

**FALUN GONG & RE-EDUCATION THROUGH
LABOR: TRADITIONAL REHABILITATION
FOR THE “MISDIRECTED” TO PROTECT
SOCIETAL STABILITY WITHIN CHINA’S
EVOLVING CRIMINAL JUSTICE SYSTEM**

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 I. INTRODUCTION	

Re-education through labor (RETL) is a form of administrative detention employed in China that is conducted outside of the formal criminal justice system and is designed to rehabilitate the behavior of societal “agitators.” It has been utilized more in recent years than in the past because flexibility in the formal criminal justice system has been diminishing with the modernization process. While Chinese officials have maintained that RETL is a necessary and effective device for sustaining societal harmony,¹ mounting pressure prompted Beijing leaders in February 2003 to endorse new prohibitions on RETL administrators to improve the image of these centers.²

For the past four years, Falun Gong members have been the target of aggressive Chinese government crackdown and caught the attention of human rights group worldwide. The group was banned

¹ See *People's Republic of China: Establishing the Rule of Law and Respect for Human Rights: The Need for Institutional and Legal Reforms, Memorandum to the State Council and National People's Congress of the People's Republic of China by Amnesty International* (Sept. 2002), at 2.2, available at <http://web.amnesty.org/library/index/ENGASA170522002> (last visited May 23, 2003) [Hereinafter *Amnesty International Memorandum to the State Council*].

² See *China Imposes “Ten Prohibitions” on Re-Education Through Labour Personnel*, BBC WORLDWIDE MONITORING, Mar. 4, 2003, available at LEXIS, Asiapc Library [hereinafter *Ten Prohibitions*].

after being marked an “evil cult”³ on July 22, 1999.⁴ Some say the banning and crackdown occurred because of the fear that such a collective and solidified group could pose to the Chinese Communist Party (CCP) governance,⁵ while others maintain such measures were necessary to protect societal stability and public order⁶ from the harms that could emerge through diffusion of the group’s message and actions. The Chinese government has taken Falun Gong’s mobilization and expansion efforts very seriously.⁷ Human rights groups have been critical of China’s use of RETL and its treatment of Falun Gong members. In fact, Falun Gong filed a lawsuit in U.S. federal court that was supported in an amicus curiae brief by more than three dozen members of Congress, against former Chinese leader Jiang Zemin for acts of genocide on Falun Gong members.⁸ While this lawsuit was dismissed by the U.S. District Court in September 2003 pursuant to the doctrine of sovereign immunity,⁹ the dismissal likely did not spell the end of the controversy.¹⁰

This article describes, from a cultural and historical perspective, why the vast majority of detained Falun Gong members, perhaps 99% of the approximately twenty thousand who have been

³ A “cult” has been defined as “a closed system whose followers have been unethically and deceptively recruited through the use of manipulative techniques of thought reform or mind control.” See LEO G. PERDUE, WISDOM AND CULT 9 (Howard C. Kee & Douglas A. Knight eds. 1977).

⁴ See *Three years after ban, Falungong still a thorn in Beijing’s side*, AGENCE FRANCE PRESSE, July 21, 2002, available at LEXIS, Asiapc Library [hereinafter *Three years after ban*].

⁵ See HUMAN RIGHTS WATCH, DANGEROUS MEDITATION: CHINA’S CAMPAIGN AGAINST FALUN GONG, at I, available at <http://www.hrw.org/reports/2002/china/> (last visited May 19, 2003). “China does not like to have anything within its borders that it cannot control. If there is a church, it will be under the government. Falun Gong scared the government with its sheer numbers. The movement had 100 million members while the Communist party had just 50 million.” See Tanu Thomas K, *Falun Gong Wave Reaches Indian Shores*, THE ECON. TIMES, May 8, 2003, available at LEXIS, Asiapc Library.

⁶ *Chinese legal officials interviewed on anti-cult moves*, BBC WORLDWIDE MONITORING, Feb. 11, 1999, available at LEXIS, Asiapc Library [hereinafter *Chinese legal officials*].

⁷ A more expansive summary of Falun Gong actions and Chinese government response is available in: HUMAN RIGHTS WATCH, *supra* note 5, at III; see *Nine Falun Members in China Face TV Hijacking Charge in May*, BBC MONITORING WORLDWIDE, Apr. 26, 2002, available at LEXIS, Asiapc Library [hereinafter *Nine Falun Members*].

⁸ See Frank J. Murray & Steve Sexton, *Falun Gong Case gets support*, June 12, 2003, WASH. TIMES, available at <http://www.washtimes.com/national/20030611-113035-2581r.htm> (last visited June 12, 2003). The lawsuit was filed pursuant to the Alien Tort Claim Act and Torture Victim Protection Act. See *id.*

⁹ See generally *Plaintiffs A,B,C v. Zemin*, 2003 U.S. Dist. LEXIS 16209 (N.D.Ill. 2003).

¹⁰ Not only is Falun Gong contemplating options to keep the case alive, but also vows to keep it before the American public. See *Judge throws out Falun Gong suit against former Chinese leaders*, THE ASSOCIATED PRESS, Sept. 15, 2003, available at LEXIS, U.S. News Library.

confined, have been commonly subject to RETL¹¹ rather than to the criminal justice process. The supposition herein is that Falun Gong has been caught between China's gradually closing door of flexibility in the law, brought about by a government desire to improve the formal criminal justice system; and the gradually opening door of improved individual rights protections vis-à-vis collectivist interests. Consequently, applying RETL to Falun Gong practitioners maintains the traditional cultural approaches of behavioral modification for individuals/groups that fall too far outside the parameter of what the government deems is acceptable societal conduct. Finding justice in this situation becomes more enigmatic because it is unfolding within a dramatically changing and volatile society still under the administration of the CCP and under the microscope of the global community. Falun Gong has arguably posed the most significant challenge to the criminal justice reform process and to CCP power in the past decade.

This article examines the positions of both Falun Gong and the Chinese government and endeavors to achieve resolution within the framework of human rights law and respect for state sovereignty. Section II considers the Chinese government's response to Falun Gong's emergence, while section III addresses global human rights standards and how tradition and culture have influenced the Chinese government's criminal justice modernization process and its response to Falun Gong members who have apparently violated Chinese law. Section IV appraises the risk that a consolidated collective group could have on the current state of legal and economic modernization in China and balances the threat of instability against human rights protections for Falun Gong members.

¹¹ See *Three years after ban*, *supra* note 4; see *Nine Falun members*, *supra* note 7; *China jails six Falungong for up to six years*, AGENCE FRANCE PRESSE, available Aug. 9, 2001, available at LEXIS, Asiapc Library [hereinafter *China jails six*]; *Falun Gong Inmates Hang Themselves in Protest*, INDEP., July 4, 2001, available at LEXIS, Asiapc Library [hereinafter *Falun Gong Inmates*]; *China: Hong Kong, Macao, Taiwan press at Falun Gong re-education camp*, BBC WORLDWIDE MONITORING, June 12, 2001, available at LEXIS, Asiapc Library [hereinafter *China: Hong Kong, Macao, Taiwan press*]; *China gives reporters glimpse of labor camp dubbed 'living hell' by critics*, THE ASSOCIATED PRESS, May 23, 2001, available at LEXIS, Asiapc Library [hereinafter *China gives reporters glimpse*]; *Two Falungong members jump to their deaths during police raid: police*, AGENCE FRANCE PRESSE, Apr. 27, 2001, available at LEXIS, Asiapc Library.

II. GOVERNMENT RESPONSE TO FALUN GONG

A. Background of Falun Gong

Falun Gong has been described as a slow motion martial arts-like meditative practice that emphasizes living a moral and honest life¹² in order to cultivate a healthy mind-body connection.¹³ It promotes “a modern variant of ancient Chinese practices of exercise, deep breathing, and meditation, collectively known as qigong, that enthusiasts claim promotes physical, mental, and spiritual well-being by enhancing the flow of vital energy through a person's body.”¹⁴ Falun Gong has associated itself with Buddhist and Taoist traditions,¹⁵ and it could be classified as a spiritual movement,¹⁶ religious order¹⁷ or

¹² See HUMAN RIGHTS WATCH, *supra* note 5, at II.

¹³ See Erin Clopak, *China's Crackdown on Falun Gong*, 9 HUM. RTS. BR. 17 (Fall 2001). The initial aspiration of the Falun Gong disciple is to cultivate character by releasing negative thoughts to reach a higher level of spirituality. See LI HONGZHI, ZHUAN FALUN (TURNING THE LAW WHEEL) 15, available at <http://www.falundafa.org/eng/books.htm>, at 1 (last visited May 25, 2003) [hereinafter LI HONGZHI]. *Cultivating* is the evolutionary process that disciples transcend so that “[t]he molecular composition of the human body is transformed into high-energy matter,” which is a profound but sufficiently subtle process that will not be noticeable by others. LI HONGZHI, FALUN GONG (LAW WHEEL QIGONG) (1993), available at <http://www.falundafa.org/eng/books.htm> (last visited May 31, 2003) [hereinafter LI HONGZHI 3]. One can reach higher dimensions that are separate from the dimension that one's body is in by attaining heightened levels of cultivation, which occurs by engaging in virtuous living by thought and deed (*id.* at 30-44, 49) and by doing the regimen of *qigong* exercises. *Id.* at 49-51. Cultivating to higher levels increases one's *gong* (*id.* at 92) and “the height you can cultivate to depends entirely on your ability to endure and your ability to bear hardships” in the physical world. See LI HONGZHI, at 39.

A Falun Gong member's ultimate goal is to evolve and reach *consummation*. See LI HONGZHI, at 41-42, 74. When reaching this highest level of *consummation*, one must “let go of all worldly attachments (including the attachment to the human body) and have made it through the process of letting go of life and death.” See LI HONGZHI, *Essentials for Further Advancement II* 16, available at <http://www.falundafa.org/book/eng/jjyz2.htm> (last visited May 26, 2003) [hereinafter LI HONGZHI 2].

¹⁴ See HUMAN RIGHTS WATCH, *supra* note 5, at I. A member stated: “The Falun Dafa (or Falun Gong) is the basic law of humanity in a language understandable to human beings, its appearance is unprecedented in human history.” See *China: Hong Kong, Macao, Taiwan press*, *supra* note 11. *Qigong* is an ancient Chinese practice of controlling energy flow. See LI HONGZHI 3, *supra* note 13, at 1-3.

¹⁵ See *Falun Gong & Falun Dafa: What it is, What it does, and why the Chinese government is so terrified of it*, at <http://www.religioustolerance.org/falungong.htm> (last visited May 19, 2003) [hereinafter *Falun Gong & Falun Dafa*]. “Buddha Law” is described as “the most wonderful and highest science.” See LI HONGZHI, *supra* note 13, at 1. Buddha Law is the “universe's most fundamental nature, to be True, to be Good, and to Endure.” See *id.* at 7. Disciples believe in Karma and previous lives (see *id.* at 73, 76) and in fostering ethical human relations and attaining a calm mind, but teachings also depart significantly from Buddhism and Taoism. See LI HONGZHI 3, *supra* note 13, at 20.

¹⁶ See *Zemin*, *supra* note 9, at 1.

¹⁷ See Kelly A. Thomas, *Falun Gong: An Analysis of China's National Security Concerns*, 10 PAC. RIM L. & POL'Y J. 471, 472 (March 2001).

a philosophy.¹⁸ Human Rights Watch states that Falun Gong does promote apocryphal¹⁹ and salvationist teachings.²⁰ The popularity of Falun Gong has resulted in peak membership of 80 million in China²¹ and 30 million elsewhere in the world.²²

The founder of Falun Gong, Mr. Li Hongzhi,²³ published the primary treatise on Falun Gong, *Falun Gong (Law Wheel Qigong)* in 1993.²⁴ While Mr. Li Hongzhi's teachings are the foundation of Falun Gong, other derivative sects have emerged,²⁵ but he states that he is the only one who is spreading a true teaching and one cannot mix thoughts from other practices.²⁶ He enforces this with a fairly strict regimen of rules mandating exclusive and steadfast devotion to his Dafa.²⁷ While all freedom of religion and conscience must be protected at international law, Mr. Li Hongzhi does make some claims to recruits and disciples that many may find surreal to which the Chinese government has reacted, such as those which promise that disciples can develop supernatural abilities over the spiritual maturation process if they devoutly practice Falun Gong and adhere to its tenets.

There are a number of important virtues that Mr. Li Hongzhi claims to provide to disciples. First, he places a "Law Wheel" in the lower abdomen of a disciple²⁸ and opens the "third eye"²⁹ to new levels,³⁰ which is the gateway to supernatural abilities.³¹ Powers are also intensified by gong potency³² and by enduring suffering.³³ According to his teaching, some of the supernatural abilities that Falun

¹⁸ See LI HONGZHI 3, *supra* note 13, ch. III.

¹⁹ Chinese Ambassador Yang has been quoted: "What the leaders of Falun Gong have been saying is that the earth has been destroyed many times and the earth is about to explode and the leaders have magic power to postpone the explosion of the earth." *Falun Gong trying to "cheat Western public opinion", Chinese envoy says*, BBC WORLDWIDE MONITORING., July 26, 2001, available at LEXIS, Asiapc Library [hereinafter *Cheat Western Public Opinion*].

²⁰ See HUMAN RIGHTS WATCH, *supra* note 5, at II; see LI HONGZHI, *supra* note 13, at 17, 51, 58-59, 69, 95, 156, 178; see LI HONGZHI 2, *supra* note 13, at 11, 25, 34, 43.

²¹ See *Three years after ban*, *supra* note 4.

²² See *Falun Gong & Falun Dafa*, *supra* note 15.

²³ Falun Dafa: Truthfulness, Benevolence, Forbearance, available at http://www.falundafa.org/eng/index_en.htm (last visited May 30, 2003).

²⁴ See LI HONGZHI 3, *supra* note 13, at 89.

²⁵ See LI HONGZHI, *supra* note 13, at 19-21, 23, 98, 174.

²⁶ See *id.* at 51, 83-84, 112, 125. Mr. Li Hongzhi has said that other *qigong* masters have possessing spirits that are wrecking our ordinary world. See *id.* at 59.

²⁷ See LI HONGZHI 3, *supra* note 13, at apps. I-IV.

²⁸ See LI HONGZHI, *supra* note 13, at 70.

²⁹ See LI HONGZHI 3, *supra* note 13, at 93.

³⁰ See *id.* at 6-8.

³¹ See LI HONGZHI, *supra* note 13, at 12, 26.

³² See LI HONGZHI 3, *supra* note 13, at 4.

³³ See LI HONGZHI, *supra* note 13, at 39.

