

CHINA'S TORTUOUS PATH TOWARD ENDING TORTURE IN CRIMINAL INVESTIGATIONS

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INTRODUCTION	274
I. THE PROBLEM OF COERCED CONFESSIONS	278
II. CHINA'S ATTEMPTS TO END TORTURE IN CRIMINAL INVESTIGATIONS	281
A. Reforms Prior to 2010	282
B. The Exclusionary Rule	287
III. WHY HAVEN'T THESE MEASURES WORKED?	289
A. In Defense of Torture	293
III. PRESCRIPTIONS FOR REFORM	295
A. Chinese Proposals to Curb Police Torture	295
B. The American Experience	297
CONCLUSION	300

INTRODUCTION

On May 21, 2010, Chief Judge Zhang Liyong of the Henan Provincial High Court left his office in the provincial capital of Zhengzhou and travelled to a remote peasant village. There, in front of national television cameras, he bowed deeply three times and personally offered his apologies to Zhao Zuohai, a poor farmer, for his unjust murder conviction.¹ Thus, a “month of reflection” in all of the “judicial organs”—the courts, the prosecutors’ offices and the police of Henan Province—came to a close. This rare public display of contrition by Chinese officialdom was occasioned by this embarrassing case of the Chinese justice system convicting an innocent man of a murder that had never occurred.

There was no gainsaying the wrongfulness of the conviction and the innocence of Zhao Zuohai. This was not a case of a guilty party getting off on a technicality. After serving eleven years in prison, Zhao Zuohai was exonerated by the most persuasive evidence possible: after more than a decade’s absence, the alleged murder victim, Zhao Zhanshang (no relation), returned to their home village still very much alive to claim social welfare benefits. Village officials were shocked to see Zhao Zhanshang “return from the dead.”

Years earlier, the two Zhaos had been seen quarreling shortly before Zhao Zhanshang disappeared. A headless body was found shortly thereafter and the police suspected Zhao Zuohai of murdering Zhao Zhanshang. They arrested him and subjected him to physical and mental abuse for weeks until he finally confessed to the “murder.”²

This story would have been simply bizarre had it not had a particular *déjà vu* quality. The Zhao Zuohai case seemed like a replay of the She Xianglin case, which sent shock waves through the Chinese legal community only five years earlier.³ Like Zhao, She Xianglin was convicted of murder, in his case, the murder of his wife, Zhang Zaiyu. As in the Zhao case, the alleged victim had not been murdered at all and was still alive. She Xianglin’s wife had simply run

¹ 河南省高院院长张立勇向赵作海鞠躬致歉 [Chief Judge Zhang Liyong of the Henan Provincial High Court Bows to Zhao Zuohai and Apologizes], 新华网 [XINHUA NEWS] (June 23, 2010), http://news.xinhuanet.com/legal/2010-06/23/c_12250222.htm [hereinafter *Chief Judge Zhang Liyong Apologizes*].

² *Improperly Jailed Man Wins Extra Cash Payout*, SHANGHAI DAILY, May 19, 2010, available at http://www.articleblast.com/Men/General/Zhao_Zuohai_gains_120,000_yuan_extra/ (“Police beat Zhao every day for more than a month in 1999 to make him confess to the murder that he didn’t commit. They forced him to sit on a beer bottle, exploded firecrackers on his head, gave him drugs and threatened to shoot him.”); see also Wang Jingqiong & Li Yuefeng, *Murder Convict Set Free After ‘Victim’ Turns Up*, CHINA DAILY, May 10, 2010, available at http://www.chinadaily.com.cn/china/2010-05/10/content_9826537.htm; Ji Beibei, *Innocent Man Spent 11 Years in Jail*, GLOBAL TIMES (May 10, 2010), <http://webcache.googleusercontent.com/search?q=cache:http://china.globaltimes.cn/society/2010-05/529982.html>.

³ Liu Li, *Wrongly Jailed Man Freed After 11 Years*, CHINA DAILY, Apr. 14, 2005, at 1, available at http://www.chinadaily.com.cn/english/doc/2005-04/14/content_434020.htm.

away with another man to a different village only to return ten years later. Like Zhao Zuohai, She Xianglin was tortured by the police until he "confessed."⁴

At the heart of the wrongful convictions of She Xianglin and Zhao Zuohai were false confessions that had been obtained by police torture.⁵ Moreover, the She Xianglin and Zhao Zuohai cases are hardly isolated outliers. Even before the Zhao Zuohai case came to light, Chinese journalists and legal scholars had documented thirty-three cases of wrongful convictions for capital offenses over the last few years and in each case, the defendant had been coerced to falsely confess to the crime.⁶ Another group of researchers analyzed fifty wrongful conviction cases and found that in forty-seven of them, the defendant's false confession had been coerced.⁷ Most of these cases came to

⁴ *Id.*

⁵ As with many wrongful convictions, there was more than one error that contributed to this outcome. In addition to being forced to confess, Zhao Zuohai was also a victim of the lack of independence of the judicial system and ineffective assistance of counsel. Zhao was detained for three years while prosecutors raised questions about the sufficiency of the evidence in the case and sent it back to the police for further investigation.

