the Genocide Convention was signed and eventually ratified. When it entered into force, it closed the gaps in the previous Nuremberg legislation by making no distinction between genocide committed inside or outside of a country's borders, during peacetime or wartime (Power 58). Lemkin's struggle paid off, though half a century passed before the first genocide trial took place.

In 1993, the UN created the International Criminal Tribunal for the former Yugoslavia (ICTY) per its Chapter VII powers. As of 2011, the ICTY prosecutor has sentenced 64 out of 161 indicted defendants for genocide, war crimes, and crimes against humanity (International Criminal Law & Practice Training Materials 235). In 1994, the UN established the International Criminal Tribunal for Rwanda, also under Chapter VII. As of 2011, 38 out of 92 indicted individuals have been convicted on counts of genocide, war crimes, and crimes against humanity (International Criminal Law & Practice Training Materials 238). Also in 1994, the U.S. passed the Cambodian Genocide Act and indicated its official commitment to support the establishment of a national or international tribunal to handle the prosecution of the offenders responsible for genocide during the Khmer Rouge regime (Power 487). In 2004, an international agreement between the UN and Cambodia led to the creation of the Extraordinary Chambers in the Courts of Cambodia hybrid court, which was appointed with the task of trying those who had committed genocide, crimes against humanity, and other violations of both Cambodian and international law from 1975 to 1979 (International Criminal Law & Practice Training Materials 240-241).

The Yugoslavia, Rwanda, and Cambodia genocide prosecutions all share a common theme. When the genocide commenced in each respective country, the political response from the outside world was to abstain from involvement. In the U.S., the focus was on not knowing that atrocities were occurring, or on not being able to fully appreciate the knowledge. Then, sporadically, the political atmosphere changed and interference was encouraged. The movement against genocide gained momentum. In other words, legal rhetoric became useful internationally only after the recognition that genocide was occurring and the desire to stop it were politically recognized domestically. Legal and political rhetoric worked together to

achieve the results of establishing tribunals and courts that tried defendants on genocide charges. The genocide cases above have proved that political rhetoric by itself is inadequate and, in isolation, legal rhetoric is equally impotent. One would not have been sufficient without the other. It is only when the two have come together that genocide cases have been successfully prosecuted. This is precisely what Raphael Lemkin believed and hoped for when he began working on the Genocide Convention project. Lemkin used both legal and political rhetoric to advance the Genocide Convention before the UN because he realized that legal rhetoric promotes human rights on the international arena, while political rhetoric furthers state interests on the domestic front. Lemkin simply had to prove that genocide prevention serves a legitimate state interest. One type of rhetoric is not more or less potent than the other – on the contrary, they are both viable tools for justice when deployed in conjunction.

As further proof of this claim, not all genocides since the establishment of the Genocide Convention have been prosecuted. Iraq's invasion of Kuwait is a prime example of inaction. In this case, while the legal rhetoric was already established, it was muted by political rhetoric, which turned a blind eye and continued to address more conventional strategic domestic concerns. The U.S., for example, chose to "trust in negotiation, cling to diplomatic niceties and 'neutrality,' and ship humanitarian aid" (Power 504). U.S. policymakers in the executive branch wanted to disengage from conflicts that were not crucial to U.S. interests, while simultaneously avoiding the moral reprimand associated with allowing genocide to continue unimpeded (Power 508). To achieve these results, U.S. officials cycled through claims of the ambiguity of knowledge and vagueness of human rights. They emphasized the futility of U.S. intervention, arguing that it will either do no good, or do more harm than good. Most importantly, they steered clear of the word "genocide" because of

its underlying duty to act (Power 508). Genocide was ostracized from the political arena and, since legal and political rhetoric were not synchronized, prosecution was not viable.

Raphael Lemkin coined the word "genocide" in 1944, persuaded the UN to sign the Genocide Convention outlawing it in 1948, and worked assiduously to promote international recognition, indignation, and prosecution of the crime of genocide for the rest of his life. William Proxmire achieved ratification of the Genocide Convention in the U.S. in 1988, with the passage of the Proxmire Act. The 1998 Rome Statute establishing the International Criminal Court included a ban of the crime of genocide. Progress was slow and uncertain, but during the 1990s, genocide became a crime officially prosecuted in an international court. The long road towards genocide prosecution has proven that in order for those responsible for genocide to be punished, and in order to eventually prevent genocide from happening at all, the legal and political spheres of rhetoric have to form an ideological symbiosis.

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Consumer Protection Policies and Practice of Automobile Industry in China: Explanations and Findings

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I. Abstracts:

The development of recent consumer protection legislation in China can be traced back to the late 1980s and early 1990s. The Law of the People's Republic of China on Protection of Consumer Rights and Interests released on Oct 31st, 1993, was the first law devoted to consumer protection in China. Despite the rapid development of consumer protection legislation since late 1980s, individual consumers in the automobile industry nowadays still complain about how little protection they get after purchasing their passenger cars. This project aims to examine how Chinese consumers in the industry of passenger cars are protected under the current consumer protection legislation through a three-level process analysis of consumer protection policy and practice. First, there will be an analysis on the legislative piece to see what legal principles are adopted in the Law of the People's Republic of China on Protections of Consumer Rights and Interests and Product Quality Law of the People's Republic of China (2000 Amendment). The second level of analysis will focus on China Consumers' Association (CCA) to examine how consumers' complaints are legally resolved and whether CCA has followed the principles of the Law of the People's Republic of China on

Protections of Consumer Rights and Interests in the process of complaint resolution. The final level of analysis will focus on consumers' individual behaviors and the interactions between consumers and car dealers in the process of informal dispute resolution. Throughout this multi-level process analysis, I will hopefully answer the question of whether Chinese consumers are adequately protected by the consumer protection law, and if not, why. Besides this explanatory purpose, this study will also generate broader implications on how better consumer protection mechanisms will potentially benefit private businesses and the development of China's automobile industry as a whole.

II. Introduction:

Gene A. Marsh in the Consumer Protection Law In A Nutshell, defines consumer transaction as follows: "A consumer transaction occurs when a person obtains goods, real property, credit, or services for personal, family, or household purposes" (Marsh, 1). As free markets develop throughout the world, an international focus on consumer law becomes more and more relevant (Marsh, 3). In 1985, the United Nations adopted The United Nations Guidelines for Consumer Protection, which has a significant influence on consumer policy actions undertaken by governments and consumer groups (Marsh, 2).

The surge in consumer protection in China starting 1980s was in part a response to the wave of the international influence. But more importantly, it was a signal that the Party first gave a green light to the free market economy. As more and more products become commercialized commodities, there also emerges great importance of consumer protection policies. The new era in the late 1980s and early 1990s marked the development of specified consumer protection laws in China. The People's Republic of China passed Law of the People's Republic of China on Protection of Consumer Rights and Interests on Oct 31st, 1993, which was the first law devoted to consumer protection in China (Xu, 27). However, while Article 45 of the Law of the People's Republic of China on Protection of Consumer Rights and Interests specifically states that "Business operators shall be responsible for repair, replacement or return of goods, if

repair, replacement or return of goods is guaranteed by provisions of the State," this provision has not been formally implemented on the cases of passenger cars until the regulation on free repairs, replacement and return for automobiles by the General Administration of Quality Supervision, Inspection and Quarantine was enacted in January, 2013.

This phenomenon raises a controversial question: if The Law of the People's Republic of China on Protection of Consumer Rights and Interests already has the provision of repair, replacement and return, why do we need a separate regulation for automobiles? This leads to the two primary research questions to be answered by this paper:

(1). What are the current consumer protection policies and practice in the automobile industry in China? How are Chinese consumers protected at the current stage?