Gong disciples have attained are clairaudience, telepathy, precognition,³⁴ and telekinesis;³⁵ the ability to “remotely view” distant places and times; know the future; reverse the aging process³⁶ to remain young forever;³⁷ levitate or fly;³⁸ heal oneself and others of ailments;³⁹ and disappear on command.⁴⁰ However, a disciple cannot ever reveal these supernormal abilities and experiences or show them to anyone else or the master may take the powers away.⁴¹

Mr. Li Hongzhi also claims to have special powers that will protect disciples throughout the spiritual maturation process. He has “countless Law Bodies” which have his “enormous divine Law-power” and these Law Bodies will protect disciples spiritually and physically so that they will not run into any danger.⁴² In fact, one cannot procure true cultivation without his Law Bodies protection, or “maybe [the disciple’s life] would be at risk.”⁴³ Dangers can emerge from both the physical world and other dimensions, and he provides examples of how he saves disciples from threatening circumstances every day.⁴⁴ “[T]here are things that come from other dimensions that interfere with our ordinary world.”⁴⁵ “Man is going bad and demons are everywhere.”⁴⁶ If a disciple becomes controlled by a foreign spirit, Mr. Li Hongzhi must cleanse that disciple.⁴⁷

Chinese Ambassador Yang has stated that emphasis is always placed on Falun Gong’s beneficial contributions to health when one participates in the exercises, but that the Falun Gong does not “let the American people know the whole doctrines.”⁴⁸ For example, in the Falun Gong sponsored program that is telecasted by local television stations throughout the United States, the program depicts the Chinese government’s persecution of the group and teaches the exercises while underscoring its peaceful nature without describing member actions

³⁴ See LI HONGZHI 3, *supra* note 14, at 4.

³⁵ See *id.* at 25.

³⁶ See LI HONGZHI, *supra* note 13, at 20; see LI HONGZHI 3, *supra* note 13, at 24.

³⁷ See LI HONGZHI, *supra* note 13, at 38.

³⁸ See *id.* at 164-65.

³⁹ See *id.* at 32-35, 115.

⁴⁰ See *id.* at 131.

⁴¹ See LI HONGZHI 3, *supra* note 13, at 5.

⁴² See LI HONGZHI, *supra* note 13, at 67-68, 85.

⁴³ See *id.* at 112.

⁴⁴ See *id.* at 67-68.

⁴⁵ See *id.* at 4, 94-95, 178.

⁴⁶ See *id.* at 59.

⁴⁷ See *id.* at 62, 65, 124.

⁴⁸ See *Cheat Western Public Opinion*, *supra* note 19.

and teachings that the Chinese government claims has caused so much travail in China.⁴⁹

B. *Government Reaction to Falun Gong*

The first major conflict between Falun Gong members and the Chinese government⁵⁰ took place on April 25, 1999 when over 10,000 Falun Gong members appeared unannounced and demonstrated outside of Zhongnanhai, the Chinese leadership compound in Beijing,⁵¹ apparently to protest an academic journal article regarding societal risks posed by cults in China.⁵² The members presented their position and disassembled without any arrests being made.⁵³

On June 20, Renmin Ribao (People's Daily), the Chinese Communist Party newspaper, launched a number of opinions regarding cults without mentioning Falun Gong. The CCP stated that it is necessary for government and society to oppose "superstition and pseudo-science" if "rapid development and modernization [are] to be achieved."⁵⁴ Other commentators addressed how dangerous Falun Gong had become to society.⁵⁵ Noting that the April 25 protest was the worst political incident since Tiananmen Square in 1989,⁵⁶ the Chinese government organized a crackdown movement, instituted a campaign to garner public support for the crackdown, enacted criminal legislation to ban "heretical cult organizations,"⁵⁷ and defined the group as an "anti-government, anti-society, family-wrecking organization."⁵⁸ This was followed by police raids and arrests,⁵⁹ but enforcement might was reciprocated by even more potent Falun Gong defiance⁶⁰ and an even more aggressive political message⁶¹ aimed at "Chinese officialdom."⁶²

⁴⁹ *Falun Gong's Challenge to China* (PBS television broadcast, May 24, 2003).

⁵⁰ From the time Falun Gong was established until July 20, 1999, the Chinese government apparently enjoyed a conciliatory relationship with the group and Chinese embassies and consulates even promoted it abroad. See John Li, *After four years of repression, it is time to let go*, INT'L HERALD TRIBUNE, July 22, 2003, available at LEXIS, Asiapc Library.

⁵¹ See Clopak, *supra* note 13, at 17.

⁵² See Thomas, *supra* note 17, at 475.

⁵³ *Id.*

⁵⁴ See HUMAN RIGHTS WATCH, *supra* note 5, at III.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See Thomas, *supra* note 17, at 475-79. "Heretical cult organizations" was listed as a crime in Art. 300 of the 1997 Criminal Law Code.

⁵⁸ See *Three years after ban*, *supra* note 4.

⁵⁹ See HUMAN RIGHTS WATCH, *supra* note 5, at III.

⁶⁰ *Id.*

Falun Gong was banned in China after being marked an "evil cult" on July 22, 1999 because of the risk it was said to pose to societal stability.⁶³ Falun Gong is not alone in that mainstream religious groups have claimed that they have been discriminated against⁶⁴ and other groups and derivative sects of some mainstream religions have also been deemed "cults."⁶⁵ Some might claim that the key issues that determine if a group is so marked is whether it is obstinate toward government authority⁶⁶ and/or is more evangelical in nature when recruiting members.

According to the Chinese government, because of Falun Gong tenets and leader advocacy, hundreds of members have committed suicide,⁶⁷ performed self-immolation by lighting themselves on fire,⁶⁸

⁶¹ Mr. Li Hongzhi did specifically mention as early as 1994 that Falun Dafa Assistance Centers "must not intervene in politics." See LI HONGZHI 3, *supra* note 13, at 87-88. It seems he prognosticated the potential problem in China. Given the extent to which Falun Gong as an organization grew, it is not surprising that political altercations have arisen. In an attempt to curb the Chinese government's vexation from the leadership core, it has requested that the United States extradite Mr. Li Hongzhi, a Chinese national, back to China. See *Falun Gong celebrate 10th anniversary in Hong Kong amid concerns over freedoms*, DEUTSCHE PRESSE-AGENTUR, May 13, 2002, available at LEXIS, Asiapc Library; see *China expels three Australian Falungong members*, AGENCE FRANCE PRESSE, Dec. 7, 1999, available at LEXIS, Asiapc Library. There were also rumors that China offered \$500 million to the U.S. to extradite Mr. Li Hongzhi. See *China government seeks to dispel "rumours" of Falungong crackdown*, DEUTSCHE PRESSE-AGENTUR, June 14, 1999, available at LEXIS, Asiapc Library. However, once the battle began, the message became more forceful and salvationist in nature.

⁶² See *Three years after ban*, *supra* note 4. Perhaps "no other group has been as effective in sustaining a campaign against Chinese officialdom for such a long time." See *id.*

⁶³ See *id.*

⁶⁴ See generally Betty L. Wong, *A Paper Tiger? An Examination of the International Religious Freedom Act's Impact on Christianity in China*, 24 HASTINGS INT'L & COMP. L. REV. 539 (2001); see generally Natasha Parassram Conception, *Human Rights Violations Against Muslims in the Xinjiang Uighur Autonomous Region of Western China*, 8 HUM. RTS. BR. 19 (2000).

⁶⁵ See *Possible Labour Camp Detentions of Chinese Christian Group Members Reported*, BBC WORLDWIDE MONITORING, Sept. 3, 2002, available at LEXIS, Asiapc Library, BBC File; see *China boasts crackdown against another Christian sect*, AGENCE FRANCE PRESSE, Jan. 11, 2002, available at LEXIS, Asiapc Library; see generally Innocents Abroad: French Anti-Cultists, Mission Support China's Anti-Cult Campaign, at <http://www.cesnur.org/2001/jan30.htm> (last visited Feb. 20, 2004); Erik Eckholm, *Furor Over Death Sentences of 5 in China Church Group*, N.Y. TIMES, Feb. 12, 2002, at A12; see *Senior CPC leader vows to strike hard on crimes*, XINHUA GENERAL NEWS SERVICE, Nov. 22, 2003, available at LEXIS, Asiapc Library.

⁶⁶ See *Chinese Catholic priest gets three years in labour camp*, AGENCE FRANCE PRESSE, May 1, 2001, available at LEXIS, Asiapc Library; XIANFA [CONSTITUTION], art. 36. The Constitution was adopted at the Fifth Session of the Fifth National People's Congress on December 4, 1982. It was promulgated for implementation by the Proclamation of the National People's Congress on December 4, 1982.

⁶⁷ See *Falun Gong Inmates*, *supra* note 11; see *Chinese legal officials*, *supra* note 6. It was reported in 2001 by a Chinese agency that 239 Falun Gong members had committed suicide and that the organization in one way or another "caused the death of 1,660 practitioners and innocent people." See *State agency reports 239 Falun Gong members committed suicide*, THE BRITISH

died from hunger strikes,⁶⁹ refused medical treatment that resulted in death,⁷⁰ and even gone on killing sprees inspired by Falun Gong.⁷¹ However, up until 2002, Human Rights Watch reported that none of the thousands of Falun Gong practitioners who had been detained or arrested were confined for any violent act against anyone else, but instead for engaging in actions designed to organize and promote Falun Gong.⁷² Nonetheless, the Chinese government maintains that even organizing and promoting Falun Gong has derivatively meant

BROADCASTING CORP., Mar. 3, 2001, *available at* LEXIS, Asiapc Library [hereinafter 239 *Falun Gong members*].

⁶⁸ See *Wheel of Energy: Killing Spiritualism By Force in China*, THE STATESMAN (India), Mar. 19, 2001, *available at* LEXIS, Asiapc Library. The event that most turned the Chinese populace against Falun Gong may have been the self-immolation incident where five Falun Gong members set themselves on fire to advocate their cause. After this incident took place in Tiananmen Square, Li Hongzhi allegedly was quoted by a Hong Kong newspaper as saying, "At long last, there are Falun Gong practitioners who are willing to step forward and sacrifice their lives for the purpose of advocating the Fa [way]." *Hong Kong paper alleges CIA behind Falun Gong*, THE BRITISH BROADCASTING CORP., Feb. 26, 2001, *available at* LEXIS, Asiapc Library [hereinafter *CIA behind Falun Gong*].

⁶⁹ See Jessie Ho, *Ma urges China to stop Falun Gong crackdown*, THE TAIWAN NEWS, Dec. 30, 2002, *available at* http://www.cesnur.org/2002/falun_007bis.htm (last visited Mar. 4 2004). In the West, hunger strikes are a form of political participation, albeit a less conventional one that is often used as a last resort to attain government responsiveness. Many religious and spiritual orientations also fast. Mr. Li Hongzhi has stated about fasting, "some people go years or even over a decade without eating or drinking anything, but they do just fine." See LI HONGZHI, *supra* note 13, at 151. This is a "special cultivation method that people use under specially designated circumstances." See *id.* Falun Gong members have participated in hunger strikes and some allegedly have died as a result. See *New Permit Policy Makes entry to HK easier*, SOUTH CHINA MORNING POST LTD., June 2, 2003, *available at* LEXIS, Asiapc Library; Christopher Bodeen, *China releases U.S.-based woman after three-year sentence for Falun Gong activism*, THE ASSOCIATED PRESS, Mar. 19, 2003, LEXIS, *available at* Asiapc Library; see 239 *Falun Gong members*, *supra* note 67.

⁷⁰ See generally Bodeen, *supra* note 69. Mr. Li Hongzhi teaches that modern medicine sometimes cannot drive away the origin of illness because fundamental causes of illness are often in other dimensions. See LI HONGZHI 3, *supra* note 13, at 10. Those with supernormal abilities can diagnosis an illness generated in other dimensions and employ *qigong* cultivation to heal that illness. See *id.* at 11, 12. However, a disciple should not heal himself or others because it will disrupt karma and may propagate the disease in the healer. See LI HONGZHI, *supra* note 13, at 42-44, 144. The most recent and related crackdown has come in Hebei province against 180 practitioners who were detained for evidently precipitating societal unrest by spreading "doomsday" prophesies about the SARS outbreak and by recruiting members with promises that those who practice Falun Gong will not contract the disease. See *China Jails 180 Falun Gong members for SARS rumors*, WASH. POST, June 5, 2003, *available at* <http://www.washingtonpost.com/wp-dyn/articles/A18206-2003Jun5.html> (last visited June 12, 2003).

⁷¹ See *Falun Gong Cult Followers Cruel in Killing the Innocent*, XINHUA GENERAL NEWS SERVICE, July 14, 2003, *available at* LEXIS, Asiapc Library [hereinafter *Falun Gong Cult Followers*].

⁷² See HUMAN RIGHTS WATCH, *supra* note 5, at 1.

that members have engaged in illegal activities, disrupted society and the economy,⁷³ and deceived people.⁷⁴

C. *Falun Gong's Claims*

Falun Gong's complaint, as filed in the district court, alleged that the Chinese government violated the human rights of thousands of practitioners by "arrest without trial, execution, rape, disappearances, forced labor in work camps, and torture."⁷⁵ In response to the crackdown and alleged brutal treatment of disciples in RETL, Mr. Li Hongzhi stated, "China's Labor Re-education Camps are dark dens of evil forces. Most of the disciplinary guards there are reincarnated minor ghosts from hell. As for the people who have been 'reformed,' it was arranged in history that they would persecute the Fa this way."⁷⁶ Mr. Li Hongzhi calls on disciples to remain true to the teachings because "the evil [that] persecutes Dafa" will be defeated and "[the CCP's] current head himself is used to destroy the party and its regime from within the party."⁷⁷ Disciples should be willing to make great sacrifices and not just take from the Dafa because "[t]hose people who are still unable to step forward today will be weeded out after this tribulation is over."⁷⁸ Disciples must fight the "evil" and he chastises those who do not "validate Dafa."⁷⁹ Disciples must continue spreading the Fa and saving people.⁸⁰ Alternatively, the government has always asserted that the banning and crackdown on Falun Gong members was

⁷³ In addition to government actions that have stymied evangelism and treated members harshly in order to prevent future harm to that disciple, his/her family, or other citizens, the Chinese government claims that frictions exist between Falun Gong teachings and the societal transformation that is taking place at the behest of the economic modernization process. See HUMAN RIGHTS WATCH, *supra* note 5, at III. Arguably, fostering individualism, markets, and science in a society can arguably counter themes of virtuous living espoused by Falun Gong (see LI HONGZHI, *supra* note 13, at 77), which advocates living selflessly (see *id.* at 27), relinquishing attachments (see LI HONGZHI 3, *supra* note 13, at 36), and avoiding being dominated by scientific discoveries. Likewise, the government claims that some people have become despondent and psychologically imbalanced because of the rapid changes emerging from the movement from a planned to a market economy, and this has allegedly "lured" people to Falun Gong teachings and created an opposition to government and modernization. See *Expert Exposes Tricks of Falun Gong*, XINHUA GENERAL NEWS SERVICE, July 26, 2001, available at LEXIS, Asiapc Library.

⁷⁴ See *Chinese legal officials*, *supra* note 6.

⁷⁵ See *Zemin*, *supra* note 9, at 4.

⁷⁶ See LI HONGZHI 2, *supra* note 13, at 18.

⁷⁷ See *id.* at 23.

⁷⁸ See *id.* at 25.