Eventually, the local party political-legal committee, which was led by the local police chief and included all of the key agencies, the police, the prosecutors, the court, and the bureau of justice, agreed that Zhao Zuohai should be charged with murder and so instructed the prosecutors handling the case. The prosecutors duly followed instructions and filed charges and the court obediently convicted Zhao after a brief trial that allegedly lasted about half an hour. 赵作海案公诉人称曾遭政法委压力不敢不起诉 [*Zhao Zuohai's Prosecutor Was Under Pressure from the Party's Political Legal Committee, Did Not Dare Not to Bring Charges*], NEWS.163.COM (May 14, 2010), <http://news.163.com/10/0514/09/66KRS4P0001124J.html> [hereinafter *Zhao Zuohai's Prosecutor Was Under Pressure*]; see also 贺卫方 [He Weifang], 冤案责任追究: 谁追究, 追究谁? [*Pursuing Responsibility for a Wrongful Conviction: Who Should Do the Pursuing, Who Should be Pursued?*], 贺卫方的博唠阁 [HE WEIFANG'S BLOG] (May 13, 2010, 12:56 PM), http://blog.sina.com.cn/s/blog_488663200100iyyv.html. An edited version is available from the website of newspaper *Southern Weekend* at http://nf.nfdaily.cn/nfzm/content/2010-05/13/content_11887824.htm.

Zhao was entitled to a free lawyer under China's legal aid system, but instead he was represented by an unlicensed intern who was working at a local law firm. 当年审案三法官停职 [*Three Presiding Judges Leave Duty*], GUANGZHOU DAILY, May 15, 2010, at A4, available at http://gzdaily.dayoo.com/html/2010-05/15/content_964786.htm.

⁶ See 方鹏 [Fang Peng], 死刑错案的理性分析——对媒体报道的 33 起死刑错案的实证考察 [*A Rational Analysis of Wrongful Convictions in Death Penalty Cases — An Empirical Study of 33 Wrongful Death Cases Reported by the Media*], 18 刑事法评论 [CRIM. L. COMMENT.] 33 (2006); 聂昭伟 [Nie Zhaowei], 侦查阶段死刑错案的原因及对策——以当前已知的 33 个死刑错案为样本 [*The Causes and Remedies for Wrongful Convictions in Death Penalty Cases During the Investigation Phase — Using 33 Known Wrongful Conviction Cases as Samples*], 山东警察学院学报 [J. SHANDONG POLICE C.], no. 3, 2007 at 87 (Nie Zhaowei is the judge of the Zhejiang Provincial Court, Third Criminal Tribunal).

⁷ 何家弘、何然 [He Jiahong & He Ran], 刑事错案中的证据问题实证研究与经济分析 [*An Empirical Study and Economic Analysis of Wrongful Convictions and Evidence Problems*], 26 政法论坛 [TRIB. POL. SCI. & LAW] 8, 8-9 (2008). It is unclear how much

light because someone else subsequently confessed to the crime or, as in the cases of She and Zhao, the “dead came back to life.” It is impossible to know how many actual cases of coerced confessions and wrongful convictions have occurred in the Chinese criminal justice system. The Ministry of Public Security reported that in 2009, 1,800 police officers were punished for their involvement in torture.⁸ According to a 2006 survey, seventy percent of inmates claimed that they knew someone who had made a confession under coercion.⁹

Coerced confessions,¹⁰ especially those that lead to convictions of innocent people come at a high cost. In purely financial terms, the wrongful convictions of Zhao Zuohai and She Xianglin cost the Chinese government hundreds of thousands of dollars in compensation,¹¹ not to mention the wasted costs of investigation, prosecution, trial, conviction, appeals and sentencing for crimes that had never occurred. Of course, there are incalculable losses to the lives of the individuals involved and their families. While he was in prison, Zhao Zuohai’s wife left him, remarried and put two of their four children up for adoption.¹² Those two children had no money for school and are now illiterate.¹³ In addition, in both the Zhao and She cases, corpses of individuals

overlap there is between the thirty-three cases in some studies and the fifty cases in others.

⁸ Tania Branigan, *Chinese Police Chief ‘Tortured to Death’*, GUARDIAN (UK), Jan. 15, 2011, at 26 (“No one knows how many such cases happen in China each year. A report from the ministry of public security said 1,800 police officers were suspended for torture in 2009. In a survey conducted three years earlier, seventy percent of prisoners said fellow detainees they knew had made forced confessions.”). A different version of this report is available at <http://www.guardian.co.uk/world/2011/jan/14/china-police-chief-dies-custody>.

⁹ *Id.*

¹⁰ In this article, the terms “coerced confession” and “extorting confessions by torture” are used interchangeably and are meant to be translations of the Chinese term *xingxun bigong* (刑讯逼供), which Chinese law does not explicitly define. It is beyond the scope of this article to attempt to provide an authoritative definition of “torture.” In the context of this article, all of these terms are used to describe the various means criminal investigators may use to set the terms and conditions of interrogation to overcome the will of a suspect and force him to make statements against his will.

¹¹ Zhao Zuohai received RMB 770,000 (USD \$116,790) in compensation. *Improperly Jailed Man Wins Extra Cash Payout*, *supra* note 2. She Xianglin received RMB 700,000 (USD \$106,172); *see also* 孙春龙 [Sun Chunlong], 冤狱之后的余祥林: 最尊敬记者想为受冤的人做事 [She Xianglin after the Miscarriage of Justice: Highest Respect for Journalists and Hoping to Do Something for Those Who Are Treated Unjustly], NEWS.SINA.COM.CN (Oct. 27, 2005), <http://news.sina.com.cn/c/2005-10-27/10538132189.shtml> (purported republication of an article from magazine ORIENTAL OUTLOOK WEEKLY); *Background: State Compensation Cases*, CNTV.CN (Dec. 2, 2010), <http://english.cntv.cn/program/china24/20101202/102581.shtml>.