(2). If consumers are not adequately protected under the current consumer protection policies and practice, how can it be explained given China's uniqueness in its economic and political systems?

III. Literature Review:

Law and Legal System:

Junkie Xu, in his journal article *Who Will Protect Chinese Consumers? The Past, Present, And Future of Consumer Protection Legislation In China*, lays out the map of the historical development of consumer protection legislation in China since 1980s. As he points out, the initial stage of the Chinese government's attempt of addressing consumer protection are the Temporary Provision Related to Total Quality Management of Industrial Enterprise in 1980 and the Regulations on Quality Responsibility for Industrial Products in 1986 (Xu, 24). According to Xu, this initial stage demonstrated China's acknowledgement of the necessity for consumer protection (Xu, 24). The new era in the late 1980s and early 1990s marked the development of more specified consumer protection laws. The P.R.C passed The Law of the People's Republic of China on Protection of Consumer Rights and Interests (CRIL) on Oct 31st, 1993, which was the first law devoted to consumer protection in China (Xu, 27). The most

important development about CRIL is that for the first time in Chinese law, it “outlined the specific rights to which the consumers were entitled, the obligations of the consumers, and the obligations of the providers of goods and services” (Xu, 27). More importantly, it outlines the role of the government in consumer protection. Since the CRIL serves as the “core of China’s unique and complex legal system to protect the consumer” (Xu, 36), I will first look into the ways in which it is effective, as well as its insufficiencies in several aspects as Junkie Xu points out to see how they affect the consumer protection in the automobile industry. However, we must also note the national legislation of consumer protection in China only serves as a broad guideline, and much of the actual implementation is subject to local interpretations. Therefore, I am especially interested in finding out how disputes are resolved at the level of dealership by interviewing passenger-car consumers and automobile dealers.

Although Junkie Xu in his study provides a comprehensive historical development of consumer protection legislation in China since the 1980s, he does little study on the consumer protection legislation in the automobile industry specifically. One example is the “Three Guarantees”. In China, the term “three guarantees” (*san bao*) is used to describe the warranties on goods sold (King, Tong, 23). The “three guarantees” in the consumer-law context are “repair,” “replace,” or “refund” (King, Tong, 23). The initial form of “Three Guarantees” was rooted in the *Regulations on Quality Responsibility for Industrial Products* issued by the State Council in 1986 (Xu, 30). In 1995, The State Economic and Trade Commission issued the *Provision on the Liability for the Repair, Replacement, and Return of Some Commodities*, and expanded the kind of commodities regulated by “The Three Guarantees” from six to eighteen types (Xu, 30). However, up until now automobiles are still not covered under Provision on the Liability for the Repair, Replacement, and Return of Some Commodities although a separate law on free repair, replacement and return for automobiles is enacted. Moreover, Junkie Xu points out that local legislation plays an important role in China’s consumer protection law. Consumer protection began in city and province levels in the 1980s, with local legislations passed even before the

CRIL (Xu, 50). Because of the decentralized structures of local institutions, local regulations are more flexible and thus easy to meet local needs (Xu, 51). However, these local governments are also further from the control of the central government and thus more flexible in the implementation of their laws. This study will set aside the legislative aspect and focus more on the actual implementation of consumer protection laws. Due to the important influence of the local legislation on the actual implementation procedures in the local level, I will also be looking into the local consumer protection legislations of Zhejiang Province, the jurisdiction in which I will conduct my interviews. Whether the consumer protection rights are legally implemented in the local level and how are consumer complaints resolved involve more in-depth study about China's political and cultural environment, and that is what this study is designed to address.

Government and Economic Enterprises:

Besides the importance of the consumer protection legislation, whether consumers are adequately protected by the consumer protection law is largely influenced by law enforcement in the local level. In order to delve deeply into the complexity of law enforcement policy by the Chinese government, it is important to examine the relationship between the Communist Party and economic enterprises, including both the State Owned Enterprises and private businesses. This examination will hopefully give us a broad view of how government's behavior and decisions are influenced by big companies. Richard McGregor, in his *The Party—The Secret World of China's Communist Rules*, offers a captivating portrait of how the Party controls the government and its businesses. As McGregor points out, the Tiananmen crackdown on June 4th, 1989 drew a dividing line between two eras of reform in China (McGregor, 36). The vanities of relatively open political and economic atmosphere by Zhao Ziyang were out and the Party started to reassert its authority once and for all (McGregor, 36). This redefines the relationship between the Chinese government and businesses: instead of trying to protect the state sector, which was threatening to sink the economy, the Party streamlined government enterprises and pilot them into the global business

arena. However, the fact that these businesses become much more global and commercial does not prevent them from being communist. In fact, the transition from the central planning economy to the market economy under Deng's new model does force the Party to pursue free-market reforms, but is "in tandem with recalibrating and tightening political authority in Beijing" (McGregor, 42). The new style of the Party's control over state owned enterprises, according to McGregor, gives top executives of state enterprises a relative freedom to run their businesses, but the Party has retained its influence by maintaining power over all senior appointments (McGregor, 68).

The Party's control over private businesses is a similar story. On one hand, the Chinese Communist Party opens up the market and allows business people to get rich. On the other hand, the Party moves closer to them in order to maintain their political control. One way of doing so is Jiang Zemin's 2002 announcement at the five-yearly party congress that entrepreneurs could officially join the Party (McGregor, 208). These entrepreneurs are invited to the Central Party School in Beijing, but they are kept enough of a distance from the Party so they have no chance to "organize into a rival centre of power" (McGregor, 128). Another way of moving close to the private businesses is to establish Party Committees in every single private business, including foreign enterprises. The permanent aim of doing so, as McGregor points out, is to "have a permanent party presence in every large private company in the country" (McGregor, 214). McGregor's comprehensive analysis of the relationship between the PRC and economic enterprises serves as a reliable political background for my study. It also supports my hypothesis of why the Chinese government is reluctant to push hard on law enforcement. Because China's major automobile manufacturers are owned by the state, overprotecting consumer rights by enforcing the compensation policies will unavoidably hurt the government's revenue. Similarly, given the large impact of private businesses on China's open market economy, it is of the great importance for the government to keep close tie with these businesses. Since large private automobile dealers also have close relationships with the PRC (its senior executives are either appointed by the PRC or have close ties with the PRC), the

government is unwilling to hurt their benefits by enforcing laws to protect consumers.

Individual Behaviors and Decision-Making:

A. Transformation of Disputes Theory:

In the article *The Emergence And Transformation of Disputes: Naming, Blaming, Claiming*, Felstiner, Abel and Sarat (1980-1981) provide a framework within which the emergence and transformation of disputes are described. The study focuses on the three stages from which dissatisfactions develop into disputes: naming, blaming and claiming. Disputes first emerge from its first stage naming, "This first transformation-saying to oneself that a particular experience has been injurious –we call naming" (Felstiner, Abel and Sarat, 635). The stage of naming is transformed into its second stage, blaming, when "the transformation of a perceived injurious experience into a grievance" (Felstiner, Abel and Sarat, 635). The third stage, claiming, is "when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy" (Felstiner, Abel and Sarat, 635). The stage of claiming is finally transformed into disputes when claims are rejected in whole or in part.