⁷⁹ See *Id.*

⁸⁰ See *id.* at 27.

necessary to protect societal stability⁸¹ and denied violating the human rights of practitioners.⁸²

III. TRADITION AND CULTURE IN CHINA & METHODS OF BEHAVIORAL MODIFICATION

A. *Chinese Tradition & Culture*

Understanding China's tradition and culture is essential to appreciating its legal processes and societal control⁸³ and the government's reaction to Falun Gong. In Chinese history, rulers for hundreds if not thousands of years have been suspect of individuals and groups that could "combine elements of charismatic leadership, a high degree of organization, and mass appeal,"⁸⁴ and thereby disrupt the status quo. China is one of the most ancient civilizations, with entrenched cultural norms that have existed throughout its long history,⁸⁵ even after chaotic periods in recent times.⁸⁶ Consequently, the fact that it has endured "countless invasions, bloody uprisings, dictatorships, civil wars, and shifts in power and philosophies"⁸⁷ and survived, may be attributable to its cohesive cultural norms. Indeed, even today, dominant informal standards of societal conduct may prevail over inconsistent codified law because of natural norms of harmonious relations,⁸⁸ making "legal culture" a term that can be more accurately defined by resorting to an understanding of traditional

⁸¹ See *Three years after ban*, *supra* note 4.

⁸² See Bodeen, *supra* note 69.

⁸³ See ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 8 (1992).

⁸⁴ See HUMAN RIGHTS WATCH, *supra* note 5, at 1. Chinese rulers for 2,000 years have periodically quelled "superstitious sects, secret societies, and evil religious organizations" perchance because of the collective potency that groups could wield against dissatisfaction with the government. See Thomas, *supra* note 17, at 472.

⁸⁵ See CHEN, *supra* note 83, at 1.

⁸⁶ When Chairman Mao ascended to power, it seemed stable societal institutions would emerge. Instead, the Anti-Rightist Campaign of 1957-58 cast the country into turmoil. See JEROME ALAN COHEN, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963: AN INTRODUCTION 5-25 (1968). The Cultural Revolution devastated China and Mao dismantled legal institutions so that "true reform" could occur for the betterment of society. See CHEN, *supra* note 83, at 32.

⁸⁷ See Shauna Emmons, *Freedoms of Speech in China: A Possibility or a Prohibition?*, 23 LOY. L.A. INT'L & COMP. L. REV. 249, 251 (2001).

⁸⁸ See Timothy A. Gelatt, *The People's Republic of China and the Presumption of Innocence*, 73 J. CRIM. L. & CRIMINOLOGY 259, 307 (1982).

collectivist societal values than new codifications⁸⁹ intended to embrace conceptions of individual rights. The balance between collectivist and individualist thought defines the direction and speed of Chinese legal reform.⁹⁰

Historical influences on current ideology trace back to the teachings of Confucius, who stressed the rights of society over the rights of the individual.⁹¹ Confucian thought designated the importance of particular societal actors by placing the state first, the collective second, and the individual last.⁹² More individualistic societies elevate the concept of legal rights by institutionally defining such rights as privileges of the individual that the collective society, government and majoritarian voices cannot eliminate.⁹³ Due to China's historically ensconced collectivist societal norms, what the Western world perceives as individual rights have been regarded as interests in China.⁹⁴ The CCP has followed this same governance philosophy during this century.⁹⁵

⁸⁹ See Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT'L L. & BUS. 383, 405 (2000).

⁹⁰ JOHN RAWLS, A THEORY OF JUSTICE 4-5 (rev. ed. 1999).

⁹¹ See generally THE ANALECTS OF CONFUCIUS (Chichung Huang trans., 1997); see Ronald J. Troyer, *Chinese Thinking about Crime and Social Control*, in SOCIAL CONTROL IN THE PEOPLE'S REPUBLIC OF CHINA 45, 46 (Ronald J. Troyer et. al. eds., 1989).

⁹² See CHEN, *supra* note 83, at 10.

⁹³ See Randall P. Peerenboom, *Rights, Interests, and the Interest in Rights in China*, 31 STAN. J. INT'L L. 359, 367 (1995).

⁹⁴ See *id.*

⁹⁵ Collectivism and many century-old Confucian norms have evolved into and been expressed during the previous century in China. In 1919, Chen Duxiu, an editor for Youth magazine who later became the CCP's first General Secretary advocated that collective interests should prevail over individual rights. See Guo Luoji, *A Human Rights Critique of the Chinese Legal System*, 9 HARV. HUM. RTS. J. 1, 2 (1996). Duxiu asserted that China's future philosophical direction should not seek to hearten individual human rights, but rather to accentuate democracy and the larger community and nation. See *id.* at 2. Duxiu reasoned that individual rights can confine cooperative societal interests and sabotage government action, particularly in circumstances where the government would otherwise emphasize that a higher utility exist when favoring majoritarian interests. See William P. Alford, *Of Arsenic and Old Laws, Looking Anew at Criminal Justice in Late Imperial China*, 72 CAL. L. REV. 1180, 1192 (1984); see generally RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 269 (1977). Society's collective rights outweigh the interests of any one individual or group of individuals. See Peerenboom, *supra* note 93, at 368-69. The CCP's traditional posture is reflected in Article 51 of the 1982 PRC Constitution, which states, "[t]he exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state of society and of the collective, or upon the lawful freedoms and rights of other citizens." See XIANFA, *supra* note 66, art. 51. A more relaxed balance between individual rights and collective interests appears in a 1999 amendment to the Xianfa: "The People's Republic of China shall be governed according to law and shall be built into a socialist country based on the rule of law." See Lubman, *supra* note 89, at 399.

Over the past two decades, government reforms have systematically driven social and legal transformation⁹⁶ in nearly every dimension of Chinese life, and reconstituted the balance of rights between the collective and individual⁹⁷ and between the significance of legal codifications vis-à-vis traditional non-legal forms of civic management. China did not even muse on the notion of global human rights until it opened its doors to the international economy to fuel development,⁹⁸ and it still claims that its history, culture,⁹⁹ and the need to develop make it unique and requires exception from universal human rights standards.¹⁰⁰ Individual rights are very much a new phenomenon in China.¹⁰¹

B. *Global Human Rights and Falun Gong*

When government grants new freedoms and individual liberties that could be inconsistent with history and tradition and there is the lurking fear that collective stability might be undermined by citizens exercising new freedoms, it may meet the distance between law and acceptable societal conduct with a crackdown movement,¹⁰² as

⁹⁶ See Timothy A. Gelatt & Frederick E. Snyder, *Legal Education in China: Training for a New Era*, 1 CHINA L. REP. 41, 41-43 (1980).

⁹⁷ See Pamela A. Seay, *Law, Crime, and Punishment in the People's Republic of China: A Comparative Introduction to the Criminal Justice and Legal System of the People's Republic of China*, 9 IND. INT'L & COMP. L. REV. 143, 146 (1998).

⁹⁸ See ANN KENT, BETWEEN FREEDOM AND SUBSISTENCE: CHINA AND HUMAN RIGHTS 100 (1993).

⁹⁹ *Cultural relativism* assumes that one nation should not condemn the sovereign practices of another nation because differing historical and cultural practices exist and no approach to governing society is superior to another.

¹⁰⁰ See Eleftherios Georgiou, *China: Where the Failure to Adhere to Domestic Political Laws Often Leads to Religious Oppression*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 355, 358 (2000).

¹⁰¹ Chinese leaders have been primarily concerned with reforms that would best encourage economic development. See Lubman, *supra* note 89, at 386-87. Deng Xiaoping was the first president to emphasize economic modernization. See JOHN KING FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY 406 (1998). However, there is a correlation between economics and social reform even though social reform lingers behind economic reform, but Western individual human rights and law do not have the same connotation in China because Chinese law has traditionally been structured to remove individual rights to favor state and collective interests. See Luoji, *supra* note 95, at 5. "Law" has had the potential to increase state power vis-à-vis the individual. See James V. Feinerman, *The Rule of Law... with Chinese Socialist Characteristics*, 96 CURRENT HISTORY 278, 280 (1997). Government authority safeguarded the larger collective interest at the expense of individual rights that were provided in the formal legal system. See Colin Campbell, *China Suddenly Taking a Tougher Line on Crime*, N.Y. TIMES, Sept. 13, 1983, at A2 (citing China's anti-crime campaign as one example).

¹⁰² See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 30, 32 (1974). The theory is that being more aggressive with crime and prosecution may result in punishing some percentage of the potentially innocent but this may save more lives by deterring potentially harmful conduct and

occurred in the 1989 Tiananmen Square massacre,¹⁰³ in hedging against an increasing crime rate,¹⁰⁴ and by deeming a group an “evil cult.” The government’s more gradual and contemplated reaction to Falun Gong might be attributable to learning by past example and understanding that increased transparency mandates appeals to supportive perceptions of not only its own citizens, but also the perception of the international community.¹⁰⁵ However, even with a more contemplated reaction, according to Falun Gong and human rights groups, government abuses have been austere and widespread¹⁰⁶ even if one were to allocate the greatest deference to cultural relativist explanations for events.

Falun Gong claims that the Chinese government’s crackdown against the group has resulted in “torture; genocide; violation of the right to life; violation of the right to liberty and security of the person; arbitrary arrest and imprisonment; violation of the freedom of thought, conscience and religion; and conspiracy to commit violations of civil rights within the United States.”¹⁰⁷ China does have an obligation to the international community to uphold human rights standards contained in several covenants that would prohibit the abuses that Falun Gong claims have occurred,¹⁰⁸ but what would be a justified

removing a higher percentage of potential wrongdoers from society. Detaining an individual pending a long investigation may be justified beyond the statutory period based on the same line of analysis.

¹⁰³ See Jennifer Morris, *Human Rights Violations During the Tiananmen Square Massacre and the Precedents Obliging United States Response*, 13 CARDOZO L. REV. 1375 (1991).

¹⁰⁴ For example, in April 1996, the government implemented a “strike hard” campaign against crime because it recognized that there were escalating crime rates and believed that harsher police practices were necessary to fortify national security. See John T. Boxer, *China’s Death Penalty: Undermining Legal Reform and Threatening National Economic Interest*, 22 SUFFOLK TRANSNAT’L. L. REV. 593, 604-05 (1999).

¹⁰⁵ Other countries have been very critical of China. See *Amnesty International Memorandum to the State Council*, *supra* note 1; *U.S. Report Slams PRC Human Rights Record*, CHINA POST, Oct. 3, 2002, available at LEXIS, Asiapac Library, Global News Wire [hereinafter *U.S. Report*]; *Human Rights Watch urges Bush to use leverage on China*, AGENCE FRANCE PRESSE, Aug. 15, 2001, available at LEXIS, Asiapac Library.

¹⁰⁶ See generally HUMAN RIGHTS WATCH, *supra* note 5.

¹⁰⁷ See *Zemin*, *supra* note 9, at 2; see generally HUMAN RIGHTS WATCH, *supra* note 5.

¹⁰⁸ China is bound to respect the Universal Declaration of Human Rights (UDHR). See G.A. Res. 217A (III), 3rd Sess., at 71, U.N. Doc. A/810 (1948) [Hereinafter UDHR]. The UDHR is not even a document that requires ratification because it was adopted universally as a statement of objectives to be pursued by governments to grant human rights to all. See *Questions and answers about the Universal Declaration of Human Rights*, United Nations Association in Canada, at <http://www.unac.org/rights/question.html> (last visited May, 21, 2003). It is nonetheless customary international law. Custom, or arguably the combination of *opinio juris* and common state practice (Anthea Elizabeth Roberts, *Tradition and Modern Approaches to Customary International Law: A Reconciliation*, 95 A.J.I.L. 757, 757 (Oct. 2001)), is a source of international law that states must follow. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Art. 38, June 26, 1945, 59

reaction within the parameters of international law and China's distinct situation is the searing question.

C. *Defining a Justified Reaction to Falun Gong*

1. Introduction

In waging its crackdown movement to contravene evangelism, the Chinese government may have denied Falun Gong's freedom of speech and expression,¹⁰⁹ religion/conscience,¹¹⁰ and assembly,¹¹¹ but

Stat. 1031, T.S. No. 993). The UDHR was approved by consensus (*see* EDMUND JAN OSMANCIK, *THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS* 402 (1990)) and has solidified tacit acceptance over the past five decades. *See* DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 95-96 (2001). China is also a party to the International Convention on Civil and Political Rights (ICCPR) (*see* International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*see* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 465 UNTS 85 [hereinafter Convention Against Torture]), and the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief. G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 172, U.N. Doc. A/36/51 (1981) [hereinafter Declaration on Religion].

¹⁰⁹ Rights, such as freedom of speech and expression, are protected in the Chinese Constitution (*see* XIANFA, *supra* note 66, art. 35) but there is dissension between Western connotations of rights expressed in human rights law, that provide a distinct balance between individualism and collectivism, and practice, as influenced by tradition and government policy-making in China. Freedom of expression (*see generally* Emmons, *supra* note 87) and the ability to disseminate information (*see U.S. Report, supra* note 105) remains strict in China even though international law prescribes that right. *See* UDHR, *supra* note 108, art. 19; *see* ICCPR, *supra* note 108, arts. 19, 21-22. Likewise, it is also an international human right to take part in government and to express one's opinion peacefully. *See id.* arts. 19-21. However, the Chinese government has supervised what citizens can express to the extent and degree that preventing social harm or promoting stability arguably requires restrictions. *See generally* WON HO CHANG, *MASS MEDIA IN CHINA: THE HISTORY AND THE FUTURE* (1989); *see generally* ALLISON LIU JERNOW, "DON'T FORCE US TO LIE": THE STRUGGLE OF CHINESE JOURNALIST IN THE REFORM ERA (1993); Jack Linchuan Qiu, *Virtual Censorship in China: Keeping the Gate between the Cyberspaces*, 4 INT'L J. COMM. L. & POL'Y 1 (Winter 1999/2000). The Chinese government has restricted and preempted Falun Gong's message as less acceptable speech that could incite societal harm and instability.

¹¹⁰ International law also provides for freedom of religion (*see* UDHR, *supra* note 108, art. 18; *see* Declaration on Religion, *supra* note 108, at 172), although it has been recently noted that one of the problems in protecting an international right to freedom of religion is in how that right should be defined. There is no international consensus. Should religion be defined as a *belief*, an *identity*, or a way of life? *See* T. Jeremy Gunn, *Religion, Democracy, & Human Rights: The Complexity of Religion and the Definition of "Religion" in International Law*, 16 HARV. HUM. RTS. J. 189, 189 (Spring 2003). "While religion as *belief* is perhaps the most readily understandable facet of religion for the typical adjudicator, religion as *identity* is more likely to be the underlying cause of religious discrimination and persecution as it exists in the world." *See id.* Regardless of the definition employed, the Chinese government has treated registered religious groups better than unregistered religious groups. *See* Georgiou, *supra* note 76, at 355. Some groups and individuals that violate Chinese law on registration requirements have been subjected to human rights abuses. *See* Steven Wales, *Remembering the Persecuted: An Analysis of the International Religious Freedom Act*, 24

whether it violated these human rights is contingent upon how one defines a sovereign's justified wielding of force to preserve public safety and security that obstructs the exercise of individual or group rights.¹¹² The international community may have a different perception than the government or citizens of a target country. Certainly, countries that lack a consolidated democratic nexus between the populace and government, such as when one political party is conspicuously dominant, can potentially have a greater distance between citizen opinion and the actual government reaction toward a group claimed to pose a national security, public safety, or health threat to the rest of society. While the trend in China is progressively enhancing the rights of the individual in substantive criminal law and in institutions designed to modify the behavior of those committing non-criminal societal transgressions, Falun Gong actions have posed a profound challenge to the Chinese government, particularly because varying public opinion exists in a time when government responsiveness to citizen desires is increasing. Examining government institutions and their relationship to citizen opinions can be telling for this dispute.