¹² Wang & Li, *supra* note 2.

¹³ Chief Judge Zhang Liyong Apologizes, *supra* note 1.

had been found and it is likely that crimes had been committed. Because of the coerced confessions and false convictions of Zhao and She, however, those crimes were never properly investigated and the actual criminals are presumably still at large. Such cases, when exposed, can also have tragic consequences for the public officials involved. In at least one case, once the scandal came to light, one of the police investigators committed suicide.¹⁴

All of these costs, while significant, pale in comparison to the loss of public trust in the criminal justice system that follow from these cases of gross injustice. It is clear from several of the reforms and campaigns over the last few years that the Chinese government is very concerned about public opinion and public trust and support for the legal system.¹⁵ The exposure of one wrongful conviction after another undermines all of the government's efforts to shore up public trust in the legal system and, by extension, trust in the government and the party.

Since at least 1997, China has officially acknowledged that coerced confessions have been a problem in its criminal justice system and has announced measure after measure to address the problem. Despite these efforts, there seems to be little discernible progress. Following the Zhao Zuohai case, the government announced new measures, including an exclusionary rule for coerced confessions. Since the new rule is less than a year old, it remains to be seen what impact, if any, it will have.

This article discusses and analyzes the effect of past measures and the likelihood of success of the new exclusionary rule. Part I of this article discusses the problem of coerced confessions in Chinese criminal justice. Part II reviews and analyzes the history of Chinese efforts to prevent coerced confessions, including the most recent adoption of an exclusionary rule for coerced confessions. Part III discusses why past efforts have failed and why the most recent reform is also unlikely to succeed. Part IV draws upon Chinese experts' prescriptions and the American experience and discusses additional suggestions for reform. Part V concludes that police torture in criminal investigations will not be substantially reduced unless and until there is broad recognition by political leaders that coercing confessions undermines the pursuit of justice and the legitimacy of the government. Only then will there be a fundamental change in the way criminal investigations are conducted. Once reliance upon confessions as the principal means of investigation comes to an end, reforms that effectively protect the rights of citizens suspected of criminal activity can be adopted and enforced.

¹⁴ Sun, *supra* note 11.

¹⁵ See, e.g., Sky Canaves, *China's Court of Public Opinion*, WALL ST. J. CHINA REAL TIME REP. (June 17, 2009, 7:33 AM), <http://blogs.wsj.com/chinarealtime/2009/06/17/chinas-court-of-public-opinion/>; Keith J. Hand, *Can Citizens Vitalize China's Constitution?*, FAR E. ECON. REV., May 2007, at 15, available at http://www.law.yale.edu/images/IntellectualLife/Hand_-_Can_Citizens_Vitalize_the_Constitution.pdf.

I. THE PROBLEM OF COERCED CONFESSIONS

As noted above, since at least 1997, the Chinese government has officially acknowledged that coerced confessions are a significant problem in China's criminal justice system.¹⁶ Chinese officials and analysts have characterized the torture problem as "widespread," "deeply entrenched," a "stubborn illness," and a "malignant tumour" that "is difficult to stop" in practice, with forced confessions characterized as "common in many places in China because the police are often under great pressure from above to solve criminal cases."¹⁷

Of course, police departments everywhere are under pressure to solve cases and many countries have experienced scandals involving innocent persons convicted of serious crimes as a result of coerced confessions.¹⁸ However, few criminal justice systems provide such generous opportunities for police to extract confessions. The reason why Chinese law makes it easy for Chinese police to obtain confessions is simple. It is much easier to convict someone who has already admitted he is guilty.

Chinese law enforcement's heavy reliance on confessions goes back to imperial times.¹⁹ The traditional Chinese saying that *zui cong gong ding* (罪从

¹⁶ U.N. Office of the High Commissioner for Human Rights, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 47, U.N. Doc. E/CN.4/2006/6/Add.6 (Mar. 10, 2006) (by Manfred Nowak), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/Go6/117/50/PDF/Go611750.pdf?OpenElement> [hereinafter *Report of the Special Rapporteur*] ("The Government's willingness to acknowledge the pervasiveness of torture was confirmed when the Supreme People's Procuratorate published *The Crime of Tortured Confession (Xingxun Bigong Zui)* in late 1997, including China's first public official statistics on criminal cases of tortured confession. It reported an average of 364 cases per year between 1979 and 1989, upward of 400 cases per year for most years in the 1990s, and included the admission that 241 persons had been tortured to death over the two-year period 1993-1994.").

¹⁷ *Id.* ¶ 46.

¹⁸ For information regarding wrongful convictions in the United States, see *False Confessions & Recording Of Custodial Interrogations*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/False_Confessions__Recording_Of_Custodial_Interrogations.php (About twenty-five percent of the 266 wrongful convictions overturned by DNA evidence in the U.S. have involved some form of a false confession and some of those were the product of physical coercion by police). For information regarding wrongful convictions in Canada, see Robin Bajer et al., *Wrongful Convictions in Canada*, INTERNATIONAL SOCIETY FOR THE REFORM OF CRIMINAL LAW (2007), www.isrcl.org/Papers/2007/YMC.pdf (citing false confessions as among the key factors that contribute to wrongful convictions).

¹⁹ HOW TO ERADICATE TORTURE, A SINO-DANISH JOINT RESEARCH ON THE PREVENTION OF TORTURE 458 (Xia Yong et al. eds., 2003) [hereinafter HOW TO ERADICATE TORTURE] (In ancient China, as in other ancient societies, torture had been used as a legitimate form of punishment and a lawful way to extort a confession).