Felstiner, Abel and Sarat's study of dispute transformation will serve as an important theoretical guideline for my research because their study approaches disputing through individual perceptions, behaviors, and decision-makings. In my analysis of the interactions between consumers and automobile dealers, I am also interested in examining the early stages of conflict transformation with a focus on individual behaviors in decision-making. The study of these un-institutionalized disputes will provide another layer of analysis underneath the formal legislation. The downside of this study is that it provides a rather broad theory of dispute transformation, with little in-depth examination on how specific culture and political background of a country can influence individuals' behavior in decision-making. Since China is a unique nation with specific culture and Party-centered political environment, individual behaviors of its people will unavoidably reflect this. Thus in my research, I plan to integrate the insight

of Chinese culture and legal consciousness into this general theory of dispute transformation in order to conduct a relatively comprehensive analysis on how individual behaviors of consumers and their interactions with the dealers influence the level of protection consumers receive from law.

B. Individual Legal Consciousness Theory:

Another reason why Chinese consumers are not adequately protected by the Consumer Protection Law can be explained by whether they are willing to actively seek legal remedies and whether informal dispute resolution remedies work for them at the level of dealerships. This is fundamentally a question of how people understand and make use of law in their everyday life. One of the classic studies about this is by Patricia Ewick and Susan S. Silby. In *The Commonplace of Law*, Patricia Ewick and Susan S. Silby investigate the presence and consequences of law in social relations. In order to discover this, they try to understand "how legality is experienced and understood by ordinary people as they engage, avoid, or resist the law and legal meanings" (Silby, 35). This is how legal consciousness is defined. Patricia Ewick and Susan S. Silby developed a cultural analysis of legal consciousness, and my study about how Chinese automobile consumers seek legal remedies is strongly related to this theory. In the cultural analysis, they point out that societies provide us with specific opportunities for thought and action, and these schemas include cultural codes, logics, hierarchies of values, and conventions (Silby, 40). In other words, culture and societal values serve as important factors on how people react to law and legal remedies. In addition to schemas, societies also "produce and distribute resources, material assets, and human capacities used to maintain or enhance power" (Silby, 41). Resources, according to Ewick and Silby, include "diverse objects and abilities as legal knowledge, capital, property, political connections" (Silby, 41). The differential distribution of resources, together with the differential access to schemas, underwrites how people view law and legality.

Patricia Ewick and Susan S. Silby's theory on legal consciousness will serve as the theoretical guide for my study on

the consumer side of the story. I am interested in examining how cultural schemas and distribution of resources in China affect the legal consciousness of individual consumers. In other words, by conducting interviews and surveys with individual automobile consumers who have experienced problems on their newly purchased passenger cars, I am interested in examining how cultural schemas and resources affect whether or not they are willing to take legal approach to resolve their complaints.

C. Cultural Skepticism of Rule of Law:

Chinese consumers' disfavor towards formal legal remedies may also be explained by China's implicit cultural assumption against the rule of law. In contrast to the Western view, China historically and contemporaneously views the rule of law with skepticism (Chew, 47). The Chinese skepticism of the rule of law can historically be traced back to two approaches: the Legalist approach (*fazhi*) and the Confucian approach (*renzhi*) (Chew, 49). The Legalist approach is what the West considers as the rule of law, while the Confucian approach is what the West considers as the rule of people. The debate between the rule of law and the rule of people first occurred over two thousand years ago and emphasized the following arguments: Legalists argue that rulers should rely on formal statutes and codes of the government rather than their intellect, intuition, or arbitrary preferences (Chew, 49). The Confucians, on the other hand, argue that the rulers should be guided by social and cultural norms (Chew, 49). The rules of proper conduct called *li*, should be the basis of governing (Chew, 49). Throughout the history, the clear tendency of who has won the debate has been for a preference towards the rule of people. As Chew points out, "Chinese society and government have opted repeatedly for moral guidance and cultural norms to trump over the rigidity of formal laws" (Chew, 53).

I believe that the Chinese cultural skepticism of the rule of law has influential impact on how individual consumers behave in the process of dispute resolution. China's specific culture on the rule of law and the rule of people will provide more insight into the theory of legal consciousness to explain that although individual consumers may behave differently based on cultural schemas and

resources the society provides them, their behaviors do rely on a certain level of common ground due to the culture they are embedded in. Moreover, this study will also integrate the theory of transformation of disputes to examine the role of culture in each stage of dispute transformation: naming, blaming and claiming.

Interpretation of Public Legal Rights in Alternative Disputing Forums:

Shauhin A. Talesh in his article *Lost In Translation: How Competing Organizational Field Logics Mediate The Meaning of Rights*, addresses the issue of conflicting field logics over the purpose and meaning of lemon laws and the goal of dispute resolution structures (Talesh, 1). "Procedural attack on rights" is a term that refers to the "legal strategies and court decisions that trim or erode the procedural and practical mechanisms concerning civil and consumer rights enforcement" (Talesh, 2). According to Talesh, the most notable procedural attack is reflected in "the court's willingness to re-route claims from courts into private disputing forums often with varying degrees of business involvement" (Talesh, 2). The procedural attacks significantly impact consumer rights enforcement as consumers often "resort to informal non-legal methods of dispute resolution" (Talesh, 2). Given that the previous scholarly inquiries concerning the procedural attack on rights all focus on the results of legal decisions on the rights themselves, Talesh in his study, focused rather on how rights are enforced, interpreted and implemented once they have been routed away from courts (Talesh, 2). By studying the private dispute resolution processes, he was also able to address the issue of how organizations (as opposed to courts) shape the meaning of public legal rights in alternative disputing forums they create (Talesh, 2).

Talesh's study shows that field actors from across the United States agree that alternative dispute resolution venues are preferable to courts for resolving lemon law disputes (Talesh, 6). There is also consensus that lemon laws are ambiguous with respect to their meaning, and thus create much room for interpretation by field actors (Talesh, 6). More importantly, Talesh points out that "public (state regulators, state lemon law

administrators, policymakers) and private(automobile manufacturers, automobile dealers) actors conflict regarding the goals of informal dispute resolution and the purpose of lemon laws” (Talesh, 6). According to Talesh’s interviews, private actors view goals and purposes of lemon laws and dispute resolution through a “business” logic that focuses on efficiency and allowing managerial discretion, while public actors adhere to a “consumer” logic that focuses on public safety, consumer protection and values such as rights, transparency, and following formal law (Talesh, 6).

Talesh’s study on the contestation in field logics in the realm of informal dispute resolution is central to my research because I am also interested in examining how disputes are resolved informally outside of courts. By comparing how consumer complaints are formally resolved by the China Consumers’ Association with how disputes are resolved privately between consumers and automobile dealers, I will be able to test Talesh’s research result on the contestation in field logics between “public” actors and “private” actors in the context of China. However, given that my study will be taken place in China, a country with unique political and economical environment, my study will also be subject to various factors (eg. culture) that may affect the results. Although the two countries are significantly different in various aspects, China’s national legislation on consumer protection is also ambiguous with respect to its meaning, and thus is subject to interpretation by different field actors. Moreover, given the fact that consumer protection rights are largely influenced by the interactions between public and private actors in the consumer protection law field, Talesh’s study provides me with a new perspective on understanding China’s consumer protection policies and practice.

IV. Methodologies:

Law and Legislation:

My first level analysis will focus on the textual analysis of Law of the People’s Republic of China on Protection of Consumer Rights and Interests released on Oct 31st, 1993 and Product

Quality Law of the People's Republic of China (2000 Amendment). I am interested in examining what legal principles are adopted in the Laws regarding what rights consumers ought to have in a general sense. Moreover, I will be looking into the roles business operators ought to play under both Laws and compare this with what businesses actually do over the issues of defective automobiles. Finally, I will analyze what the Laws require administrative departments and agencies to do in order to reach the State goal of consumer rights protection.