2. China's Government Structure & Institutions

The PRC Constitution proclaims that all power resides in the people and that governing authority is exercised through the National People's Congress (NPC).¹¹³ The NPC is the preeminent organ of state authority and has ultimate lawmaking power,¹¹⁴ but the NPC Standing Committee carries out the work of the NPC when it is not in session¹¹⁵ and it is responsible to the NPC.¹¹⁶ The NPC also delegates rule-

HOUS. J. INT'L L. 579, 609 (2002). This is a method of favoring ideology that could otherwise blossom into an opposing collective political force. See Gunn, at 207. Scholars disagree over whether Falun Gong should be defined and protected as a "religious group." See Jiangyu Wang, *China and the Universal Human Rights Standards*, 29 SYRACUSE J. INT'L. L. & COM. 135, 156 (Fall 2001); see Gunn, at 196. The official Chinese position is that the crackdown is not involving religious suppression but obstructing ulterior motives of Falun Gong as an organization (see *Cheat Western Public Opinion*, *supra* note 19) and punishing members, not for practicing Falun Gong, but for violating Chinese law. See HUMAN RIGHTS WATCH, *supra* note 5 at VII.

¹¹¹ See UDHR, *supra* note 108, art. 20; see ICCPR, *supra* note 108, arts. 21-22; see XIANFA, *supra* note 66, art. 35.

¹¹² See ICCPR, *supra* note 108, arts. 4, 19, 21-22.

¹¹³ See XIANFA *supra* note 66, art. 2 (1982).

¹¹⁴ See *id.*

¹¹⁵ See *id.*, arts. 58, 62, 67.

¹¹⁶ See *id.*, art. 69.

making authority to the State Council,¹¹⁷ the executive of the government, making it somewhat beholden to the NPC.¹¹⁸ Since the 1980's there has been legal fragmentation and jurisdictional regulatory overlaps of authority between institutions of government¹¹⁹ and State Council challenges to NPC authority, but ultimate legislative authority and appointment of top positions within the State Council do still resort back to NPC prerogative¹²⁰ and CCP recommendations.¹²¹ Because of this government structure, China is often depicted as having a unified legislature and administrative bureaucracy.¹²²

Outside of the general legislative authority in China, other institutions have had an important impact on the criminal law process and actions relating to Falun Gong. Even though all government institutions are subordinate to the NPC, most new legal initiatives are compromises among various interested institutions and government organs.¹²³ The Supreme People's Court and the Supreme People's Procuratorate (public security organ) have important roles in the criminal justice system but neither are lawmaking bodies.¹²⁴ The Supreme People's Court and the Supreme People's Procuratorate are constitutionally independent from each other and other government organs,¹²⁵ but the Procuratorate monitors and supervises the Court,¹²⁶ and both are legally and politically responsible to the NPC due to the

¹¹⁷ See Donald C. Clarke, *What's Law Got to Do With It? Legal Institutions and Economic Reform in China*, 10 UCLA PAC. BASIN L.J. 1, 18-19 (1991).

¹¹⁸ See DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 96-97 (2002).

¹¹⁹ See Lubman, *supra* note 89, at 390.

¹²⁰ See XIANFA *supra* note 66, arts. 57, 58, 89.

¹²¹ See Clarke, *supra* note 117, at 17.

¹²² See RONALD C. KEITH, *CHINA'S STRUGGLE FOR THE RULE OF LAW* 83 (1994).

¹²³ See Clarke, *supra* note 117, at 26. Generally, since the criminal justice modernization process began, the voices and interests of these institutions have differed and provided a rich atmosphere of pluralistic debate when new criminal law and criminal procedure legislation has been at issue. The final statutory product of initiatives has had the tendency to strike a compromise between historical collectivist positions and individual legal rights (see Lubman, *supra* note 89, at 405), and has resulted in consequential advances, but certainly not perfection, in the human rights protection arena.

¹²⁴ *Translated in* Supreme People's Court, *Certain Provisions on the Work of Judicial Interpretation* (June 23, 1997) (unpublished translation by Professor Bing Ling). The Supreme People's Court publicly issues judicial interpretations with legal force in the form of "Explanations" (how to implement a law or apply it in particular types of cases); "Provisions" ("norms and opinions given on the adjudication work according to the needs of adjudication"); and "Replies" ("responses to request for instructions on questions concerning concrete application of laws arising from adjudication work by the high people's courts and the military courts of the People's Liberation Army"). See *id.*

¹²⁵ See XIANFA *supra* note 66, arts. 126, 131 (1982).

¹²⁶ See CHOW, *supra* note 118, at 215-17.

appointment and removal process.¹²⁷ Thus, the Supreme People's Court and the Supreme People's Procuratorate are, to some degree, responsible to the NPC, as well as informally beholden to the CCP.¹²⁸

Prior to the crackdown decision, Chinese leaders espoused varying opinions regarding the most appropriate response to Falun Gong,¹²⁹ but after the judicial system administered the first enforcement actions that resulted in criminal punishments and detentions being imposed on Falun Gong members,¹³⁰ all branches of government and institutions were unified in support of the crackdown.¹³¹ However, this does not mean that unification in dispositions by government institutions should be perceived as a citizen-sponsored preference. The CCP is still the only real political party in China¹³² even though political dynamics denote that there is

¹²⁷ See XIANFA, *supra* note 66, arts. 67, §§ 11-12, 128, 133.

¹²⁸ See Jeremy J. Monthly, *Internal Perspectives on Chinese Human Rights Reform: The Death Penalty in the PRC*, 33 TEX. INT'L L.J. 189, 205 (1998).

¹²⁹ "Not all China's leaders opted to strictly crackdown on Falun Gong. Some preferred to implement a program of co-optation that would bring Falungong under strict bureaucratic control analogous to the way China treats religious believers and institutions." See HUMAN RIGHTS WATCH, *supra* note 5, at VII.

¹³⁰ See Clopak, *supra* note 13, at 17.

¹³¹ China's Ministry of Civil Affairs and Public Security censored Falun Gong activities, the National People's Congress set crimes and penalties for practicing and evangelizing Falun Gong tenets, and the Supreme People's Court has prosecuted and punished Falun Gong practitioners (*see id.*) without questioning whether individual or group rights were unjustifiably abridged. The Supreme People's Procuratorate has stated, "procuratorial organs have conscientiously carried out the decision of the NPC Standing Committee on outlawing religious cults and on guarding against and punishing crimes committed by religious cults, and have approved the arrest of and brought public persecution against a batch of criminal suspects on charge of disrupting the execution of the law by organizing and utilizing such religious cults as the 'Falun Gong.'" *Apparent Full Text of Work Report of Chinese Supreme People's Procuratorate*, BBC MONITORING INTERNATIONAL REPORTS, Mar. 31, 2003, available at LEXIS, Asiapac, BBC File. [hereinafter *Work Product of Procuratorate*]. Also, the Chinese judicial system has formally accepted the substantive basis on which Falun Gong members have been convicted. In a recent work product report by the Chinese Supreme Court, it indicated that "[c]rimes that compromise state security and those that jeopardize the safety of citizens' lives. . . . [subvert] state power. . . . [and disrupt] the enforcement of laws by organizing and using the 'Falun Gong'" have been "severely punished according to law." *China: Apparent full text of Supreme Court Work Report*, BBC MONITORING INTERNATIONAL REPORTS, Mar. 29, 2003, available at LEXIS, Asiapac Library, British Broadcasting Corporation.

¹³² If there is only one political party in power, which has been the case in China, there is no real electoral choice or debate among groups or positions. See BUILDING DEMOCRATIC INSTITUTIONS: PARTY SYSTEMS IN LATIN AMERICA 6-20 (Scott Mainwaring et al. eds., 1995) [hereinafter BUILDING DEMOCRATIC INSTITUTIONS]. In democracies, politicians compete in electoral markets as representatives and would lose their elected positions if they indulged their own whims at the constituents' expense. See Bruce Bender & John R. Lott, Jr., *Legislator Voting and Shirking: A Critical Review of the Literature*, 87 PUB. CHOICE 67, 89 (1996). In a democratic society, legitimate government authority depends on this process and on citizen consent. See BRUCE A. ACKERMAN, SOCIAL JUSTICE BY THE LIBERAL STATE 10-11 (1980). In fact, many Chinese leaders have clung to power by punishing agitators for political crimes. See U.S. Report, *supra* note 105. The CCP still has an abiding stronghold on political control (*see* KEITH,

ostensibly more consistency today between government policies and citizen preferences.¹³³ While the international community scrutinizes only sovereign actions, populace preferences should also be considered to provide insight into the environmental and social context surrounding a potential human rights violation. In international law, a government has a right to self-determination and to govern itself without external or internal influence,¹³⁴ but the populace has the right to choose leaders and government type,¹³⁵ express its opinion,¹³⁶ and

supra note 122, at 3-5) and party members hold a high percentage of top government, police, and military positions, and those outside this power rampart may still fear reprisal for expressing too divergent of opinions (*see* Alford, *supra* note 95, at 1183), but change has been evident. During Mao's tenure, the CCP and Mao had an authoritarian grip on society and policy-making. *See* Lubman, *supra* note 89, at 384. Legal reform and the modernization process have challenged traditional social mores about the appropriate relationship between the populace and government in China and new dynamic relationships exist among institutions and society. *See* CARLOS WING-HUNG LO, CHINA'S LEGAL AWAKENING: LEGAL THEORY AND CRIMINAL JUSTICE IN DENG'S ERA 29-31, 258 (Derek Roebuck et al. eds., 1995) [hereinafter LO, CHINA'S LEGAL AWAKENING].

¹³³ The CCP no longer has a centralized and authoritarian grip on Chinese society. *See* STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 2 (1999); *see* Merle Goldman & Roderick MacFarquhar, *Dynamic Economy, Declining Party-State*, in THE PARADOX OF CHINA'S POST-MAO REFORMS 3, 25 (Merle Goldman et al. eds., 1999). Political participation and negotiation within government, and evolving institutions determine how rights are defined in law at any given time. *See* Kenneth G. Lieberthal, *Introduction: The "Fragmented Authoritarianism" Model and Its Limitations*, in BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 1, 9 (Kenneth G. Lieberthal et al., eds., 1992). Debate and negotiation is the norm among positions within the CCP even though it is still undeniably the ultimate driving force for new policies and laws. *See* James Hugo Friend, *The Rocky Road Toward the Rule of Law in China: 1979-2000*, 20 NW. J. INT'L L. & BUS. 369, 374 (2000).

Many factors now influence government policy-making. Societal and economic forces require government to maintain legitimacy. *See* *Intimations of Morality*, ECONOMIST, June 30, 2001, at 21-23. General society can apply political pressure on government because lower levels of government may adopt local regulations that do not contravene higher law. *See* XIANFA *supra* note 66, art. 100; *see* Seay, *supra* note 97, at 147. Also, lower level deputies are selected from general society (*see* XIANFA *supra* note 66, art. 59) through a bottom-up hierarchical process. *See* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA: 1983-1986, at 62, 68 (1995) [hereinafter LAWS OF THE P.R.C.]. NPC delegates have been able to form constituent loyalties. *See* MURRAY SCOT TANNER, THE POLITICS OF LAWMAKING IN POST-MAO CHINA: INSTITUTIONS, PROCESSES AND DEMOCRATIC PROSPECTS 72 (1999). There is some right to employ policy-making power at the grass roots level outside of the formal government structure. *See* XIANFA, *supra* note 66, art. 111. Pressure also emerges from increased pluralism within the NPC (*see* TANNER, at 51-74), influences by interest groups outside of government (*see id.*), and diminished populace faith in former political ideology (*see* Lubman, *supra* note 89, at 404).

¹³⁴ *See* THE PEACE OF WESTPHALIA, 1 Consolidated Treaty Series 198 (1648); THE MONTEVIDEO CONVENTION, Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19, arts. 4, 8.

¹³⁵ *See* UDHR, *supra* note 108, art. 21.

¹³⁶ *See* UDHR, *supra* note 108, art. 19; *see* ICCPR, *supra* note 108, arts. 19, 21, 22.

thereby derivatively influence policies, normally through political parties and representatives.¹³⁷

3. The Opinion of Chinese Citizens Regarding Falun Gong

Chinese citizens have sought and attained more individual rights protections in criminal justice institutions over time, but government policies enacted to stringently fight crime have also apparently been consistent with the will of the people.¹³⁸ In the case of Falun Gong, public opinion has been somewhat opposed to the group, but opposition is certainly less conspicuous and uniform than that of the positions held by government institutions or exhibited by the claimed harshness of the crackdown movement. Apparently, public opinion of ordinary mainland Chinese since January 2001 did seemingly swing against Falun Gong.¹³⁹ Likewise, Voices of Chinese conducted a web survey of 1,064 primarily foreign educated Chinese on a number of issues relating to the Chinese government's treatment of Falun Gong and its members.¹⁴⁰ The survey is telling, and while it is

¹³⁷ A political party is any group that sponsors candidates at elections and is capable of placing them in public office. GIOVANNI SARTORI, *PARTIES AND PARTY SYSTEMS: A FRAMEWORK FOR ANALYSIS* 63 (1976). In systems of governance where the populace has a fairly strong nexus with actions by politicians, e.g. consolidated democracies, parties are key actors of societal and political representation because they provide an efficient and aggregate voice for society (see SIDNEY VERBA ET AL., *PARTICIPATION AND POLITICAL EQUALITY: A SEVEN-NATION COMPARISON* 142 (1978)), reduce information costs (see WALTER LIPPMANN, *PUBLIC OPINION* 58-63 (1949)), and bestow more predictability and compromise to the political process and government. See *BUILDING DEMOCRATIC INSTITUTIONS*, *supra* note 108, at 4-5.

¹³⁸ For instance, in the "strike hard" against crime campaign in 1996, the NPC granted more leniencies to police to fight crime and dispense stricter penalties on those convicted of crimes. See Boxer, *supra* note 80, at 606. Seemingly, this campaign was implemented at the behest of societal and populace preferences. Actual adoption and administration of the harsher policies had overwhelming support from the populace. See *id.*, at 604.

¹³⁹ See *The Killing of a Cult*, SUNDAY AGE (Melbourne), Mar. 17, 2002, available at LEXIS, Asiapc Library; see *Cheat Western Public Opinion*, *supra* note 19; see *CIA behind Falun Gong*, *supra* note 68. A number of Chinese academics and experts have requested that the international community "jointly denounce and resolutely put a stop to the new crimes of 'Falun Gong', which harm public security and challenge human civilization" *Chinese Academics Denounce Falun Gong*, BBC WORLDWIDE MONITORING, July 11, 2002, available at LEXIS, Asiapc Library.

¹⁴⁰ Mei Lu, *The Controversy About Falun Gong: What Do Chinese People Think?*, THE REPORT OF FALUN GONG SURVEY, at <http://www.voicesofchinese.org/falun/surveyrpt.shtml#falun> (last visited June 4, 2003).