供定) (“convictions begin with confessions”)²⁰ makes clear that “over a long period of time in China the confession was viewed as the ‘king’ of evidence.”²¹ According to one Chinese judge:

Because of the high probative value of confessions, and the limitations of investigative resources, all of our investigative activities are basically focused on the confession of the suspect. After investigators obtain a little bit of evidence, they immediately interrogate the suspect and then use his confession as a basis for gathering other evidence.²²

One experienced defense lawyer and former police officer put it more bluntly. He asked, “Why do you think Chinese police are the most successful in the world?” He answered his own question: “It is not because they are the smartest police in the world it is just that they obtain a confession in every case.”²³

China’s criminal procedure law maximizes the opportunity for the police to obtain a confession. Before the 1996 reforms of the Chinese Criminal Procedure Law (“CPL”), Chinese police could detain suspects indefinitely while subjecting them to repeated rounds of police interrogation. In 1996, in apparent recognition that such prolonged detention was abusive, the National People’s Congress (“NPC”) substantially revised the CPL to limit pre-charge detention to thirty-seven days, which the police may extend under certain circumstances.²⁴

²⁰ 常建中 [Chang Jianzhong], 浅谈刑讯逼供的危害、原因及对策 [A Brief Discussion of the Harm, Causes and Preventive Measures to Address Coerced Confessions], 法制与社会 [LEGAL SYS. & SOC'Y], no. 2, 2007 at 151, 151.

²¹ 杨宇冠、赵珊珊 [Yang Yuguan & Zhao Shanshan], 刑事错案的预防与补救 [Preventing and Remediating Wrongful Convictions], 甘肃社会科学 [GANSU SOCIAL SCIENCES], no. 5, 2010 at 131, 132.

²² Nie, *supra* note 6, at 88.

²³ Interview with Chinese defense lawyer and former police officer (Mar. 2000).

²⁴ For details about how time limits are calculated under the criminal procedure law, see Ira Belkin, *China's Criminal Justice System: A Work in Progress*, WASH. J. MODERN CHINA, Fall 2000, at 61, 71–73, available at http://www.law.yale.edu/documents/pdf/chinas_criminal_justice_system.pdf. See also 中华人民共和国刑事诉讼法 [Criminal Procedure Law of the People's Republic of China] art. 128 (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 1979, effective Jan. 1, 1980, amended Mar. 17, 1996), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.), translated at <http://www.cecc.gov/pages/newLaws/criminalProcedureENG.php> (last modified Dec. 12, 2003) [hereinafter Criminal Procedure Law] (Article 128 of the Criminal Procedure Law permits the clock to restart if a new offense is discovered.). According to criminal defense attorneys, the police sometimes extend the detention period by initiating an investigation into a new offense once the initial period is about to expire. Interview with Chinese defense lawyer and former police officer, *supra* note 23.

During this lengthy but lawful period of detention, a suspect has no right to refuse questioning and must, in fact, “answer truthfully” the questions of the police.²⁵ In other words, there is no right to silence or privilege against self-incrimination in Chinese law.

Moreover, police interrogations are conducted in secret during lengthy periods in which suspects are held incommunicado. Lawyers or other third parties are not permitted to be present during police interrogations. While the police have a legal obligation to notify a detainee’s family or legal representative upon his request, that notice may be waived if the police deem that it would inhibit the investigation and, in any event, that representative does not have a right to be present during interrogation.²⁶ In addition, all attorney client meetings may be monitored by the police.²⁷ A suspect in detention may be completely cut off from all contact with anyone outside the detention center.

For years, the Chinese criminal defense bar has advocated for reforms that would give lawyers the right to enter a criminal case to protect the rights of a client at the investigative stage. It appeared that they had achieved some success in 2008 when the NPC passed a new Law of the People’s Republic of China on Lawyers [hereinafter Lawyer’s Law] that explicitly allowed lawyers to meet with their clients in confidence and begin representing them immediately after the initial interrogation by the police.²⁸ However, despite this legislative victory, Chinese police have continued to resist allowing lawyers to visit their clients during the investigation stage of a case. First, the Ministry of Public Security mounted a legal challenge to the Lawyer’s Law, arguing that because it was inconsistent with the CPL and because it was passed by the NPC Standing Committee and not the entire NPC, it was invalid. The NPC rejected that challenge,²⁹ but the police, who control the detention

²⁵ Criminal Procedure Law, *supra* note 24, art. 93.

²⁶ *Id.* art. 64 (“When detaining a person, a public security organ must produce a detention warrant. Within 24 hours after a person has been detained, his family or the unit to which he belongs shall be notified of the reasons for detention and the place of custody, except in circumstances where such notification would hinder the investigation or there is no way of notifying them.”).

²⁷ *Id.* art. 96.

²⁸ 中华人民共和国律师法 [Law on Lawyers (P.R.C.)] art. 33 (promulgated by the Standing Comm. Nat’l People’s Cong., May 15, 1996, effective Jan. 1, 1997), *STANDING COMM. NAT’L PEOPLE’S CONG. GAZ.* (P.R.C.) (“Starting from the day when a criminal suspect is interrogated by the investigating organ for the first time, a lawyer entrusted is entitled to meet the criminal suspect or the defendant and learn information related to the case by presenting the certificate for law practice, the certificate issued by the law firm and the certificate of entrustment or the official letter for legal aid. The lawyer shall not be monitored when meeting the criminal suspect or the defendant.”).