Moreover, my preliminary research has shown that although automobiles are generally not covered by the current national consumer protection legislation (Law of the People's Republic of China on Protection of Consumer Rights and Interests), the local consumer protection legislation of Zhejiang Province has incorporated consumer protection of automobiles into its provincial measures. Therefore, besides the national legislative pieces, I will also examine the local legislative piece: Procedures of Zhejiang Province on the Law of the People's Republic of China on Protection of Consumer Rights and Interests. The local legislative piece will serve as important supplementary materials to gain insights on law enforcement process.

Law Enforcement Agency:

My second level of analysis will focus on China Consumers' Association. The CCA is "a national organization legally registered to protect consumers' interests by means of supervision of commodities and services" (China Consumers' Association). According to the Law of Protection of Consumers' Rights and Interests of the People's Republic of China, the CCA is responsible to "receive, inspect and mediate the complaints of consumers" (China Consumers' Association). If the complaint refers to the qualities of commodities or services, the CCA is also responsible to "require appraisal department to appraise the quality of commodities or services" (China Consumers' Association). Furthermore, if the complaint reaches a higher level, the CCA is responsible to "support the infringed consumers in making lawsuits on violations of consumers' interests" (China Consumers' Association).

Given the CCA's legal responsibilities under the Consumer Protection Law, I am interested in examining how the CCA resolves consumers' complaints in the cases involving automobile quality issues, and whether the real practices align with what was written in the Law. The cases I have obtained currently are approximately twenty written cases within the timeframe between 2002 and 2008. They are the past cases resolved by the CCA provided by a CCA official, whose name will not be disclosed in my research. I have also contacted the official to request more recent cases. But since these cases are not yet published, they are only available on the CCA's internal website. Therefore, I will need to sit in the CCA's office in order to review them.

Individual Behaviors and Decision-making:

My third level of analysis will focus on individual consumers' behaviors and decision-making with respect to the following questions: how do disputes emerge and how are they transformed before they have reached the stage of formal remedy? Research methodologies employed for this part of the analysis are largely in-depth interviews with individual consumers who have bought passenger cars recently and who have experienced quality issues of their newly purchased passenger cars. The theoretical foundation of my interview questions will be based on the three stages of dispute transformation described in Felstiner, Abel, and Sarat's *The Emergence And Transformation of Disputes: Naming, Blaming, Claiming...* Besides the interviews with individual consumers, I will also conduct in-depth interviews with local passenger-car dealers in order to analyze the interactions between individual consumers and car dealers with respect to dispute resolution. The style of interviews will be semi-structured. That is, I will ask standard questions related to my research question, as well as give my interviewees enough room to expand on any issue they want to express. Due to the limited resources and networks I am exposed to in China's automobile industry, a Snowball Sampling technique will be used in my interviews with the car dealers. That is, I will start from one local passenger car dealer and will later get referred by him to other dealers.

Semi-structured In-Depth Interviews:

A. Individual Consumers:

The pool of interviewees will consist of individual consumers who have bought passenger cars from local dealers. This pool of consumers will be divided into two large subgroups: one group of consumers has already experienced quality issues of their new-purchased cars and have already reported their complaints to the China Consumers' Association, while the second group of consumers have expressed no intention for dispute resolution. I will first get access to the contact information of the first group of consumers through CCA's internal case documents. Phone surveys will then be conducted to each one of the consumers whose complaint was received by the CCA. The goal of the phone surveys is to invite each consumer to an in-person interview. However, if a consumer refuses to meet in person, a phone interview will be conducted instead. For this group of consumers, my questions will be focused on the process of how disputes emerged and developed. Given that the process of dispute development has three stages: naming, blaming, and claiming (Felstiner, Abel, and Sarat, 635), my questions will focus on each individual stage. Moreover, I am specifically interested in how the last stage--claiming, has developed into disputes when consumers' claims are rejected by the dealer. This methodology will provide a close examination of Felstiner, Abel, and Sarat's theory on dispute transformation, and specifically, how this general theory is applied within the context of China.

My sampling strategy is slightly different for the second group of consumers. First, I will gather the contact information of a set of consumers who have recently purchased passenger cars in the past three years. The list of contact information will be provided by a local car dealer. Phone surveys will then be conducted to every consumer who is chosen. The goal of the phone surveys is to identify the consumers who have experienced quality issues but have not yet expressed intention to seek remedies. These consumers will then be invited to an in-person interview. For this group of consumers, my interview questions will focus on the three stages of the transformation—naming,

blaming and claiming. This is based on the assumption that certain consumers who have experienced quality issues have gone through the stages of naming and blaming (or both), but have never reached the stage of claiming. For consumers who have reached the stage of claiming, I will focus on why they decide not to go forward with their claim. Under this situation, I am interested in examining the reasons underneath it and specifically, what is the impact of "social structural variables, as well as personality traits" on dispute transformations (Felstiner, Abel, and Sarat, 635). Finally, my interview with individual consumers will also incorporate questions on Chinese culture to reflect how much an impact culture can play in the early stages of dispute emergence and transformation.

B. Car Dealers:

The second set of interviews will be conducted with local passenger-car dealers, with a purpose to understand the process of dispute transformation from claiming to dispute. According to *The Emergence And Transformation of Disputes: Naming, Blaming, Claiming...*, "a claim is transformed into a dispute when it is rejected in whole or in part" (Felstiner, Abel, and Sarat, 636). Therefore, my first part of the interview will involve questions concentrating on interactions between consumers and car dealers in the stage of claiming. Among the cases that reached the stage of claiming, I am interested in how the car dealers resolve these cases and whether they have evolved into disputes.

I plan to recruit interviewees using Snowball Sampling. I will start with one local dealer and ask him to refer me to other dealers. Considering the fact that foreign dealerships in China also have to follow international warranties constructed by their foreign parent companies, I am interested in learning whether foreign dealerships, under the constraint of international warranties, resolve disputes differently from Chinese dealerships. Therefore my intention is to start with the foreign dealership that I have been in contact with, and ask him to refer me to at least one Chinese dealership. One limitation of this interview method is the validity of the responses from the dealers, as most dealers are

concerned about their reputation and may be reluctant to uncover any information regarding disputes with their clients. However, since the responses of car dealers will be balanced by the viewpoints of individual consumers, there shall be no significantly negative impact on my study.

VI. Findings and Analysis:

a. Law in The Book:

Relationship between Law of the People's Republic of China on Protection of Consumer Rights and Interests and Product Quality Law of the People's Republic of China:

The Consumer Protection Law and The Product Quality Law are the two important laws on the national level that help regulate the market economy of China. With the effective date around 1993, both laws can be viewed as direct response to China's transformation from planned economy to market economy. After the detailed analysis of both laws, I have reached the conclusion that on one hand, the two laws are closely related as both serve an important role in terms of consumer rights protection; on the other hand, the two laws are different as they have different legislative intents and principles.

Article I of The Product Quality Law states that "The Law has been formulated with a view to reinforcing the supervision and regulation of product quality, improving the quality of products, clarifying the liabilities for product quality, protecting the legitimate rights and interests of consumers and safeguarding the social and economic order" (Product Quality Law of the People's Republic of China). By reinforcing the supervision and regulation of product quality, The Product Quality Law also reinforces the responsibilities and obligations of producers and sellers: "Producers and sellers are responsible for the product quality according to the provisions of the law" (Product Quality Law of the People's Republic of China). Since product quality is a major issue in the realm of consumer protection rights, The Product

Quality Law, therefore, plays an important role in protecting consumer rights, and thus is supplementary to The Consumer Protection Law.