Responses to Questions about Falun Gong	Agree	Disagree	Neutral	DK
1. Is a cult.	51%	33%	8%	8%

not the opinion of citizens currently residing in China, it is the opinion of Chinese who have been exposed to mainland culture and understand the Chinese government and society behaviors.¹⁴¹ Some conclusions can be reached from the survey results.

The participating overseas Chinese do believe that Falun Gong is a cult that is harmful to Chinese society, its stability, and the country's modernization process,¹⁴² but to some degree also believe that there can be health benefits but not spiritual benefits to practicing Falun Gong.¹⁴³ While Chinese are overwhelmingly critical of the group's leader, stating that his teachings are fallacious¹⁴⁴ and that they

2. Teaches people to do good things	33	37	22	8
3. Hypocritical appeal to truthfulness, benevolence, forbearance.	41	33	15	1
4. Beneficial to people's body.	36	32	15	1
5. Harmful to Chinese society.	47	35	14	4
6. Beneficial to people's soul.	30	49	16	5
7. Anti-scientific.	64	25	8	3
8. Threatens the stability of society.	44	37	15	5
9. Engaged in illegal actions.	42	34	13	11
10. Led to many practitioners' death.	38	24	13	24
11. Li Hongzhi is a master of various disciplines.	15	66	8	10
12. Li Hongzhi is an imposter.	59	24	8	9
13. Li Hongzhi's works are fallacious	55	24	8	9
14. Should be banned in China	39	41	17	3
15. Government violated human rights.	43	36	18	3
16. Government's actions inappropriate.	50	31	15	3
17. Banned because of its political influence.	62	16	14	8
18. Banned because of the harm caused to people and society.	43	40	14	7

¹⁴¹ The opinion polls of overseas Chinese are more apt to be consistent with mainland Chinese than any position of Western governments or their citizens. However, there is an important distinction. Mainland Chinese have a much lower education level than overseas Chinese.

¹⁴² See Lu, *supra* note 140, questions 1, 5, 8.

¹⁴³ See *id.*, questions 4, 6.

¹⁴⁴ See *id.*, questions 11-13.

led practitioners to engage in illegalities¹⁴⁵ and to commit suicide,¹⁴⁶ they do not necessarily believe that Falun Gong should be banned.¹⁴⁷

The survey's respondents affirmed that it is not the government's role to prevent speech or control what people want to believe. Also, the surveys indicate that a high percentage of Chinese maintain that the government violated human rights and that its reaction to Falun Gong was inappropriate,¹⁴⁸ but respondents were notably convinced that the Chinese government banned it primarily because of the fear of losing political control and only partially because the group posed a potential harm to society.¹⁴⁹

As suggested by the results of these poll questions, the Chinese populace believes that this dispute should not be framed in terms of the truthfulness of Falun Gong tenets, but in terms of whether Falun Gong should have a right to exist and express itself as long as those expressions and actions do not threaten societal stability. However, this has always been the cardinal government claim – Falun Gong was banned not for holding particular beliefs but because member actions posed potential harms to society and that criminal penalties or non-criminal reform measures was warranted.

Chinese government institutions and the emphasis on fostering collective interests over individual rights have often defined the legislative agenda for society,¹⁵⁰ which then influences criminal law parameters and enforcement. Certainly, China's statutory criminal law has begun to resemble its counterpart in many Western countries, but how it functions in practice and the existence of ideologically-related but non-criminal reform institutions assemble very distinct Chinese characteristics. For example, just as the United States distinguishes between misdemeanors and felonies, the Criminal Law in China dichotomizes societal transgressions into "serious" and "minor" offenses, and whether either is applied is dependent on the circumstances surrounding the transgression and the harm to the community.¹⁵¹ Serious offenses are more apt to be handled by the

¹⁴⁵ See *id.*, questions 1, 5, 7-8.

¹⁴⁶ See *id.*, questions 9-10.

¹⁴⁷ See *id.*, questions 4, 14.

¹⁴⁸ See *id.*, questions 14-15.

¹⁴⁹ See *id.*, questions 17-18.

¹⁵⁰ See Seay, *supra* note 97, at 143, 145-46.

¹⁵¹ "All acts that endanger the sovereignty, territorial integrity, and security of the state; split the state; subvert the political power of the people's democratic dictatorship and overthrow the socialist system; undermine social and economic order; violate property owned by the state or property collectively owned by the laboring masses; violate citizens' privately owned property; infringe upon

official criminal justice process, while minor offenses are more prone to be handled by RETL.

*D. Behavioral Change for Societal Transgressions:
Formal Criminal Justice System vs. Informal RETL*

1. Theory of Instilling Acceptable Behavior vs. Punishment

Leaders have employed many methods to cultivate socially desirable behavior in China,¹⁵² often without relying on criminal punishment. At a person's early age, it can include providing traditional and rudimentary cultural training to nurture social and moral instruction within the family unit¹⁵³ and raising children in a manner to support societal harmony to preempt them from committing wrongs against society; while later in life, actual transgressions might occasion ostracizing individuals from the community or utilizing informal behavioral modification approaches.¹⁵⁴ Alternatively, the criminal justice system is premised on legal and objectively defined forms of punishment to mete out civil and criminal penalties for more severe transgressions of acceptable norms.

In China, the law and informal norm counterpoise is normally depicted by scholars as a balance between *li* and *fa*.¹⁵⁵ *Li*, premised on Confucianism, refers to the non-criminal mechanisms that can preempt societal transgressions before they occur by instilling "moral and social rules of conduct"¹⁵⁶ that educate society about proper behavior, which assumes that excessive legal coercion is not necessary or desirable to modify the behavior of individuals.¹⁵⁷ Alternatively, *Fa*

citizens' rights of the person, democratic rights, and other rights; and other acts that endanger society, are crimes if according to law they should be criminally punished. However, if the circumstances are clearly minor and the harm is not great, they are not to be deemed crimes." Criminal Law of the People's Republic of China, Adopted by the Second Session of the Fifth National People's Congress on July 1, 1979 and amended by the Fifth Session of the Eighth National People's Congress on March 14, 1997, art. 13, available at <http://www.com-law.net/findlaw/crime/criminallaw1.html> [hereinafter Criminal Law].

¹⁵² See Wallace Johnson, *Status and Liability for Punishment in the T'ang Code*, 71 CHI.-KENT L. REV. 217, 217 (1995).

¹⁵³ See *id.*, at 218.

¹⁵⁴ See Boxer, *supra* note 104, at 601.

¹⁵⁵ See CHEN, *supra* note 83, at 9.

¹⁵⁶ See *id.*, at 8.

¹⁵⁷ See *id.*, at 9. For most of Chinese history and for the first three decades of CCP rule, informal power sources of ethical persuasion deeply molded societal behavior. See *Concepts of the Law in the Chinese Anti-Crime Campaign*, 98 HARV. L. REV. 1890, 1890-91 (1985) [hereinafter *Concepts*].

refers to rules imposed by the state, ostensibly in a codified form that can be enforced by state-imposed sanctions.¹⁵⁸ Fa, or rule by law, is considered to be more congruent with global human rights standards because transparently defined rules can provide predictability to individuals, endow rights against government abuses, and provide for procedural protection within an independent judiciary.¹⁵⁹

China's criminal justice system is gradually becoming more consistent with a fortified and more transparent form of codified law, fa; while RETL is an administrative behavioral modification system consistent with China's history of moral rule, li, or rule by man.¹⁶⁰ Even though more transparency in the formal criminal justice process has decreased the opportunity to enforce the law by political will,¹⁶¹ the increased use of RETL is arguably occurring to compensate for new restrictions on government's ability to employ the formal legal system for political means.¹⁶² A relatively ambiguous substantive offense, and an existing inverse relationship between fortifying the rule of law and employing flexible behavioral reform mechanisms in the informal detention system, may explain why a fractional percentage of Falun Gong members have been judicially prosecuted and detained, while a very large percentage have been subject to detention within RETL camps.

of Law]. Leaders ruled by ethical guidance and sought to persuade through moral examples that emphasized societal harmony rather than adherence to written sources of law. See Troyer, *supra* note 91, at 50. There is integration among society, the family, and the paternalistic state (see CHEN, *supra* note 83, at 10) to define and enforce proper societal conduct.

¹⁵⁸ See CHEN, *supra* note 83, at 8.

¹⁵⁹ See generally THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate et al. eds., 1995).

¹⁶⁰ Chinese leaders have made it a specific goal to de-politicize the law. See Ian Dobinson, *The Criminal Law of the People's Republic of China (1997): Real Change or Rhetoric?*, 11 PAC. RIM L. & POL'Y J. 171, 179-181 (2002). Many believe that the CCP's control over the criminal justice process has still remained "an abiding stronghold of politicized administration of law." See Lubman, *supra* note 89, at 394-95. The CCP's transition from relying on *li*, as its primary power source, to *fa* remains an ostensibly irresolvable contradiction (see Lubman, *supra* note 89, at 399.), but it is imperative to the CCP's credibility that it make the transition to the rule of law.

¹⁶¹ See Daniel C. Turack, *The New Chinese Criminal Justice System*, 7 CARDOZO J. INT'L & COMP. L. 49, 53 (1999); see Daphne Huang, *The Right to a Fair Trial in China*, 7 PAC. RIM L. & POL'Y J. 171, 179-81 (1998).

¹⁶² RETL has evolved in recent years from a method intended to modify moral behavior to a "crime control mechanism" employed to avoid procedural requirements of the Criminal Procedure Law, such as when sufficient evidence may not be available to convict under the Criminal Procedure Law. See Veron Mei-ying Hung, *Improving Human Rights in China: Should Re-Education Through Labor Be Abolished?*, 41 COLUM. J. TRANSNAT'L L. 303, 315 (2003).

2. Reform of the Formal Criminal Justice System

Key leaders in the Falun Gong organization, who have engaged in actions that the Chinese government claims are criminal in nature, have been tried in the criminal justice system while other members have been subject to informal behavioral modification techniques to “re-educate”¹⁶³ and bring an individual back into the collective society as a productive member.¹⁶⁴ Remaining flexibility in the criminal justice system and new legislation enacted to ban “cults,”¹⁶⁵ is how many Falun Gong members have been detained, but the encompassing policy rationale for this legislation that delineates the underlying offense may revert to the most bedrock foundation that the CCP has historically employed to maintain power – the counterrevolutionary/endangering state security line of crimes.¹⁶⁶

Even with new institutional frameworks and cultural influences, the politics of China’s current criminal justice system is attributable to a struggle among institutional interests and competing populace demands.¹⁶⁷ The aggregation of competing societal interests at one point in time can beget legislative criminal justice reforms, but new laws still operate flexibly within a structure that ensures government discretion to combat rising crime rates¹⁶⁸ or other “offenses” against society. Indeed, codified law that protects individual rights can be well-defined and ostensibly less open to interpretation, but broad flexibility may still exist in the government’s

¹⁶³ See Thomas, *supra* note 17, at 480.

¹⁶⁴ See Seay, *supra* note 97, at 152.

¹⁶⁵ See Clopak, *supra* note 13, at 17.

¹⁶⁶ In the 1979 Criminal Law Code, a “counterrevolutionary crime” was an act that sought to endanger the PRC with the goal of overthrowing the government. See Criminal Law, *supra* note 151, art. 90. The 1997 Code renamed this crime “endangering state security” but it does not provide precise commentary on what this means. See Dobinson, *supra* note 160, at 24 (2002). Political will can still determine when a particular set of facts “endanger state security” and by eliminating the second prong of the test from the 1979 provision, the threshold of actions that could potentially be perceived as undermining state security has dropped, but probably is somewhat restricted by a new time and environment in China. The Chinese government clearly has had an official goal of depoliticizing criminal law (see *id.* at 24-25), but this remnant of flexibility within such a rapidly evolving society has provided discretion in managing Falun Gong’s activities.

¹⁶⁷ See Friend, *supra* note 109, at 375.

¹⁶⁸ For instance, China’s crackdowns on crime appear to come in phases. See Work Product of Procuratorate, *supra* note 133. While profound political and economic changes have been fluctuating values and populace beliefs in many regions of the country toward individualism, other societal problems emerge, such as rising crime rates because of mass migration of people in search of employment. See Lubman, *supra* note 89, at 404. Thus, criminal justice reforms, specifically implemented to fortify personal rights (see Turack, *supra* note 161, at 49), are operating within an environment of rising crime rates that risk societal harm to the collective.

ability to define the balance of competing interests when protecting public safety. Achieving an outcome in public safety in a collectivist society where crime drops because risks are taken with the potentially innocent¹⁶⁹ may be relatively more palatable and consistent with political expectations of the collective than in a liberal democratic society,¹⁷⁰ but this conception often does not provide adequate protection for individual human rights from a Western perspective.

The Chinese government has long recognized the imperative need to fortify the rule of law with checks and balances over arbitrary government authority¹⁷¹ to improve individual rights and liberties with codified and transparent rules.¹⁷² Its expectation is that state power can be fortified¹⁷³ if heightened legitimacy to government can be achieved.¹⁷⁴ Providing more individual rights protections in the criminal law and procedure process confront traditional forces that

¹⁶⁹ See H.J. McCloskey, *A Note on Utilitarian Punishment*, 72 MIND 599 (1963). "Risks" can include granting police more leniencies when searching for evidence, holding an individual with minimal evidence despite a low probability of guilt, and convicting someone based on a reduced or subjective guilt threshold. See LO, CHINA'S LEGAL AWAKENING *supra* note 132, at 100-01.

¹⁷⁰ Since Chinese have also traditionally espoused a conception of social order and human rights that balances in favor of the interests of the majority over the individual (see Luoji, *supra* note 69, at 3; see Carlos Wing-Hung Lo, *Criminal Justice Reform in Post-Crisis China: A Human Rights Perspective*, 27 HONG KONG L. J. 90, 145 (1997)), it is not surprising that someone accused of a crime in China has less protection from unfair prosecution than a similarly situated individual in probably all Western countries. In any society, some equilibrium is struck between the rights of the accused on the one hand, and the interests of the collective and victim on the other.

¹⁷¹ See Preston M. Torbert, *Book Review: China's Internal Debate*, 28 J. MARSHALL L. REV. 639, 640 (1995).