²⁹ 孙继斌 [Sun Jibin], 全国人大常委会法工委回复应按修订后律师法规定执行 [The National People’s Congress Standing Committee Legislative Affairs Commission Responds: The Amended Lawyer’s Law Should be Enforced], *法制日报* [LEGAL DAILY], Aug. 17, 2008, at 1, available at http://news.xinhuanet.com/legal/2008-08/17/content_9425038.htm.

centers where most defendants are held, appear to be reluctant to implement the new law.³⁰

Even if the Lawyer's Law were implemented as written, it would still provide little protection against coerced confessions. Lawyers still have no right to be present during interrogation and can only enter a case after the initial interrogation is completed. Moreover, the vast majority of criminal defendants in China, roughly eighty percent or more, are not represented by counsel at all.³¹ Only defendants who are charged with a capital offense, are underage, or suffer from some disability, are entitled to mandatory free counsel.³² Some defendants, primarily in economic crime cases, can afford to hire lawyers, but most defendants have no lawyers.

Thus, even strict adherence to current Chinese law may result in a suspect being subjected to a long period of detention isolated from family and friends, without the protection of a lawyer, during which time the police may interrogate the suspect repeatedly. These conditions are inherently coercive, apparently by design. Even under the 1996 Criminal Procedure Law, the purpose of detention appears to be to create the most favorable conditions for obtaining a confession. Again, obtaining a confession makes criminal prosecution and conviction much simpler.

II. CHINA'S ATTEMPTS TO END TORTURE IN CRIMINAL INVESTIGATIONS

Perhaps in recognition of the high costs of coerced confessions and wrongful convictions, the Chinese government has, since the 1980s, taken

³⁰ 袁定波 [Yuan Dingbo], 律师会见期待出台操作细则 [*Lawyer Visitation Awaits Operating Regulations*], 法制日报 [LEGAL DAILY], May 27, 2009, at 5, available at http://www.legaldaily.com.cn/bm/content/2009-05/27/content_1096187.htm?node=9.

³¹ Statistics on the percentage of defendants represented by counsel nationwide are hard to come by. However, one can extrapolate from available statistics that the rate of representation is very low. According to a recent article in Legal Daily, between January 2009 and July 2010, in Shanghai's Pudong District, one of China's most economically developed areas, only about twenty-five percent of defendants were represented by counsel. Of those, twenty-three percent had retained counsel and 1.56% were represented by legal aid. 刘建 [Liu Jian], 全国首家公设辩护人办公室在沪成立 [*The Nation's First Public Defenders Office Will Open in Pudong*], 法制日报 [LEGAL DAILY .COM.CN] (Oct. 27, 2010), http://www.legaldaily.com.cn/zfb/content/2010-10/27/content_2330126.htm?node=20609. If the rate of representation in Shanghai is twenty-five percent then it is fair to assume that the rate of representation nationwide is lower.

³² 法律援助条例 [Regulation on Legal Aid] art. 12 (promulgated by the Standing Comm. St. Council, July 16, 2003, effective Sep. 1, 2003), ST. COUNCIL GAZ. (P.R.C.), translated at <http://www.cecc.gov/pages/selectLaws/ResidencySocWelfare/regsLegalAid.php> (last modified Dec. 18, 2003) ("If a defendant is blind, deaf, mute or is a juvenile and has not retained a defense lawyer, or if there is a possibility that the defendant will be sentenced to death and has not retained a lawyer, the people's court shall assign a lawyer, government legal aid departments shall offer legal aid and there is no need to investigate the financial circumstances of the defendant.").

some steps to address the problem. China has signed and, in one case, ratified international conventions that prohibit torture, revised its criminal procedure law and criminal law to outlaw torture, and has passed legislation and regulations that provide that coerced confessions cannot be used as the basis of a conviction. Despite these well-intentioned efforts, there is no persuasive evidence that any of these measures has made an appreciable impact on the number or frequency of coerced confessions.³³ Finally, in May 2010, China adopted an exclusionary rule for coerced confessions. While the exclusionary rule addresses some of the problems with the previous rules it does not fundamentally change the way criminal investigations are conducted and therefore, without additional reforms, is also unlikely to significantly reduce the incidence of coerced confessions.

A. Reforms Prior to 2010

In 1987, China ratified the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). The Convention, at Article 15, provides as follows:³⁴

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

³³ In a statement accompanying its fourth and fifth periodic reports to the U.N. Committee Against Torture, the Chinese government claimed a reduction in coerced confessions, citing the reduction in the number of prosecutions for such offenses. See Introductory Statement by H.E. Ambassador Li Baodong, Head of Chinese Delegation, at the consideration of the Committee Against Torture on China's 4th and 5th Periodic Reports (Nov. 25, 2008), http://www2.ohchr.org/english/bodies/cat/docs/statements/China_cat41.pdf (last visited Aug. 24, 2011).

Certainly, the number of prosecutions is significant but these only reflect the number of cases of coerced confessions discovered and prosecuted. Cases like Zhao Zuohai and She Xianglin festered below the surface in the system for over ten years before the facts of their coerced confessions were disclosed and officially acknowledged. It is unknown how many other such cases are in the system and without a concerted effort to review all cases with allegations of torture it is difficult to know whether, in fact, instances of confessions obtained by torture are increasing, decreasing or remaining the same.