The two laws are interrelated in the following aspects. First, both laws address two major relationships: the relationship between consumers and business operators and the relationship between government agencies and business operators. The first relationship is addressed in Chapter Three: Responsibilities and Obligations of Producers And Sellers of The Product Quality Law, and Chapter Two: Rights of Consumers and Chapter Three: Obligations of Business Operators of The Consumer Protection Law, respectively. Likewise, the second relationship is addressed in Chapter Two: Supervision and Control Product Quality and Chapter Five: Penalty Provisions of The Product Quality Law, and Chapter Six: Settlement of Disputes and Chapter Seven: Legal Responsibilities of The Consumer Protection Law. Second, both laws have contents that supplement and support each other. This is reflected in two ways:

(1). The Product Quality Law has comprehensive provisions with regard to the obligations and responsibilities of business operators as addressed in Chapter Three: Responsibilities and Obligations of Producers And Sellers. The Consumer Protection Law, however, lacks the comprehensive provisions regarding obligations of business operators. But it refers to The Product Quality Law as Chapter Seven of The Consumer Protection Law states that "Business Operators shall, if the commodities and services they supply involve the following circumstances, bear civil liabilities in accordance with the provisions of the Law of the People's Republic of China on Product Quality" (Law of the People's Republic of China on Protection of Consumer Rights and Interests).

(2). One of the major issues in the process of consumer protection rights enforcement is the quality supervision and control. Without proper quality supervision and control mechanisms, consumer rights cannot be successfully enforced. That is to say, quality control mechanisms serve as the standards to determine whether consumer rights are violated or not. Therefore, while The Consumer Protection Law offers no comprehensive provisions on quality control and examination

procedures, Chapter Two of the Product Quality Law provides comprehensive procedures of quality examination and supervision mechanisms.

As every individual law has its own legislative intent and emphasis, the differences between The Consumer Protection Law and The Quality Law include the following aspects. First, the two laws are guided by different principles. As Article 1 of the Product Quality Law states: "The Law has been formulated with a view to reinforcing the supervision and regulation of product quality, improving the quality of products, clarifying the liabilities for product quality, protecting the legitimate rights and interests of consumers and safeguarding the social and economic order" (Product Quality Law of the People's Republic of China). In accordance with this principle, the Product Quality Law clarifies the quality supervision mechanisms, which includes quality control standards, supervision and inspection system, and damage penalty. On the other hand, the Consumer Protection Law is formulated "for the protection of the legitimate rights and interests of consumers, maintenance of the socio-economic order and promotion of the healthy development of socialist market economy" (Law of the People's Republic of China on Protection of Consumer Rights and Interests). Second, the two laws offer different levels of compensation for damage. Although both laws claim that sellers and producers shall be responsible for losses incurred to the consumers, The Consumer Protection Law imposes more severe penalties on business operators in the case of fraudulent activities. As Article 49 of the Consumer Protection Law states: "Business operators engaged in fraudulent activities in supplying commodities or services, shall, on the demand of the consumers, increase the compensations for victims' losses; the increased amount of the compensations shall be two times the costs that the consumers paid for the commodities purchased or services received" (Law of the People's Republic of China on Protection of Consumer Rights and Interests). The increased compensation in the Consumer Protection Law perfectly reflects the principle of the law as protecting consumers' rights and interests due to the vulnerable position Chinese consumers are in compare to business operators.

Relationship between *Law of the People's Republic of China on Protection of Consumer Rights and Interests* and *Procedures of Zhejiang Province on the Law of the People's Republic of China on Protection of Consumer Rights and Interests*.

Due to the fact that there is currently no English version I can find on Procedures of Zhejiang Province on the Law of the People's Republic of China on Protection of Consumer Rights and Interests, specific provisions used to illustrate my findings will be translated to English by myself. The Procedures of Zhejiang Province is the local legislation formulated under the guidelines of the Consumer Protection Law, and thus shares the same general principles and purposes with the national legislative piece. While the general principles are the same between the two laws, the Procedures of Zhejiang Province makes more detailed inquiries into the national provisions based on the actual situation of Zhejiang Province. My research has indicated that the local legislative piece, while preserves most of the provisions of the national law, emphasizes the following aspects:

- (1). The Procedures of Zhejiang Province emphasizes the role of public media in consumer rights protection. As Article Six states: "The public media shall fulfill the responsibility of consumer rights protection by supporting the work of China Consumers' Association and exposing the activities of consumer rights violation. No public organization or individual can suppress the media exposure about consumer rights protection" (Procedures of Zhejiang Province on the Law of the People's Republic of China on Protection of Consumer Rights and Interests). The indication of emphasis on public media in The Procedures of Zhejiang Province reflects the increasing importance of social force in the process of law enforcement, which strongly affects business operators' reputation.
- (2). Article Two of Law of the People's Republic of China on Protection of Consumer Rights and Interests states that "The rights and interests of consumers in purchasing and using commodities or receiving services for daily consumption shall be under the protection of the present law, or under the protection of other

relevant laws and regulations in absence of stipulations in this law” (Law of the People’s Republic of China on Protection of Consumer Rights and Interests). Therefore, the general principle of The National Legislation is to enforce consumer rights and interests for the purpose of purchasing and using commodities or receiving services for daily consumption. Under this general principle, Procedures of Zhejiang Province on the Law of the People’s Republic of China on Protection of Consumer Rights and Interests provide more details regarding what specific activities are qualified as “purchasing and using commodities or receiving services for daily consumption” (Law of the People’s Republic of China on Protection of Consumer Rights and Interests).

(3). Procedures of Zhejiang Province on the Law of the People’s Republic of China on Protection of Consumer Rights and Interests set more clear standards for consumer compensation if the commodities and service provided by business operators led to harm, disability, or death of the consumers.

b. Law in Action:

(1). The China Consumers’ Association:

My second level analysis involves studying how disputes are actually resolved by China Consumers’ Association.

China Consumers’ Association:

Chapter Five of Law of the People’s Republic of China on Protection of Consumer Rights and Interests states the role of China Consumers’ Association: “Consumer associations and other consumer organizations are public organizations formed according to law to exercise social supervision over commodities and services and to protect the legitimate rights and interests of consumers” (Law of the People’s Republic of China on Protection of Consumer Rights and Interests). That is to say, China Consumers’ Association is a public organization that exercises social supervision to protect consumer rights and interests without the control of the government. While the CCA, as a public organization, does not have the legal authority over consumer dispute resolution and thus can only exercise the function of mediation, is nevertheless subject to the General Administration of Quality Supervision, Inspection and Quarantine. As the CCA Official revealed in the in-depth interview:

Our organization does not have the legal authority over consumer complaints. Therefore, most cases are resolved by us through informal mediation. However, we are part of the General Administration of Quality Supervision, Inspection and Quarantine, and are subject to the government regulation. For example, the chief officer of CCA in the City of Ningbo is also the chief officer of the General Administration of Quality Supervision, Inspection and Quarantine of Ningbo, the government department that regulates the product quality supervision. Unlike the U.S where public organizations possess relative autonomy from the government, CCA does not possess complete autonomy from the Chinese government. However, compare to other government agencies, CCA does provide relative freedom to consumers because consumers are free to report any complaints regarding the violations of their legitimate rights, with the expectation that we will provide them the right direction to resolve their cases.