¹⁷² In 1979 Deng authorized the writing of a criminal code (see Shao-chuan Leng, *Criminal Justice in Post-Mao China: Some Preliminary Observations*, 73 J. CRIM. L. & CRIMINOLOGY 204, 205 (1982)), and the Law of Criminal Procedure, which was amended in 1996. THE CRIMINAL LAW AND THE CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (Jerome A. Cohen et. Al trans., 1984) [hereinafter 1979 CPL]. The 1979 CPL was adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, and was revised in accord with the Decision on Revising the Criminal Procedure Law of the People's Republic of China at the Fourth Session of the Eighth National People's Congress on March 17, 1996. It came into force on January 1, 1997. The Criminal Law was also updated and came into effect on October 1, 1997. See Mike P. H. Chu, *Criminal Procedure Reform in the People's Republic of China: The Dilemma of Crime Control and Regime Legitimacy*, 18 UCLA PAC. BASIN L.J. 157, 203 (2001). Interestingly, a draft of the criminal procedure code was prepared in 1957, but it was largely ignored because social changes after the Cultural Revolution were so extreme that an entirely new code was needed. See SHAO-CHUAN LENG, JUSTICE IN COMMUNIST CHINA: A SURVEY OF THE JUDICIAL SYSTEM OF THE CHINESE PEOPLE'S REPUBLIC 54 (1967). Additionally, the People's Congress adopted its Constitution in 1982 (see XIANFA, *supra* note 66), and other codified sources to support the process of legal transition. See Leng, at 207. Some other sources relevant to political control, government institutions, and protection of individual rights include the Organic Law of Local People's Congresses and Local People's Government's, the Electoral Law for the NPC and Local People's Congresses, the Organic Law of People's Courts, and the Organic Law of People's Procurators. *Id.*

¹⁷³ See Feinerman, *supra* note 101, at 280.

¹⁷⁴ See *Concepts of Law*, *supra* note 157, at 1894.

have previously undermined legal functions.¹⁷⁵ One commentator has noted the influence of li on criminal justice reform:

[B]efore the promulgation of the Criminal Law, we depended on criminal policies in convicting someone of crimes and meting out punishment. We made decisions at our discretion, and the work was strongly characteristic of rule by man. Under such circumstances, the promulgation of the Criminal Law put an end to the era in which there was no law to go by, and it was a historical progress.¹⁷⁶

Prior to 1979, China had no codified criminal law or procedure sources, which gave complete flexibility to actions of the police,¹⁷⁷ prosecutors, and the courts when assessing a suspect's guilt.¹⁷⁸ Subject to the scourges of the Cultural Revolution, drafters of the 1979 Criminal Procedure Law (1979 CPL) intentionally fortified the rights of the accused,¹⁷⁹ but legal norms were being injected into a system where cultural will was dominant, creating much conflict and inconsistency.¹⁸⁰ A mélange of non-codified exceptions emerged along with an abysmal chasm between codified law and reality.¹⁸¹ Since reinvigorating government legitimacy was the paramount mission, the government amended the 1979 CPL to make written law consistent with culture.¹⁸² For the next decade and a half, the battle brewed among newly independent institutions with formal divisions of responsibility in the investigative, prosecutorial, and adjudicative arenas in the criminal justice system.¹⁸³ The Supreme People's Court urged that prosecutorial power be curbed so that more rights would be endowed to the accused,¹⁸⁴ the Supreme People's Procuratorate advocated greater authority and leniency in prosecutorial standards,¹⁸⁵

¹⁷⁵ See Seay, *supra* note 97, at 143-45.

¹⁷⁶ See Turack, *supra* note 161, at 50.

¹⁷⁷ See LUBMAN, *supra* note 89, at 165-66.

¹⁷⁸ See *id.*, at 172; see generally 1979 CPL, *supra* note 172.

¹⁷⁹ See LENG, *supra* note 172, at 206-07.

¹⁸⁰ See Huang, *supra* note 161, at 160.

¹⁸¹ See Turack, *supra* note 161, at 52-53.

¹⁸² See FU HUALING, CRIMINAL PROCEDURE LAW, INTRODUCTION TO CHINESE LAW 164-65 (Wang Chenguang et. al. eds., 1997).

¹⁸³ See Lo, *supra* note 170, at 90, 100-01.

¹⁸⁴ See J. HECHT, OPENING FOR REFORM? 64-69 (1996).

¹⁸⁵ See HUALING, *supra* note 182, at 138.

and the Ministry of Public Security desired greater flexibility for police enforcement of criminal laws.¹⁸⁶

The culmination of these debates and pluralistic voices manifested with the adoption of the 1996 Criminal Procedure Law (1996 CPL).¹⁸⁷ This law has created more objectivity and fairness in the criminal justice process, but if these provisions had been applied to a significant percentage of Falun Gong members, or if their liberty was restrained,¹⁸⁸ within the much improved,¹⁸⁹ but far from flawless,¹⁹⁰ formal criminal justice process, the more that reform measures would be perceived as impotent since globally unpalatable substantive charges would likely have been brought against members. Instead, employing RETL engenders more opacity, and thus flexibility to behavioral modification to bring followers back into society as productive members with less stringent scrutiny from the international community and without undermining institutional reforms of the formal legal system, but it also can potentially result in a higher level of abuses than if these individuals were placed in the formal criminal justice system.

¹⁸⁶ See *id.*, at 137.

¹⁸⁷ See HECHT, *supra* note 184, at 19, 37-38.

¹⁸⁸ The 1996 CPL has five compulsory measures that permit government to restrain the action of an individual. These five methods are compulsory summons, pre-trial payment of bail, supervised residence, pre-arrest detention, and arrest. See Criminal Procedure Law of the People's Republic of China, pt. 1. ch. VI (1996), available at <http://www.chinalaw114.com/englishlaw/shownews.asp?id=178> [hereinafter CPL].

¹⁸⁹ Pretrial rights and rights to a fair hearing within the criminal justice system in China have become more consistent with international standards of more fully protecting individual rights of the accused. For example, within the UDHRs, there is a right to be presumed innocent (art. 11), to have a fair trial (arts. 10, 11), and to counsel (U.N. CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS at 120, U.N. Doc. A/Conf.144/28/Rev.1, U.N. Sales No. E.91.IV.2 (1991). Under the 1979 CPL there was no presumption of innocence (see Gelatt, *supra* note 88, at 284; see Leng, *supra* note 172, at 222-23), while there now arguably is one in the 1996 CPL. See CPL, *supra* note 164, art. 12; see HECHT, *supra* note 184, at 61; see Luoji, *supra* note 95, at 12. The right to counsel was recognized in the 1954 Constitution only to be abolished later (see COHEN, *supra* note 86, at 472-73), and then brought back in the 1979 CPL (see 1979 CPL, *supra* note 172, art. 26) but without being available at early stages of the proceeding. See Gelatt, *supra* note 88, at 287-89; see 1979 CPL, *supra* note 172, art 110. The 1996 CPL now provides an accused with a right to a lawyer at a much earlier stage, within three days of the police referring the case to the prosecution. See CPL, *supra* note 188, art. 33; see HECHT, *supra* note 184, at 39. Similarly, there is more transparency and adversarial procedures during the criminal trial process (see LO, CHINA'S LEGAL AWAKENING *supra* note 170, at 310-11) and a right to an open-court appeals process. See CPL, *supra* note 188, arts. 183, 186-187, 189.

¹⁹⁰ See Turack, *supra* note 161, at 52; see Seay, *supra* note 97, at 145, 151; see Huang, *supra* note 161, at 172; see Leng, *supra* note 172, at 224; see Elisabeth Rosenthal, *In China's Legal Evolution, the Lawyers are Handcuffed*, N.Y. TIMES, Jan. 6, 2000, at A1.

3. Informal Behavioral Modification Mechanisms and RETL

In recent history, China has had two primary methods of detaining someone for a non-criminal societal transgression – Shelter and Examination/Investigation (SI) and RETL. Consequently, an action subjecting someone to SI or RETL would normally not meet the substantive elements of a criminal offense. Thus, if the criminal law system is not being used, Criminal Procedure Law protections do not apply. Human rights groups have called these administrative detention forms “punishment without crime.”¹⁹¹ Administrative detention is more consistent with political will and long-existing informal norms designed to flexibly modify deviant behavior, than with the more transparent and objective rule of law standards encountered in criminal law codifications. “‘Law’ is distinct from discipline or administration.”¹⁹²

The CCP devised SI in the early 1960's to dampen the instability caused by mass incursions of migrants during the Great Leap Forward, one of Mao's revolutionary periods.¹⁹³ It was designed to be an efficient mode of rounding up migrants, temporarily detaining them, and leading them back to rural areas.¹⁹⁴ To emphasize the rule of law, the government presumably eliminated SI in 1980 only to reinstitute it in 1983¹⁹⁵ because of instability and a lack of adequate legal resources to process individuals through the criminal justice system.¹⁹⁶ Police utilized it on those suspected of committing crimes¹⁹⁷ when the criminal justice system arrest standard appeared too stringent.¹⁹⁸

¹⁹¹ AMNESTY INTERNATIONAL, PUNISHMENT WITHOUT CRIME: ADMINISTRATIVE DETENTION, Sept. 1991, at 5-14 [hereinafter AMNESTY INT'L].

¹⁹² See *Concepts of Law*, *supra* note 157, at 1898-1901. “Disciplinary and administrative sanctions are, like legal sanctions, imposed for transgressions against rules of conduct. The two differ theoretically in that the term ‘administrative sanctions’ usually means sanctions imposed by the state as state, whereas disciplinary sanctions are imposed by one’s work unit, such as a factory, or some other organization of which one is a member, such as the Party or a labor union. When, however, as is frequent in China, the employer is the state or the organization is the Party, there tends to be little practical distinction between the two. What is important about disciplinary sanctions are that although they are explicitly differentiated in theory and practice from ‘legal’ sanctions, they can, like legal sanctions, be imposed with the authority of the state.” See *id.*

¹⁹³ See generally AMNESTY INT'L, *supra* note 191, at 7.

¹⁹⁴ See HECHT, *supra* note 184, at 22.

¹⁹⁵ See *id.* at 21-22.

¹⁹⁶ See *Concepts of Law*, *supra* note 157, at 1895-96.

¹⁹⁷ See generally *Notice of the Ministry of Public Security Concerning Strict Control of the Use of the Method of Shelter and Investigation* (1985), CHINESE LAW & GOVERNMENT 38-39 (1994) [hereinafter *Notice of the Ministry of Public Security*].

¹⁹⁸ See HECHT, *supra* note 184, at 21-23.

The extent and degree to which administrative sanctions have been employed has steadily decreased over the past two decades as the functioning of the criminal justice process has become more consistent with codified rules.¹⁹⁹ In fact, SI was permanently abolished in 1996²⁰⁰ after scathing attacks²⁰¹ for the lack of procedural protections,²⁰² lengthy detention periods,²⁰³ prison-like conditions,²⁰⁴ and the desire to improve the public image of the police.²⁰⁵ However, the trend of reduced use of administrative detentions methods, by employing RETL, reversed at about the same time that Falun Gong emerged. Thus, while the abolition of the likes of politically-based rules of criminal justice, such as “crime by analogy”²⁰⁶ and SI, have strengthened the rule of law, the increased use of RETL²⁰⁷ and flexibility outside the rule of law have undermined it.

Perhaps 99% of long-term Falun Gong detainees—the vast majority—do not enter the formal criminal justice process, but instead have been held in RETL camps.²⁰⁸ RETL “rehabilitates” political agitators,²⁰⁹ and those who commit minor crimes²¹⁰ and other societal transgressions²¹¹ that are not appropriate for the official criminal justice

¹⁹⁹ See Boxer, *supra* note 104, at 598.

²⁰⁰ *New Laws to Protect the Innocent*, CHINA DAILY, Mar. 23, 1996, at 4; see HUALING, *supra* note 182, at 137-38.

²⁰¹ See AMNESTY INT’L, *supra* note 191, at 5-6.

²⁰² See HECHT, *supra* note 184, at 22.

²⁰³ An SI detention was supposed to only last for a maximum of three months. See generally *Notice of the Ministry of Public Security*, *supra* note 197, at 39. There have been allegations that some detainees were held for up to ten years in SI. See HECHT, *supra* note 184, at 23.

²⁰⁴ See Gelatt, *supra* note 88, at 314.

²⁰⁵ See HECHT, *supra* note 184, at 21-23.

²⁰⁶ See generally LENG SHAO-CHUAN, *JUSTICE IN COMMUNIST CHINA: A SURVEY OF THE JUDICIAL SYSTEM OF THE CHINESE PEOPLE’S REPUBLIC* (1967).

²⁰⁷ “In 1996 there were 200,000 people in RTL camps in 2001, the number had increased to 310,000.” See *Amnesty International Memorandum to the State Council*, *supra* note 1, at 2.2; see Giles Hewitt, *Wang Dan Heads for the Chinese Gulag*, AGENCE FRANCE PRESSE, Oct. 30, 1996, available at LEXIS, Asiapc Library.

²⁰⁸ See Clopak, *supra* note 13, at 17; see *China jails six*, *supra* note 11. In addition, perhaps about five times the number that spends time in RETL camps also have gone to temporary detention centers. See Clopak, *supra* note 13, at 17.

²⁰⁹ See *Leading Chinese dissident jailed again*, AGENCE FRANCE PRESSE, Sept. 25, 2002, available at LEXIS, Asiapc Library, International News; see Harvey Stockwin, *Longest Serving Tibetan Dissident Released*, ECON. TIMES (India), July 15, 2002, available at LEXIS, Asiapc Library, Global News Wire; see *China says more than 100 political prisoners in Tibet*, AGENCE FRANCE PRESSE, May 30, 2001, available at LEXIS, Asiapc Library.

²¹⁰ See Hung, *supra* note 162, at 303. Minor crimes, for which RETL may be applied, can include prostitution and drug addiction. See *China’s capital considers reforms to labor camp system*, THE ASSOCIATED PRESS, July 20, 2002, available at LEXIS, Asiapc Library.

²¹¹ See *China reports family reunion of jailed couple held at “re-education centres”*, BBC WORLDWIDE MONITORING, Jan. 30, 2003, available at LEXIS, Asiapc Library, BBC File.

system by providing “thought reform”²¹² through moral and cultural education so that the detainee may be brought back into society knowing acceptable societal conduct.²¹³ Pursuant to Chinese culture and tradition, Falun Gong practitioners are not criminals and did not commit crimes, but instead are “troubled” citizens who must be “reformed” and brought back to productive society.²¹⁴ However, from the perspective of global human rights, because there is a detention against one’s will, detainees are still treated like criminals in connotative effect,²¹⁵ even though the essence of the underlying substantive “wrongdoing” is not criminal by Chinese standards, law, and history.

Those held within RETL camps are called personnel rather than prisoners. It is believed that there are currently about 300,000 personnel in approximately 300 camps nationwide²¹⁶ and human rights

²¹² See Ramin Pejan, *Laogai: “Reform Through Labor” in China*, 7 HUM. RTS. BR. 22, 22 (Winter 2000).

²¹³ See IV. *Legal, Moral, Cultural and Technical Education of Criminals*, Information Office of the State Council Of the People’s Republic of China, August 1992, Beijing, available at <http://www.china.org.cn/e-white/criminal/8-5.htm> (last visited May 21, 2003); see HUALING, *supra* note 182, at 134.

²¹⁴ RETL traditionally was not intended to address “crimes.” In the 1957 Decision of the State Council Regarding the Question of Re-Education Through Labor, the Chinese government established RETL to punish four groups of individuals – those who commit dishonest actions that are not crimes, engage in counterrevolutionary actions, refuse to work, and are involved in disruptive or obstructive behavior that has not been remedied after admonition. See Hung, *supra* note 162, at 312. Crimes would be handled by the criminal justice system, while offenses committed by “troublemakers” that do not rise to the level of a “crime” could be administered in RETL. See *Amnesty International Memorandum to the State Council*, *supra* note 1, at 2.2. Since China emerged out of the Cultural Revolution and began to open itself to the international system, it has modified its RETL rules. In 1979, there was a Supplementary Decision of the State Council for Re-Education Through Labor that limited the time period of detention from an indefinite period to a one to three year period, with a one year extension allowance when necessary; and limited its use to medium- to large-sized cities. See Hung, *supra* note 162, at 314-15. In 1982, the Ministry of Public Security passed a regulation, *Trial Methods for the Implementation of Re-Education Through Labor*, that extended imposition of RETL beyond the four categories of the 1957 decision to “anyone who ‘joined others to commit a crime such as murder, robbery, rape, and arson,’ or who ‘abetted others to commit a crime’ where the circumstances surrounding such crimes are not serious enough for criminal punishments.” See *id.*, at 314.