Interestingly, the Henan High court recently reported that as a result of the Zhao Zuohai case, it undertook a review of 16,218 cases and, as a result found seventy-three defendants to be innocent and released them. 李亚楠 [Li Ya'nán], 河南高院反思赵作海案、“天价逃费案”教训 [*Henan High Court Reflects on Lessons of Zhao Zuohai Case, Toll Road Cases*], 新华网 [XINHUA NEWS], Jan. 20, 2011, http://news.xinhuanet.com/legal/2011-01/20/c_121004122.htm.

³⁴ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 15, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

Although China signed and ratified the CAT, it did not enact any domestic legislation implementing the exclusionary rule set forth in Article 15.

On October 5, 1998, China signed the UN International Covenant on Civil and Political Rights, but has not yet ratified it.³⁵ Several articles are pertinent to the prohibition of coerced confessions. Article 7 provides as follows: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Article 10 provides, in pertinent part: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Article 14 provides, in pertinent part:

(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . (g) not to be compelled to testify against himself or to confess guilt.

In addition to signing both and ratifying one of these key international human rights conventions, China has also revised its domestic law to prohibit torture and the coercing of confessions. As noted above, in 1996, China substantially revised its Criminal Procedure Law. Article 43 expressly forbids coerced confessions: "It shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means."

The revised CPL also de-emphasized the role of confessions in proving a defendant's guilt stating that it was neither necessary nor sufficient for conviction. Article 46 provides:

A defendant cannot be found guilty and sentenced to a criminal punishment if there is only his statement but no evidence; the defendant may be found guilty and sentenced to a criminal punishment if evidence is sufficient and reliable, even without his statement.

The revised Criminal Procedure Law did not go so far as providing for a procedure to determine whether a confession was unlawfully obtained and if so, that it should be excluded from evidence. Following the revision of the Criminal Procedure Law, The Supreme People's Court ("SPC") issued a lengthy judicial interpretation to guide China's courts in its implementation. Article 61 provides:

³⁵ On March 13, 2008, Chinese Premier Wen Jiabao announced at a press conference that China will ratify the UNCCPR at "an early date." *Premier: China to Ratify UN Covenant on Civil and Political Rights at Early Date*, CHINA ECONOMIC NET (Mar. 18, 2008), http://english.ce.cn/National/Politics/200803/18/t20080318_14878399.shtml.

It shall be strictly forbidden to use unlawful methods to obtain evidence. Any testimony of a witness, victim or defendant obtained by coercion, enticement, deception or other illegal method cannot be the basis for conviction.³⁶

On December 12, 1998, the Supreme People's Procuratorate ("SPP") passed detailed rules instructing the country's procurators how to implement the new criminal procedure law. Article 140 reiterated the prohibition against using unlawful methods to obtain confessions. Article 265 provided the most detailed rules to date about how to implement CPL Article 43's prohibition against coerced confessions:

It is strictly forbidden to use unlawful methods to collect evidence. Statements obtained from suspects, defendants or witnesses by coercion, threats, enticement or deception or other unlawful means cannot form the basis of an accusation of a criminal offense.

If the review department of the People's Procuratorate discovers during the review of a case that investigators used unlawful means to collect evidence from a suspect, defendant or witness, it should offer an opinion to rectify the situation, at the same time it should demand that the investigating agency dispatch other investigators to reinvestigate the case and gather evidence and, if necessary, the procuratorate, itself, can carry out the investigation. If the investigating agency has not reinvestigated the case and collected evidence again, then the procuratorate may send the case back to the investigating agency to supplement the investigation.³⁷

³⁶ 最高人民法院关于执行《中华人民共和国刑事诉讼法》若干问题的解释 [Supreme People's Court Interpretation on Certain Questions Concerning the Implementation of the People's Republic of China Criminal Procedure Law] art. 61 (promulgated by the Sup. People's Ct., Sept. 2, 1998, effective Sept. 8, 1998), SUP. PEOPLE'S CT. GAZ. (P.R.C.) ("第六十一条 严禁以非法的方法收集证据。凡经查证确实属于采用刑讯逼供或者威胁、引诱、欺骗等非法的方法取得的证人证言、被害人陈述、被告人供述，不能作为定案的根据。")

³⁷ 最高人民检察院刑事诉讼规则 [People's Procuratorate Criminal Procedure Rules] art. 265 (promulgated by the Sup. People's Proc., Jan. 18, 1999, effective Jan. 18, 1999), SUP. PEOPLE'S PROC. GAZ. (P.R.C.). The section provides in the original Chinese:

第二百六十五条 严禁以非法的方法收集证据。以刑讯逼供或者威胁、引诱、欺骗等非法的方法收集的犯罪嫌疑人供述、被害人陈述、证人证言，不能作为指控犯罪的根据。

人民检察院审查起诉部门在审查中发现侦查人员以非法方法收集犯罪嫌疑人供述、被害人陈述、证人证言的，应当提出纠正意见，同时应当要求侦查机关另行指派侦查人员重新调查取证，必要时人民检察院也可以自行调查取证。侦查机关未另行指派侦查人员重新调查取证的，可以依法退回侦查机关补充侦查。

These rules focus on whether the statements themselves are tainted and presume that a reinvestigation could purge whatever taint may have attached to them.³⁸ Similar to the SPC rules, there was no suggestion that an unlawfully obtained confession should be “excluded” from evidence.