This special relationship between the CCA and the local government provides the CCA with additional methods for dispute resolution. When I asked the CCA Official how they resolve the consumer complaints, he said the following:

Besides the informal mediation, we often use two other methods to increase the effect of dispute resolution. First is the government enforcement. Unlike the U.S where there exists the phenomenon of "Small government and big society," in China we have "Big government and small society," which means the so-called public organizations such as CCA is also subject to government regulation. For example, if we find through consumer complaints the fraudulent activities that violate the consumer rights, we can inform the corresponding government agency for administrative punishment. The second method is through media exposure. The primary function of media exposure is to ensure fair competition between business operators.

In order to further examine whether CCA, as China's primary public organization for consumer rights protection, adequately protects consumers' legitimate rights and interests, I have conducted a close analysis on the cases resolved by the CCA. These cases are collected from two major sources and are thus sorted into two categories: five cases related to automobile disputes from 2002 to 2006 are collected from *The Case Studies By China Consumers' Association* (全国消协组织投诉调解案例选编), and twenty-seven cases resolved by the CCA from Jan 1st, 2012 to Dec, 31st, 2012 in the City of Ningbo are collected from the CCA's internal website by random sampling. I have reached the following conclusions regarding the five cases collected from *The Case Studies By China Consumers' Association*:

(1). Three out of five cases involving automobiles are resolved by mediation, which aligns with Consumer associations' functions according to The Consumer Protection Law: "Consumer associations shall perform the following functions: (4) to accept and hear complaints of consumers and offer investigations and mediations with respect to points of complaints" (Law of the People's Republic of China on Protection of Consumer Rights and Interests). The favor of alternative dispute resolution of mediation over the court system may result from various factors and interactions between different actors in the field (consumers, automotive dealers, manufacturers, government agencies), as Talesh suggests in his article (Talesh, 18). Details of why mediation is favored over courts and the logics of each field actor will be further explored in the section of Law in Mind.

(2). All five cases published in *The Case Studies By China Consumers' Association* are successfully resolved either by CCA's mediation or court rule favoring consumers' rights and interests. On one hand, it can be viewed as a signal that the Chinese government recognizes the importance of consumer rights protection and has already made steps to enforce consumer rights strictly in accordance with the law; on the other hand, the published cases might be biased with an intention for government

publicity and advertisement. Therefore, in order to deeply understand the current situation of China's consumer rights protection enforcement, I will compare the published cases with another 26 cases actually resolved by the CCA of Ningbo from Jan 1st, 2012 to December 31st, 2012.

From Jan 1st, 2012 to Dec 31st, 2012, The China Consumers' Association in the City of Ningbo received a total of 1249 consumer complaints regarding passenger cars. A random sample of 26 cases out of 1249 cases has been obtained and analyzed in this study. As the graphs show, 18 out of 26 cases are indicated by the CCA as successful mediation, reflecting a 69% of total cases; 6 cases are resolved by other remedies due to the failure of CCA mediation, indicating a 23% of total cases; only 2 cases out of 26 cases are illegitimate complaints due to the misconduct of consumers (The CCA Consumer Complaints Report).

Based on the report by The Vehicle Administrative Office in the City of Ningbo, the total number of passenger cars in Ningbo in the year of 2012 is 8.952 million. That is to say, the percentage of consumer complaints reported to the CCA consists only of 0.01% of the total number of passenger cars. This number has a positive indication on the overall satisfaction of consumers towards their new passenger cars. However, several issues may raise the suspicions upon this conclusion: First, consumers who experience dissatisfactions may resolve their cases using other remedies than reporting to the CCA. For example, most consumers will negotiate with their dealers, and if successful, do not have the need to go through the CCA. Second, some consumers who encountered the problems choose not to claim due to the inconvenience of the process. This is reflected in my interviews with the consumers:

Interviewer: Why did you not choose the CCA to help resolve your case?

Consumer B: We didn't go through the CCA process or formal legal procedures. They are too time-consuming and costly. They receive so many complaints each day and you know, would most likely ignore my case since it is so minor.

(2). Individual Behaviors and Decision-making:

The second part of Law In Action focuses on the analysis of individual consumer behaviors and their relationship with the dealer in the process of informal dispute resolution. This part of research is heavily relied on the interviews I have conducted with consumers and dealers in the City of Ningbo.

I have obtained consumer contacts from two major sources. The first group of consumer contacts is obtained from four automobile dealers in the area: a BMW dealer, a Geely dealer, a Nissan dealer and a Buick dealer. Out of the four brands, Geely is the only Chinese automotive manufacturing company. I have obtained the second group of contacts from the 26 cases I have obtained from the CCA. Due to the large sample size and the unwillingness consumers expressed in the phone surveys, only phone interviews are conducted with each one of the contacts.

First Group of Consumers:

30 Geely consumers, 20 Nissan consumers, 20 Buick consumers, and 10 BMW consumers are interviewed by phone respectively. Out of the 80 phone calls, only 16 consumers are willing to answer my interview questions. The majority of consumers expressed distrust and anger over the phone and questioned me where I had obtained their contact information.

Of the three Geely consumers who answered my interview questions, none of them indicate that they have encountered quality issues or related problems that may lead to complaints. Of the four Nissan consumers who answered my questions, two indicated that they have encountered quality issues. Of the eleven Buick consumers who answered my questions, three indicated that they have encountered quality issues. Of the ten BMW consumers I interviewed, only one responded to my survey and indicated to have quality issues with his car.

A large proportion of consumers who have purchased passenger cars recently have encountered quality issues or other related issues that may lead to consumer complaints, with an exception with Geely consumers. The fact that Geely consumers report no quality issues may be subject to several reasons: (1). Since the number of Geely consumers who respond to my survey

is so small, the sample may not be as representative as we expect. (2). Due to the general distrust of Chinese consumers towards research institutions, consumers may misrepresent themselves in the survey. The survey result of BMW consumers is also viewed as unrepresentative due to similar reasons. The following section will focus on the major theme emerged in my study on individual consumer behaviors using the theoretical framework of Dispute Transformation Theory.

The Emergence and Transformation of Disputes in the Context of China:

According to *The Emergence And Transformation of Disputes: Naming, Blaming, Claiming...* by Felstiner, Abel, and Sarat, disputes first emerge from its first stage naming: "This first transformation—saying to oneself that a particular experience has been injurious—we call naming" (Felstiner, Abel and Sarat, 635). According to the definition of naming, all consumers who indicate the experience of quality issues have gone through the stage of naming by saying to themselves that "a particular experience has been injurious" (Felstiner, Abel and Sarat, 635).

The stage of naming has transformed into blaming when "a person attributes an injury to the fault of another individual or social entity" (Felstiner, Abel and Sarat, 635). My research shows that almost all of the consumers who experienced the stage of naming have also experienced the stage of blaming, where they attribute the quality issues to the fault of another entity. The two major entities consumers blame are the dealer and the manufacturer.

The third transformation, claiming, occurs when "someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy" (Felstiner, Abel and Sarat, 635). Although consumers attribute the problems they encountered to both the dealer and the manufacturer, my interview results show that they often voice their grievances to the dealer instead of the manufacturer.

Interviewer: When you encountered quality issues with your car, what did you do?

Consumer: I went to the 4S company (dealer) directly and asked for compensation.

When being asked the relationship with the manufacturer, the Geely dealer answered the following:

Mostly dealers face the consumers directly and deal with the issues. If the core parts of a car are broken, manufactures will compensate. For those small issues, dealers compensate and manufacturers pay nothing.