²¹⁵ See *Amnesty International, Memorandum to the State Council*, *supra* note 1. Since RETL is outside the formal criminal justice system, those placed in RETL do not have the previously discussed protections available in the Criminal Procedure Law. Also, since the maximum period of detention in RETL can sometimes be longer than penalties for certain crimes in the Criminal Law (see Hung, *supra* note 162, at 315-16), there is inconsistency between the aims of the criminal justice punishment process and goals of moral reform predicated on the definition of a crime and manner in which crimes or moral infractions are enforced in certain locales. Local administrators have much discretion and country-wide uniformity does not exist.

²¹⁶ See Hung, *supra* note 162, at 304. RETL was established in the 1950s and it is believed that 3.5 million people have been detained in a RETL camp since being established.

advocates have complained about the relative overuse of the system.²¹⁷ Of these personnel, between 5,000 and 10,000 are Falun Gong members,²¹⁸ while more than 20,000 members may have been sent to RETL since 1999.²¹⁹ Allegations about the functioning of the system, if true, could violate human right standards regarding right to liberty,²²⁰ remedy before a competent and independent tribunal for a fundamental right deprivation,²²¹ due process protections,²²² right to freedom from arbitrary arrest,²²³ involuntary servitude,²²⁴ and torture.²²⁵

Outside access is not given to RETL camps,²²⁶ which is why the system is such a mystery. Conditions of detention have been said to be poor,²²⁷ and there are reports of beatings, interrogations, inadequate food rations, and other human rights abuses.²²⁸ Over seven hundred Falun Gong members have apparently died in these camps.²²⁹ Behind the walls of RETL camps are fields and factories²³⁰ and some have stated that detainees are required to work very long hours and their rewards or lack of punishment are often commiserate with work effort.²³¹

²¹⁷ See *China: The Same to You, Too*, ECONOMIST, Mar. 3, 2001, at 38-39.

²¹⁸ See *China gives reporters glimpse*, *supra* note 11.

²¹⁹ See *Cambodian authorities deport two Falun Gong practitioners*, DEUTSCHE PRESSE-AGENTUR, Aug. 14, 2002, available at LEXIS, Asiapc [hereinafter *Cambodian authorities*]. Others have said that this number could be in the tens of thousands. See HUMAN RIGHTS WATCH, *supra* note 5, at III; John Schauble, *10 Falun Gong Followers Die in Mass Suicide Protest*, THE AGE (Melbourne), July 4, 2001, available at LEXIS, Asiapc Library. Falun Gong reports that over 100,000 have been sent to RETL. See <http://www.faluninfo.net> (last visited May 30, 2003).

²²⁰ See UDHR, *supra* note 108, art. 3; see ICCPR, *supra* note 108, art. 9(1).

²²¹ See UDHR, *supra* note 109, arts. 8, 10; see ICCPR, *supra* note 108, arts. 9(3), 14.

²²² See UDHR, *supra* note 108, art. 11; see ICCPR, *supra* note 108, arts. 9, 14.

²²³ See UDHR, *supra* note 108, art. 9; see ICCPR, *supra* note 108, art. 9.

²²⁴ See UDHR, *supra* note 108, art. 4; see ICCPR, *supra* note 108, art. 8.

²²⁵ See UDHR, *supra* note 108, art. 5; see ICCPR, *supra* note 108, art. 7; see generally Convention Against Torture, *supra* note 108.

²²⁶ See Turack, *supra* note 161, at 67-69.

²²⁷ In fact, recently the United Nations High Commissioner for Human Rights has expressed concern over China use of RETL camps and has held a joint conference regarding this form of detention and the substantive offenses that justify its use. See Hung, *supra* note 162, at 305-06. The Chinese government has depicted this detention system in a more favorable light. *China gives reporters glimpse*, *supra* note 11.

²²⁸ See *Released Chinese dissident speaks of horrors of labor camp life*, AGENCE FRANCE PRESSE, Feb. 15, 2002, available at LEXIS, Asiapc Library.

²²⁹ See Li, *supra* note 50; see *Falun Gong inmates*, *supra* note 11; see *China gives reporters glimpse*, *supra* note 11; *China sentences Falun Gong woman linked to prize-winning reporter*, DEUTSCHE PRESSE-AGENTUR, May 9, 2001, available at LEXIS, Asiapc Library.

²³⁰ See *China gives reporters glimpse*, *supra* note 11.

²³¹ See Pejan, *supra* note 212, at 22.

IV. BALANCING STATE INTERESTS WITH HUMAN RIGHTS PROTECTIONS FOR FALUN GONG

A. *Modernization, Cultural Relativism, and Reconsidering the Substantive Underlying Offense Imposed on Falun Gong Members*

1. Introduction

Culture will eventually coalesce with legal reforms in China which will result in a more transparent and objective enforcement of law, thus decreasing informal influences on legal processes.²³² However, there are two primary categories of institutions applicable to Falun Gong that are problematic from a global human rights perspective - (1) the substantive law that defines the offensive conduct and the (2) detention institutions that seek to bring a practitioner back into society as a productive member.

2. Global Human Rights Restricted

If global human rights standards are applied to Falun Gong, the justification for the crackdown should first be placed into an objective definition of actions that can cause societal harm or are “illegal” based on China’s particular situation and institutions since international law does provide for public need exceptions.²³³ Certainly, the economic modernization process is gradually endowing Chinese citizens with more economic and personal liberties every day and even though this movement away from tradition makes China’s situation unique²³⁴ and prescribes patience, it does not mean that allegations of human rights abuses can be ignored. China has made much progress in fortifying individual rights in the criminal justice system and has designed institutions to protect citizens from government abuses,²³⁵ but to uphold

²³² See Lubman, *supra* note 89, at 406-07.

²³³ See ICCPR, *supra* note 108, arts. 4, 21.

²³⁴ China has 1.5 billion people with per capita incomes of US\$912 per year. See Alex Frew McMillan, *China Growth Myth Dispelled*, available at <http://edition.cnn.com/2002/BUSINESS/asia/10/29/hk.bnpcchina/> (last visited June 17, 2003).

²³⁵ Reforms have strengthened the legal system and decreased the degree of flexibility in the law, police brutality, torture, and coercion in enforcing the law. However, the CCP and various government organs are cognizant of remaining problems (see *Top Chinese security official calls for tighter discipline on police*, BBC WORLDWIDE MONITORING, June 20, 2002, available at LEXIS, Asiapc Library, BBC File [hereinafter *Top Chinese security official*]), have been addressing

interests of the collective, the government has also criminalized and suppressed behavior that would not be criminalized in liberal democracies because Chinese leaders believe certain actions can divide the country, undermine the socialist market economic system, or challenge CCP control,²³⁶ which is allegedly what Falun Gong has attempted to accomplish.²³⁷

International law provides for freedom of conscience and religion²³⁸ but it also provides that a state has a right to protect citizens if a group can cause public harm.²³⁹ Even the United States and Japan have had to counter “fringe” religious groups recently and navigate negative public sentiment against such groups.²⁴⁰ Groups like People's Temple,²⁴¹ the Branch Davidians,²⁴² the Aum Shinrikyo,²⁴³ the Order of the Solar Temple,²⁴⁴ and the Heaven's Gate UFO cult²⁴⁵ all have had beliefs that were perceived as too radical for mainstream thinking and apt to engender societal harm or violence. Chinese human rights experts have criticized such double standards on the part of the United States.²⁴⁶

concerns by reducing the degree and number of individual rights abuses (see Lubman, *supra* note 89, at 392-93), and have been promulgating legislation, to attain public trust. See *Top Chinese security official*.

²³⁶ See Emmons, *supra* note 87, at 262.

²³⁷ Falun Gong has been relatively effective at expressing a message of “frustrations coming out of the transformation of Chinese society and economy” and has challenged the government. See *Three years after ban*, *supra* note 4.

²³⁸ See UDHR, *supra* note 108, art. 18; see Declaration on Religion, *supra* note 108, art. 6.

²³⁹ See ICCPR, *supra* note 108, arts. 4, 21.

²⁴⁰ See Scott M. Lenhart, *Hammering Down Nails*, 29 GA. J. INT'L & COMP. L. 491, 492-96 (Summer 2001).

²⁴¹ In 1978, over 900 people committed suicide in Jonestown, Guyana at the order of Reverend Jim Jones. See ANSON D. SHUPE, JR. & DAVID G. BROMLEY, *THE NEW VIGILANTES: DEPROGRAMMERS, ANTI-CULTISTS, AND THE NEW RELIGIONS* 207-31 (1980).

²⁴² In 1993, David Koresh led his Branch Davidians to the standoff in Waco, which resulted in the death of seventy-eight followers. See *Flares Said Found in Waco Evidence*, THE ASSOCIATED PRESS, Sept. 8, 1999, available at LEXIS, News Wires.

²⁴³ The AUM Shinrikyo group engaged in a series of murders from February 1989 to April 1995, and the 1995 sarin gas attack on the Tokyo subway system. See *AUM's Niimi gets death sentence for murders*, JAPAN ECON. NEWSWIRE, June 26, 2002, available at LEXIS, News Wires.

²⁴⁴ Between October 1994 and March 1997, there were 74 suicides by Order of the Solar Temple members across Switzerland, France, and Canada. See *Trial Set for Swiss musician accused over cult deaths*, AGENCE FRANCE PRESSE, Dec. 29, 2000, available at LEXIS, News Wires.

²⁴⁵ See generally JOHN R. HALL, PHILIP D. SCHUYLER, & SYLVAIN TRINTH, *APOCALYPSE OBSERVED: RELIGIOUS MOVEMENTS AND VIOLENCE IN NORTH AMERICA, EUROPE, AND JAPAN* (2000). In 1997, 39 members of the Heaven's Gate UFO Cult committed suicide because they believed that the Hale-Bopp comet had come to transport them to heaven. See S. Purdum, *Videotapes Left by 39 Who Died Described Cult's Suicide Goal*, N.Y. TIMES, Mar. 28, 1997, at A1.

²⁴⁶ “Cults are a public hazard facing many countries in the world, [and] the crackdown on ‘Falun Gong’ by the law in China is precisely to protect the human rights and normal religious freedom” of

If the members of a "less conventional" spiritual/religious group are apt to harm themselves, other people, or society at large, most governments, including those with strong individual right protections and freedoms, would detain, counsel, and/or "treat" members to assist them in comprehending a reality that is more consistent with mainstream society. The detention may not even be seriously questioned by the majority of people within that country or the international community.²⁴⁷ Even if a certain number of Falun Gong members do fall into the category²⁴⁸ of the tenacious "devotee"²⁴⁹ that might violate the law,²⁵⁰ this does not mean that a widespread crackdown movement was necessarily justified.

3. The Role of Government Institutions

The difference between most liberal democracies and China in dealing with fringe religious groups resides in the role of government institutions. Most Western governments institutionally grant religious

China's "100 million believers of various religions and "over 3,000 religious groups." Zhongguo Xinwen She, *Chinese Human Rights Experts Defend Crackdown on Falun Gong*, BBC MONITORING INT'L REPORTS, May 23, 2003, available at LEXIS, Asiapc Library.

²⁴⁷ While the majority may not question the detention, there have been some cases that have permitted tort claims and civil rights violations in the United States for involuntary deprogramming, while other cases have denied such claims. See Howard O. Hunter & Polly J. Price, *Regulation of Religious Proselytism in the United States*, 2001 BYU L. REV. 537, 564-65; see Cynthia Norman Williams, *America's Opposition to New Religious Movements: Limiting the Freedom of Religion*, 27 LAW & PSYCHOL. REV. 171, 178-79 (2003). However, if there is a violation of generally applicable laws, the criminal justice system could be employed, or if a cult member is deemed mentally ill, he/she could be detained for treatment as in any involuntary commitment proceedings. France has enacted legislation to block new cults and improve methods of fighting against them. See *id.*, at 652-53. Belgium has also recently enacted laws to control "Harmful Sectarian Organizations." See generally Adelbert Denaux, *The Attitude of Belgian Authorities Toward New Religious Movements*, 2002 BYU L. REV. 237.

The Israeli government has also detained cult members to preempt suspected violence on society. See *Israel detains Denver doomsday cult members*, DEUTSCHE PRESS-AGENTUR, Jan. 3, 1999, available at LEXIS, North-South Amer. News Lib.

²⁴⁸ *China tries Falun Gong suicide-bid organizers*, DEUTSCHE PRESSE-AGENTUR, July 20, 2001, available at LEXIS, Asiapc Library; see Schauble, *supra* note 219.

²⁴⁹ Some Falun Gong disciples have said, "Everything Great Master Li Hongzhi says are Heaven's secrets." See LI HONGZHI, *supra* note 13, at 156. Mr. Li Hongzhi says, "we are truly guiding people up to high levels, we're saving people."

²⁵⁰ In Mr. Li Hongzhi's official teachings, the members/followers went from a first stage as *students* and *practitioners*, who should live an honest and healthy lifestyle and do the exercises (see generally LI HONGZHI 3, *supra* note 13); to a second stage as *disciples*, who will develop supernatural powers if they devoutly follow Mr. Li Hongzhi (see generally LI HONGZHI, *supra* note 13); to a third stage as *advocates* who should oppose the government. See LI HONGZHI 2, *supra* note 13, at 16, 18, 25, 27; see *CIA Behind Falun Gong*, *supra* note 68.

groups rights against government,²⁵¹ while the Chinese government and countries with similar traditions²⁵² instead have promoted or authorized certain religions over others, which is an expected and deductively logical distinction between “rule of law”/individual rights dominant countries and “rule by man”/collective interest dominant countries. This can determine whether a “ban” or group prohibition is employed to prevent the spreading of a message or whether a government will only seek to prevent harm to society once that message is spread.

Information dissemination has been essential to Falun Gong’s growth. According to the Chinese government, Falun Gong has staged protests; launched e-mail, mailing, telephone and fax methods to spread its messages; and allegedly broke into cable and satellite systems to televise its message to millions.²⁵³ Unlike China’s

²⁵¹ International law would permit impeding a religious group’s proselytism if there is an overriding state interest to protect harm to society or the rights of others. Human Rights Committee, General Comment 10 (art. 19), U.N. GAOR 19th Sess., P 4, at 11, U.N. Doc. HRI/GEN/1/Rev.1 (1994). The United States has struggled with the balance between privacy rights and the rights of a religious group to proselytize. See William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah’s Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997, 1021-22 (1987). The U.S. Supreme Court upheld the right of the Jehovah’s Witness to engage in door-to-door solicitation/proselytism by holding that the right to communicate religious messages must receive free exercise protection. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Likewise, there was never a “banning” or direct media attack on the group. This holding is in a country that has a two century cultural and constitutional foundation of more aptly upholding the rights of individuals even if those rights infringe on preferences or interests of the majority. Constitutional jurisprudence in the U.S. is not framed in terms of elevating collective rights, as in China, but in terms of political and economic individualism. The U.S. government does not promote or restrict religion.