Within just two years after the issuance of these rules, on January 2, 2001, the SPP issued “A Notice Regarding the Prohibition Against Using Coerced Confessions As a Basis For Conviction.”³⁹ As stated in the Notice itself, it was occasioned by a notorious case of a conviction of an innocent person based upon a confession obtained by torture. The Notice cited a scandal in Kunming over the wrongful conviction and death sentence (later commuted to a death sentence with a two year reprieve) of an innocent person, Du Peiwu, for the murder of two police officers. Du Peiwu (who was a police officer himself) had been forced to confess to the crime and “manufacture evidence of his guilt.” Du Peiwu’s innocence was discovered years later when the actual perpetrator was caught and confessed to the murders.⁴⁰

The SPP Notice used the language of “exclusion” (排除) (*paichu*) for the first time in an official Chinese legal document. According to paragraph 3 of the Notice, procuratorates at all levels should thoroughly implement relevant rules regarding coerced confessions and clear rules about excluding coerced confession. Citing the above articles of the CPL and its own implementing rules, the Notice directed that if a procuratorate “discovered that the statements of a suspect, defendant or witness were obtained unlawfully, they should be resolutely excluded, coercing confessions or using other unlawful methods to obtain evidence cannot be given any leeway.” In the next sentence, however, the Notice reiterated the remedy set forth in Article 265 of the CPL implementing Rules, namely, “reinvestigation.”⁴¹

As early as 2003, Chinese scholars began predicting that an exclusionary rule for coerced confessions would be enacted soon.⁴² Until the Zhao Zuohai wrongful conviction was exposed in May 2010, however, there was still no national rule or procedure for excluding any unlawfully obtained evidence, including coerced confessions.⁴³

³⁸ In 2000, the author interviewed various prosecutors in Sichuan, Guangzhou, and Beijing and they confirmed that if they suspected that a defendant’s confession was obtained through coercion the remedy was to re-interview the defendant and that the original confession could be used as a basis for the second interrogation.

³⁹ 中华人民共和国最高人民检察院关于严禁将刑讯逼供获取的犯罪嫌疑人供述作为定案依据的通知 [People’s Republic of China Supreme People’s Procuratorate Notice Regarding the Strict Prohibition Against Using Coerced Confessions As a Basis For Conviction] (promulgated by the Sup. People’s Proc., Jan. 2, 2001), SUP. PEOPLE’S PROC. GAZ. (P.R.C.).

⁴⁰ *Id.*

⁴¹ *Id.* ¶ 3.

⁴² HOW TO ERADICATE TORTURE, *supra* note 19, at 459–60.

⁴³ Since that time, some local courts have announced rules for the exclusion of unlawfully obtained evidence. *Report of the Special Rapporteur, supra* note 16, ¶ 49.

Of course, an exclusionary rule is only one way of addressing the problem of torture and coercion in criminal interrogations. In addition, China has promulgated numerous laws and regulations, including the criminal law, which prohibit law enforcement officials from using unlawful methods such as coercing confessions.⁴⁴ The punishment for causing death when extorting a confession by torture can be as serious as execution.⁴⁵

Also, in 2008, the SPP enacted significant reforms for interrogations conducted in the very small percentage of cases that are investigated directly by prosecutors.⁴⁶ Under Chinese law, all crimes committed by government officials, including corruption, must be investigated by Chinese prosecutors and not the police.⁴⁷ Since 2008, following pathbreaking research and pilot projects carried out by Chinese legal scholars,⁴⁸ the SPP began to require that prosecutors audiotape and videotape their interrogations of suspects.⁴⁹ In

However, there seem to be no reported cases of confessions being excluded under those rules.

⁴⁴ 中华人民共和国刑法 [Criminal Law (P.R.C.)] art. 247 (adopted by the Nat'l People's Cong., July 1, 1979, amended Mar. 14, 1997, effective Oct. 1, 1997), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.), translated at <http://www.cecc.gov/pages/newLaws/criminalLawENG.php> (last modified May 27, 2011) [hereinafter Criminal Law] (making it a crime to coerce a confession, punishable by imprisonment for three years or less).

⁴⁵ *Id.* arts. 234, 232 (if injury or death results from extortion of a confession by torture, the punishment can be up to life imprisonment or execution).

⁴⁶ By way of example, according to China's 2006 Yearbook of National Statistics, in 2005, prosecutors investigated 32,616 cases. 检察机关情况 (2005年) [Procuratorial Organs (2005)], 2006 中国统计年鉴 [CHINA YEARBOOK OF NATIONAL STATISTICS] 23-17 (number listed for "结案件数" (*jie'an jianshu*) (concluded cases)). Police in the same year investigated 2,097,369 cases, almost seventy times as many. 公安机关案的刑事案件及构成 [Criminal Cases Registered in Public Security Organs and Their Composition], 2006 中国统计年鉴 [CHINA YEARBOOK OF NATIONAL STATISTICS] 23-11 (footnote on "破获刑事案件" (*pohuo xingshi anjian*) (solved criminal cases)).

⁴⁷ Criminal Procedure Law, *supra* note 24, art. 18.

⁴⁸ 侦查讯问程序改革实证研究——侦查讯问中律师在场、录音、录像制度试验 [EMPIRICAL RESEARCH ON INTERROGATION PROCEDURE REFORM—EXPERIMENTATION WITH LAWYERS-ON-SITE, AUDIOTAPING, AND VIDEOTAPING IN SUSPECT INTERROGATIONS] (樊崇义 & 顾永忠 [Fan Chongyi & Gu Yongzhong] eds., 2007); see also Thomas Stutsman, *The Role of Demonstration Projects in Chinese Criminal Procedure Reform*, in the present symposium.