The stage of claiming is crucial because that is where the informal dispute resolution between the dealer and consumers takes place. My interviews with the car dealers show that most complaints are resolved in this level and will thus not rise to disputes. Moreover, all of the dealers I interviewed with indicate that they often compensate the consumers more than they would get reimbursed from the manufacturer in order to preserve the company reputation. When being asked how they solve consumer complaints, three dealers made the following comments:

Nissan: Consumers often find the sales person first. The Consumer Service Department will then conduct a primary inspection on the quality issues. If we find that the problems are caused by consumers' own mistakes, our Consumer Service Department will inform consumers and provide instruction for future use. If there indeed exist quality issues, we will provide maintenance service free of charge.

Interviewer: What will you do if the consumers are not satisfied with your initial compensation, and is intended to resolve their complaints formally?

Nissan: We will mediate again with the consumers with larger compensation. We usually don't like consumer complaints rising into disputes.

Buick: Consumers have several ways to complain: (1). Consumers file the complaints to the Sales Consultant. (2). We will conduct phone surveys regularly to old customers, and during the surveys, consumers can report the complaints. For small issues, sales consultant will report back to consumers. But for the problems that need quality inspection by the 4S dealer, we often negotiate with consumers until consumer needs are satisfied. For big problems, we will report to manufacturers.

Interviewer: What will you do if the consumers are not satisfied with your initial compensation, and is intended to resolve their complaints formally?

Buick: I usually let them go first and think again. Usually they will come back and (1). Still don't compromise. (2). Will compromise a bit and ask for better compensation (a little more). (3). Accept the original compensation. We will usually offer larger compensation when consumers don't accept the original offer.

Geely: We try to satisfy the customer needs by providing free fixing and free services, etc. But we usually offer few cash compensations.

Interviewer: What will you do if the consumers are not satisfied with your initial compensation, and is intended to resolve their complaints formally?

Geely: The headquarter will call the consumer and negotiate. If it is still not resolved, we will compensate consumers ourselves. Most cases are informally resolved finally. For violent consumers whose cars are not fixed, we will give them some small money and they will be satisfied as well. For those consumers who regret buying Geely and try to return thecar, they will go through CCA (those cases are hard to resolve). But even if they go through

CCA, they will often lose the case.

All three dealers indicate that the percentage of consumer complaints being resolved through formal remedies (CCA or court system) is incredibly small. ie. 2% of consumer complaints in Nissan, 20% of consumer complaints in Buick, and 0.2% of consumer complaints in Geely are resolved by CCA and formal adjudication. The Buick dealer also indicates that among the 20% of consumer complaints that are not resolved informally between consumers and the dealer, the majority of them are resolved by CCA mediation, with very few cases going through formal adjudication. The final stage occurs when "a claim is transformed into a dispute" (Felstiner, Abel and Sarat, 636). A dispute matures when a claim "is rejected in whole or in part" (Felstiner, Abel and Sarat, 636). We noticed here that "delay that the claimant construes as resistance is just as much as a rejection as is a compromise offer (partial rejection) or an outright refusal" (Felstiner, Abel and Sarat, 636). In other words, rejection does not necessarily have to be expressed explicitly by words, and consumers who have filed their cases to CCA have all experienced some kind of rejection, even if dealers might have offered compromise. Therefore, while the article *The Emergence And Transformation of Disputes: Naming, Blaming, Claiming...* is focused on the early stages of dispute transformation and is thus deficient in studying the stage of dispute, I intend to enrich and complete the theory by relying on the cases from the CCA and the online complaint forum. The question I am interested in in this stage is to compare the dispute transformation process by the dispute institutions such as the CCA with that of the private channel, ie. the online complaint forum.

The 26 cases I have studied indicate that most cases are resolved by mediation. The successful mediation often involves awarding only monetary damages to consumers. In other words, the CCA transforms disputes by "individualizing remedies" (Felstiner, Abel and Sarat, 648). While consumers often walk away with satisfactory monetary damages, the victims' concept of an acceptable outcome is transformed from "a collective good into individual enrichment" (Felstiner, Abel and Sarat, 648). This type

of transformation, while on its face resolves the majority of consumer complaints peacefully, is likely to lead to a violation of CCA's principle purpose of "protecting the rights and interests of consumer from the perspective of an independent third party," as the CCA official asserts in the interview.

The transformational effect of the private media channel (In my case, a major Chinese online automobile consumer complaint forum) sharply contrasts with that of the CCA. In the forum, consumers are encouraged to describe the conflict and express their feelings freely. For example, consumers may include the exact names of the dealers in their complaints as well as subjective feelings towards them. There is also a section at the bottom of the forum that encourages readers' comments. Although the facts presented in the online forum are highly likely to be subjective and are thus less accurate than the facts presented during the CCA mediation, these private channels are indeed more interactive and engaging. Therefore, where the outcome of successful mediation by the CCA achieves maximum resolution rates and high profits for the consumers, the outcome of a successful online forum may result into the improvement of consumer rights awareness, namely, collective good.

c. Law In Mind:

This section will focus on how consumer protection law is perceived by different actors in the field, namely, consumers, automobile dealers, and the CCA. The theoretical framework that I will rely and build up on is the idea of the conflicting field logics over the purpose and meaning of the law addressed in Shauhin A. Talesh's *Lost In Translation: How Competing Organizational Field Logics Mediate The Meaning of Rights*. The purpose of this section is to identify how private and public actors view the purpose of the consumer protection laws and goals of informal dispute resolution in the context of China, and how these different views impact the consumer protection rights in China.

I have concluded from my previous sections the prevalent presence of informal dispute resolution including the preference of the CCA mediation over formal court adjudication. This phenomenon is referred as "the most notable procedural attacks"

by Talesh (Talesh, 2). According to Talesh, these procedural attacks “significantly impact rights enforcement going forward” (Talesh, 2), which are strongly reflected in my research. My interviews with the consumers indicate that a very small portion of consumers who have injurious experiences have filed complaints or even recognized that they have been wronged. Those who do take actions end up resorting to informal dispute resolutions or mediation by the CCA. The actions consumers often take are self-help, media exposure, violence, and negotiation with the dealers. When being asked what actions they take after encountering an issue, one consumer responded the following:

I told them [the dealer] that I will go through four steps. First, we will negotiate. If it doesn't work out, my second step is to use media exposure. Thirdly, I will tell the dealer that since the car I bought is for the use of the company, I will urge my employees to go on a strike. My final resort will be to paint the car (with insulting words) and park the car in the dealer's parking lot.

Clearly the four approaches this consumer mentioned have nothing to do with formal remedies. The reason that the consumer decides not to go through the CCA process or formal legal process is the fact that they are “too inefficient and time consuming.” Clearly consumers value individual benefits and results more than the processes of rights enforcement. Most consumers indicate in their interviews that they are “satisfied” with the results of informal dispute resolution or even self-help through violence and illegal actions. In fact, many of them indicate that these self-help actions are more effective than the law. Next I will discuss the different “field logics” operating in the consumer protection law field from the perspectives of private actors (consumers and the dealers) and public actors (the CCA as a branch of government agency) (Talesh, 2). Although there is a general consensus between dealers, consumers, and the CCA that prefers informal dispute resolution venues to formal legal remedies, the field logics behind that vary.