²⁵² The recent Russian Jehovah’s Witness cases are also telling by comparison and provide an analogy to the Falun Gong situation, particularly because China and Russia share similar communist origins, stages of economic modernization, and treatment of religions. Since the fall of communism, Russia has opened to the rest of the world, gradually shed its collectivist identity in the law, codified new individual rights and liberties, and has reformed the judiciary to more fully uphold those new rights. See generally Leonard Orland, *A Russian Legal Revolution: The 2002 Criminal Procedure Code*, 18 CONN. J. INT’L L. 133 (Fall 2002). However, in April 1998, a prosecutor for the Moscow Northern Administrative District brought suit to ban Jehovah’s Witness in Moscow, citing, that the group goads religious dissension, destroys the family, has “tendencies toward suicide by refusal of medical assistance in life-threatening situations,” infringes on citizens’ individual rights, and lures teenagers and young children into the “cult.” See Charlotte Wallace, *The Jehovah’s Witnesses Case: Testing the 1997 Law “On Freedom of Conscience and Religious Associations” and the Russian Legal Process*, 32 CAL. W. INT’L L.J. 39, 47 (Fall 2001). The Russian government excluded a religious group because it defined its actions as harmful to the collective society. The trial court held in favor of the Jehovah’s Witness, but strong forces of tradition and culture and the promulgation of a June 1997 nearly unanimously passed bill, “On Freedom of Conscience and Religious Associations” by President Yeltsin and the Russian Parliament, designed to promote their national idea of religion and elevate Russian Orthodoxy to a preminent position, led the appellate court to reverse the previous decision and require a retrial. See *id.*, at 41, 82-85. The hearing recommenced in February 2003. See Yelena Dorofeyeva, *Court hearings on Jehovah’s witnesses sect in Moscow*, TASS, Feb. 11, 2003, available at LEXIS, Euro Library.

²⁵³ See *Three years after ban*, *supra* note 4.

approach, in most liberal democracies, the message, assuming no additional criminal illegality occurred in the dissemination process, would not be prohibited. However, Western governments would respond when members engage in illegal actions in furtherance of the message, but potential threats would likely not be apt to merit a large-scale banning of a group.

Even with significant cultural and historical differentiation, there is apparently consistency between how liberal democracies would react and what Chinese citizens' desire. In the Voice of Chinese survey, a large percentage of respondents did state that Falun Gong is a "cult" that engaged in illegal actions and threatened the stability of society, but that the government inappropriately banned the group for a political motive.²⁵⁴ The survey's result reflects the Chinese populace's desire for freedoms and protections in the rule of law with consistency and fairness in the detention and reform process.

B. *Human Rights and RETL*

Criminal convictions and RETL detentions have charged Falun Gong members with committing social chaos and ambiguous crimes,²⁵⁵ such as disrupting public order, endangering national security, and subverting the socialist system.²⁵⁶ If Chinese leaders wanted to continue on the path of fortifying the rule of law, they could craft more transparent laws that apply to Falun Gong and similar groups. Such laws might more fully distinguish those actions that are objectively criminal from those that merit "rehabilitation", and enumerate and enforce protections that preserve freedom of conscience. If members in this group of 70-80 million Falun Gong followers were indiscriminately subjected to a reform-based detention, China may not be acting in a manner that is consistent with its obligations under international law.

Amnesty International claims that detention conditions in RETL are systematically denying human rights on a widespread basis.²⁵⁷ To consider what might be more consistent with human rights norms, it is availing to compare RETL with a similar counterpart in the U.S. criminal justice process. In the U.S., a "correctional boot camp,"

²⁵⁴ See Lu, *supra* note 140, questions 1, 8, 9, 10, 14, 16, 17.

²⁵⁵ See HUMAN RIGHTS WATCH, *supra* note 5 at III.; see Clopak, *supra* note 13, at 17.

²⁵⁶ See Thomas, *supra* note 17, at 495-96.

²⁵⁷ See Amnesty International Memorandum to the State Council, *supra* note 1.

while also controversial,²⁵⁸ can be an alternative to the criminal justice process for an offense meriting a detention period.²⁵⁹ Incarceration is replaced by a short-term military-like basic training camp²⁶⁰ that endeavors to reform behavior through disciplinary mechanisms with the expectation that a detainee will become a productive member of society and not slide into recidivism.²⁶¹ Granted, a military training process is not forced labor, as is alleged to occur in RETL,²⁶² but it is still forced physical exertion against one's will during a shorter but more intense experience than incarceration.²⁶³ Generally speaking, RETL may also be consistent with this "shorter" and more intense approach to rehabilitation, although rule uniformity and transparency in duration is needed.

RETL detainees do not have criminal justice system procedural protections available to them.²⁶⁴ If RETL were to contain procedural safeguards that permit a detainee to maintain his/her innocence, a close connection exists between the offense and the detention penalty,²⁶⁵ and there is humane treatment of detainees consistent with global human rights standards, there would be little theoretical difference between RETL and the U.S. correctional boot camp reform process. Despite weaknesses in the Chinese judicial system²⁶⁶ and fears of reprisal for challenging the administrative detention system,²⁶⁷ having a hearing

²⁵⁸ The U.S. camps are also controversial because some question whether they are "conducive to positive growth and change" or in "direct opposition to . . . conditions . . . needed for quality therapeutic programming." See Doris Layton MacKenzie, David B. Wilson, & Suzanne B. Kider, *Part II: Research Finding from Prevention and Intervention Studies: Effects of Correction Boot Camps on Offending*, 578 ANNALS 126, 128 (Nov. 2001). The policies, approach, and goals of this system are very similar to China's RETL system, but the correctional boot camp contains more procedural protections not available to the RETL process.

²⁵⁹ See *id.*, at 127. These facilities are operated throughout the U.S. at both the state and federal level and "in some jurisdictions judges sentence participants to the camps; in others, participants are identified by department of corrections personnel from those serving terms of incarceration."

²⁶⁰ See generally DORIS LAYTON MACKENZIE & EUGENE E. HEBERT, EDS., *CORRECTIONAL BOOT CAMPS: A THOUGH INTERMEDIATE SANCTION* (1996).

²⁶¹ Deterrence, punishment, and rehabilitation are reasons for the system's use. See Doris Layton MacKenzie & Claire Souryal, *A "Machiavellian" Perspective on the Development of Boot Camp Prisons: A Debate*, 2 U. CHI. L. SCH. ROUNDTABLE 435, 435 (1995).

²⁶² See Zemin, *supra* note 9, at 4.

²⁶³ See Mackenzie & Souryal, *supra* note 261, at 435.

²⁶⁴ See Gelatt, *supra* note 88, at 313-14.

²⁶⁵ The Chinese criminal justice process relates the degree of societal harm caused by an infraction of the law to the punishment imposed. See Leng, *supra* note 172, at 228-29. Detailed legislative guidance associating the degree of harm caused by specified non-criminal societal transgressions with established RETL detention periods might follow this same approach.

²⁶⁶ See Hung, *supra* note 162, at 322-23; see *Amnesty International Memorandum to the State Council*, *supra* note 1.

²⁶⁷ See Hung, *supra* note 162, at 319-22.

presided upon by an independent institution separate from the one that claims RETL should be imposed on a person and incorporating the Criminal Law and Criminal Procedure Code into the process, could significantly improve transparency and fairness to meet populace and international community expectations. On a positive note, the Chinese government has recognized some of these problems in RETL and has begun to take initial steps to reform the system at a regional level.²⁶⁸

Safeguards should exist within RETL facilities to ensure compliance with human rights standards. There are reports that RETL detainees have been subject to “cruel and degrading treatment and oftentimes torture”²⁶⁹ and that hundreds of Falun Gong members have died in custody.²⁷⁰ In press releases, the Chinese government denies that members have been tortured in RETL.²⁷¹ However, the Chinese government recognizes that human rights abuses do occur in RETL²⁷² and it might be reasonable to assume that Falun Gong members are treated the same as other RETL detainees, even if Falun Gong members are not subjected to any “worse treatment” than other personnel in the facilities. Similar allegations of abuse are a reason why SI was eliminated.²⁷³ If these reports are true and widespread abuse is truly the case, system-wide reform is necessary for China to be in compliance with international obligations.

V. CONCLUSION

China does respond to pressure from the international community, but the true impetus to reform must come from within²⁷⁴ and be consistent with its current challenges and the modernization process. China has made much progress in improving human rights,²⁷⁵ more fully defining “crimes”, and providing a procedural criminal law

²⁶⁸ The Beijing municipal RETL bureau initiated a system to make personnel assessment more publicly open, transparent, and available to question. See *Beijing re-education-through-labour bureau moves towards public scrutiny*, BBC WORLDWIDE MONITORING, July 23, 2002, available at LEXIS, Asiapc Library, BBC File.

²⁶⁹ See Pejan, *supra* note 212, at 22.

²⁷⁰ See *Cambodian authorities*, *supra* note 219.

²⁷¹ See Bodeen, *supra* note 69.

²⁷² See *Ten Prohibitions*, *supra* note 2.

²⁷³ See HECHT, *supra* note 184, at 23-24.

²⁷⁴ See Torbert, *supra* note 171, at 640.

²⁷⁵ See David Hsieh, *Beijing's search for value system on human rights; UN rights chief says China has made great strides in human rights and is looking for a suitable value system*, THE STRAITS TIMES (Singapore), Aug. 21, 2002, available at Asiapc Library [hereinafter *Beijing's search for value system*].

framework that is more transparent and apt to protect the rights of the accused. Chinese leadership is dedicated to finding a new value system that “combines world standards for human rights with the strengths of its own governance” and “is suitable to modern China.”²⁷⁶ Planning is currently underway for comprehensive system-wide criminal justice reforms in the next few years.²⁷⁷ However, there is still strong national and local political resistance to abolishing informal institutions such as the RETL because it is believed RETL provides an imperative contribution that preserves public order for those who commit minor crimes and social disturbances.²⁷⁸ Just as the official criminal justice process was improving and becoming more transparent by Western standards while the use of RETL, which is more consistent with tradition and culture than with the rule of law, had been decreasing in use, Falun Gong surfaced.

This case study highlighted China’s reforms and the broader internal and external ramifications of the government’s banning of Falun Gong. The dispute is squarely influenced by the tenor of international law and its interaction with state sovereignty, the populace right to influence government policies, and varying perceptions over what is a justified government reaction to suppress what many might perceive as less conventional or even “dangerous” thinking.

In liberal democracies, individuals are endowed with rights that the government cannot easily appropriate. Constitutional foundations form the bedrock of individual rights and the acceptable balance between individual rights and security measures. Freedom of belief and religion are held sacred. China also calls itself a democracy, but it has traditionally framed democratic will by “the will of the collective” and has emphasized that stringently favoring individual rights could undermine the will of the collective and its conception of democracy. If a majority of Chinese citizens,²⁷⁹ government leaders, and institutions supported the ban²⁸⁰ because of the potential threat that Falun Gong might pose to societal stability, does this mean that

²⁷⁶ See *id.*

²⁷⁷ “A set of laws and regulations on judicial administration with Chinese characteristics will be in force by 2008, a vice-minister of justice has pledged.” See *Laws to Protect Rights of Citizens*, CHINA DAILY, Dec. 28, 2002, available at LEXIS, Asiapc Library. This law will consider “laws on prisons, re-education-through-labor, lawyers, notary, national judicial examination, judicial expertise, mediation and legal aid.” See *id.*

²⁷⁸ Amnesty International Memorandum to the State Council, *supra* note 1, at 2.2.

²⁷⁹ See Lu, *supra* note 140, question 14; see *Cheat Western Public Opinion*, *supra* note 19.

²⁸⁰ See Clopak, *supra* note 13, at 17; see *Work Product of Procuratorate*, *supra* note 131.

individual right deprivations did not violate international law?²⁸¹ Liberal democracies generally represent the position that more fully fortifying the rights of minority beliefs can be the best way to preserve long-term collective security for all. How can one balance between two very different ideological conceptions of democracy and individualist-based human rights in international law and still remain respectful to state sovereignty?

The further that group conduct digresses from the median populace preference or standard and places society at risk, the more likely that the average citizen's conception of individual rights will not be offended if government must cogently react to protect the majority even if that action infringes on a group's complete freedom. However, the threshold of acceptable government action between a society grounded on individual rights protections and one that is founded on serving the collective is highly distinct. The Chinese government has employed traditional and cultural institutional mechanisms to counter Falun Gong, but, employing these methods is less consistent with the perception that the government wishes to garner from the international community regarding its criminal justice system modernization process.

The Chinese government has claimed that hundreds of citizens have died directly or derivatively as a result of Falun Gong's teachings²⁸² and the ban and crackdown were necessary to protect citizens and society. From the perspective of the Chinese government and its perception of ordinary reality, bringing Falun Gong members back to the collective society, preventing them from inveigling current disciples from harming themselves, and thwarting evangelism because it could disrupt society or undermine the economic modernization process,²⁸³ are desirable for the good of all. The Chinese government has also endeavored to reverse Falun Gong inculcation. Even Western governments have sought to "de-program" the "mind-control" of

²⁸¹ Ostensibly, pursuant to international law, the severity of government reaction against a group posing a potential threat to societal stability must be balanced against the relative deprivation of human rights. Human Rights Committee, General Comment 10 (art. 19), U.N. GAOR 19th Sess., P 4, at 11, U.N. Doc. HR1/GEN/1/Rev. 1 (1994); see generally ICCPR, *supra* note 108, arts. 4, 19.

²⁸² See 239 Falun Gong members, *supra* note 67. See Philip Kennicott, *China's Spiritual Outlaws: Falun Gong Bring Their Cause to Capitol Hill*, WASH. POST, July 23, 2003, at C01; see *Falun Gong cult followers*, *supra* note 71.

²⁸³ President Jiang Zemin said yesterday Beijing would leave dealing...South China Morning Post, March 6, 2001, available at LEXIS, Asiapc Library.

cults.²⁸⁴ A government does have a right to react to potential harms to society, but what action and level of action is justified is the probative question.

Even if Falun Gong has intentionally provoked the Chinese government, posed a threat to public safety, or has been deceptive in the way that it portrays itself across countries, that does not necessarily mean that a large-scale banning of the group is consistent with international law. While a carefully crafted Chinese government media campaign that factually forewarns of potential harms would probably be warranted, banning the group may deny citizens of their freedom of expression, association, and conscience. Likewise, if torture has unofficially been employed discretionarily at the local level by police and guards within prisons and RETL facilities, the Chinese government has an obligation to its citizens and to the global community to end such practices.²⁸⁵

²⁸⁴ See Catherine Wong, *St. Thomas on Deprogramming: Is it Justifiable?*, 39 CATH. LAW. 81, 81 (1999).

²⁸⁵ See Convention Against Torture, *supra* note 108.