Private Actors:

The Dealers: My study shows the adhering results as what Talesh concluded in the article that businesses “view the purpose of lemon laws and goals of informal dispute resolution around adhering to business logics of efficiency, cost-effectiveness, allowing for managerial discretion and control, and customer retention” (Talesh, 1). This is partly reflected in the dealers’ preference of informal negotiations with the consumers, even though this will cost them more in terms of monetary compensation. My study shows that dealers in China are extremely concerned about their reputation and corporate image, and having consumer filed their complaints to the CCA or the courthouse will inevitably affect their corporate image negatively, especially that the media is often involved in such cases. That is primarily the reason why dealers are willing to offer larger monetary compensations to “violent” consumers (consumers who explicitly express their dissatisfaction to the dealers and use threats in order to achieve their goals). In addition to preserve corporate image, dealers indicate that their goal is customer retention. This is partly why dealers often value their customers as “God”. The dealer representative of Geely explains how offering larger monetary compensations to its consumers through informal dispute resolution often works better than formal venues:

Geely: Most cases are informally resolved finally. For violent consumers, we will give them some small money and they will be satisfied. We are willing to offer larger monetary compensation if they are not initially satisfied. I think both consumers and us do not like going through the CCA and the court system, because it is not cheap (for consumers as well) and also time consuming. Our goal is to make them [consumers] happy, and we will do our best to make them happy and preserve our corporate image.

While Chinese automobile dealers mostly indicate a preference of informal monetary compensation, they also indicate that the current consumer protection law lacks the necessary protection to the consumers, which is indeed also harmful to the dealers:

Buick: Because now without the law, there are no precise regulations we can strictly follow. Consumers can ask for whatever they want. Some consumers know that we care about our reputation, so they start asking for ridiculous amount of compensation.

In conclusion, the dealers consider the value of informal dispute resolution as customer retention and corporate image improvement, but at the same time desire more rigorous consumer protection laws to prevent consumers from taking advantage of the ambiguity of the law.

Consumers:

Consistent with the findings by Talesh that “private actors transform the meaning of lemonlaws away from rights and protection and toward solving problems and addressing the underlying problem” (Talesh, 25), my interviews show that Chinese automobile consumers view productivity and short-term monetary benefits more valuable than their long-term consumer rights and interests. Most consumers who have encountered quality issues with their cars state that they are “very satisfied” with the compensation they get from the dealer and none of them mentions any dissatisfaction with the original problem they have encountered. Due to their interest of productivity and problem solving, consumers prefer informal dispute resolution and view the beauty of informal dispute resolution as “being able to agree on anything, as well as being very efficient.” When being asked whether they have pursued formal dispute resolution venues or the CCA mediation, the majority of consumers indicate that they prefer solving problems by themselves:

Consumer: You have to provide all sorts of evidence in order to proceed formally, which is too time consuming for me. The existence of the CCA does not provide convenience for consumers. I still have to reply on myself to solve the problem. Chinese consumers’ overly reliance

on business values when thinking about the purpose of consumer protection law and goals of dispute resolution has negative impacts on the enforcement of consumer protection rights.

Chinese consumers' obsession with short-term monetary compensation over advocacy of consumer protection rights shows their lack of legal consciousness. In other words, they are not fully aware of the facts that solving problems informally will hinder the advocacy of consumer protection rights, which may also affect their long-term benefits.

Public Actors:

China Consumers' Association:

The public actor such as the CCA claims that the purpose of the consumer protection law is to protect consumers' rights and interests: "The CCA, as an independent party, serves the purpose to protect our consumers. That means, we will favor consumers over the dealers in the cases that both parties are sort of equal." Besides the purpose of protecting consumers' rights and interests, the CCA also claims to provide a neutral forum for consumers to voice their concerns, especially with the involvement of social media.

However, unlike the public actors in the U.S. who emphasize less on efficiency than due process protections (Talesh, 28), my study reveals that the CCA still puts much effort on problem solving and efficiency. This is shown mainly through the CCA's preference of mediation and money damage compensation. As the dealer of Geely comments in his interview:

Government agencies such as the CCA always encourages "peaceful resolution" by asking the dealers to compromise more to the consumers. The CCA solves most of their cases by mediation and discourages consumers to go to court because they do not want consumers to create trouble to the government.

CCA's overly reliance on mediation and informal resolution also leads to its "flexible adherence to substantive provisions of formal law" (Talesh, 29). Whereas Talesh points out in his article that U.S. "public actors indicate that formal law should govern the outcome of dispute despite being in an informal setting" (Talesh, 30), public actors in China such as the CCA reflect a logic that emphasizes more on efficiency and problem-solving than the substantive formal law.

Besides the field logic that emphasizes on efficiency and problem solving, the reason of why the CCA prefers informal resolution can also be explained by the Chinese culture. Unlike "the West's implicit cultural assumption that the rule of law is an inherently positive goal" (Chew, 45), and the rule of law is supposed to "bring order and predictability to how a country functions" (Chew, 45), the Chinese cultural assumption values the rule of people and views the rule of law as not sufficient to bring order and transparency to the society. The CCA official mentions in his interview that the CCA is in the process of establishing a "Social Honesty and Credit" system:

China has its unique culture that is derived from its two-thousand-year tradition. Unlike the U.S. who values contracts and rule of law, we see the rule of law as a necessary, but not sufficient part. I view public morality as an equally important element of consumer rights protection. The CCA is in its process of establishing "Social Honesty and Credit" system where we rank every company in terms of its moral reputation. Then we will publish it and inform our consumers.

Although the establishment of "Social Honesty and Credit" system cannot be viewed as a step towards the rule of law, it sets the step towards the "systematization of morality," where the measure of morality becomes more transparent, and almost becomes more "law like." While the establishment of "Social Honesty and Credit" system is still relied on the Chinese cultural assumption of "rule of people" rather than "rule of law," it serves as a beneficial supplement of consumer protection law. be

interviewed, it was not possible to have a complete grasp of their perspectives in this study.

VIII. Conclusion and Implications:

There is no doubt that as China transforms itself from planned economy to market economy, the adequate protection of consumer rights and interests becomes more and more important. My study indicates that although the consumer protection law in China is not yet complete enough to adequately protect the consumers, it is in the upward trend of becoming more comprehensive. For example, the enactment of the new regulation on free repairs, replacement and return for automobiles by the General Administration of Quality Supervision, Inspection and Quarantine is a supplementary regulation for the general guidelines provided by The Law of the People's Republic of China on Protection of Consumer Rights and Interests. Despite this positive trend, the enforcement of the consumer protection law is still lacking. As my study shows, the dispute resolution process of the public actors such as the CCA relies too heavily on informal mediation. That can possibly be explained by the public actor's "business logic" as the informal mediation is usually faster and more efficient in terms of problem solving. However, relying too heavily on efficiency inevitably undermines the long-term goal of consumer rights protection and law enforcement.

On the other hand, my interviews with automobile dealers and consumers clearly indicate the preference for the same field logic. Unlike the businesses that have a clear goal to maximize profit and increase customer retention, consumers choose "efficiency" simply due to the fact that going through formal remedies is too costly and time consuming. Moreover, Chinese consumers generally lack the legal consciousness to fight for their rights and interests, manifested in their obsession with the one-time monetary compensation and problem solving.

Therefore, given the results of my study, I propose the following to better enforce the consumer protection law and protect Chinese consumers' rights and interests. First, the public actors must adopt a new field logic that puts public safety and consumer protection over efficiency and problem solving. This

may require not only the CCA to strictly follow and enforce the written text of law, but also the effort from regulators, legislators and other government agencies. Second, businesses shall recognize the importance of consumer protection because if the consumers are better protected, they will create benefits for the businesses as well. Third, consumers must improve on their legal consciousness by recognizing the rule of law as more important than private negotiations. Although going through the formal remedies may be more costly and time consuming, it is effective for raising the awareness of public actors and will thus benefit consumers in the long run.

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