⁴⁹ 最高人民检察院办公厅于 2006 年 12 月 4 日印发关于《人民检察院讯问职务犯罪嫌疑人实行全程同步录音录像技术工作流程 (试行)》和《人民检察院讯问职务犯罪嫌疑人实行全程同步录音录像系统建设规范 (试行)》的通知 [Supreme People's Procuratorate Office Notice Concerning "The Flow for Complete, Simultaneous Audiotaping and Videotaping of Interrogations by People's Procuratorates of Suspects in Cases of Criminal Offenses Committed by Civil Servants (Experimental)" and "The Establishment of a Regular System for People's Procuratorates to Simultaneous Audiotape and Videotape the Entire Process of the Interrogation of Suspects in Cases of

2010, the Ministry of Public Security announced its support for the use of audiotaping and videotaping of interrogations and the police in at least one province, Shandong, have reported that they have installed and are using recording equipment to record their interrogations.⁵⁰

B. The Exclusionary Rule

On June 13, 2010, approximately one month after the disclosure of Zhao Zuohai's wrongful conviction, China's law enforcement, judicial and prosecutorial establishment announced with great fanfare in a joint Notice, the promulgation of two new sets of evidence rules, one to deal with the exclusion of illegally obtained evidence and the other concerning specific evidence questions in death penalty cases. The announcement had several unusual features, one of which was that it mentioned by name Zhou Yongkang, the Secretary of the Chinese Communist Party's (CPC) Central Politics and Law Committee:

Comrade Zhou Yongkang, member of the CPC Politburo, member and secretary of the Central Politics and Law Committee, led a full session of the Central Politics and Law Committee that also served as a briefing on reform of the legal system [at which] serious discussions of the two sets of rules [took place]. He called on people's courts, people's procuratorates, public security organs, state security organs, and judicial administration organs at all levels to carry out their duties in accordance with the law; strictly implement the two sets of rules; pay attention to facts, evidence, the law, and responsibilities; guarantee quality in handling cases; punish crime, protect human rights, and uphold justice in accordance with the law; and ensure that each criminal case handled can withstand scrutiny of the law and history.⁵¹

Criminal Offenses Committed by Civil Servants (Experimental)"] (promulgated by the Sup. People's Proc., Dec. 4, 2006), SUP. PEOPLE'S PROC. GAZ. (P.R.C.), available at <http://www.spp.gov.cn/site2006/2006-12-20/000141191.html>.

⁵⁰ 张亮 [Zhang Liang], 两个证据规定"刷新办案人员意识 办铁案要靠证据说话 [The Two Evidence Rules Have Changed the Thinking of Officials in Charge of Cases, To Bring an Iron-clad Case You Must Let the Evidence Do the Talking], 法制日报 [LEGALDAILY.COM.CN] (Dec. 16, 2010), http://www.legaldaily.com.cn/zfb/content/2010-12/16/content_2408629.htm?node=20611.

⁵¹ 最高人民法院、最高人民检察院、公安部、国家安全部、司法部关于《关于办理死刑案件审查判断证据若干问题的规定》和《关于办理刑事案件排除非法证据若干问题的规定》的通知 [Notice from the Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, Ministry of State Security, and Ministry of Justice Regarding the "Regulations on the Examination and Evaluation of Evidence in Capital Cases" and "Regulations on the Exclusion of Illegally Obtained Evidence in Criminal Cases"] (promulgated by the Sup. People's Ct., Sup. People's Proc., Ministry

In addition, the Notice stated two principles that reformers have been advocating for years:

Each unit concerned should stringently and thoroughly implement the two sets of rules in their practice of executing the law and firmly establish *the equal importance of punishing crime and protecting human rights* and *the equal importance of substantive and procedural law*. (emphasis added)

The question, of course, is whether the promulgation of these rules will change police practices and have a significant impact on the incidence and frequency of coerced confessions in the Chinese criminal justice system.

The new exclusionary rule has one obvious advantage over the earlier SPC and SPP rules. The exclusionary rule was jointly issued by the Ministry of Public Security and the Ministry of State Security, as well as the Ministry of Justice, so all of the law enforcement agencies have agreed to be bound by the rule. Moreover, the rule clearly has the imprimatur of the most powerful body in the Chinese criminal justice system, the Communist Party Central Political-Legal Committee and Zhou Yongkang, the person who has the criminal justice portfolio on the nine-person Standing Committee of Chinese Communist Party Politburo that governs the People's Republic of China. These political factors are important because a rule with that level of political backing stands a much better chance of effective implementation.⁵²

In addition to its national scope, inter-agency consensus and political backing, the exclusionary rule broke new ground in three areas. First, a defendant who makes a sufficient showing to satisfy a judge that there is evidence that his confession was obtained unlawfully can be afforded a hearing by a court to determine whether his confession should be suppressed. This is the first time an actual procedure has been created to litigate the lawfulness of confessions. Since Chinese procedure does not provide for pre-trial hearings, this is an especially path-breaking change.

Second, the rules make clear that the burden of persuasion is on the prosecution to prove the lawfulness of interrogation procedures. If a defendant

of Public Security, Ministry of State Security & Ministry of Justice, June 13, 2010), SUP. PEOPLE'S PROC. GAZ. (P.R.C.), available at <http://www.spp.gov.cn/site2006/2010-06-25/0005428115.html>, translated at <http://www.duihuahrjournal.org/2010/06/translation-chinas-new-rules-on.html>.

⁵² As an example of the power of political backing, in 2003, Chinese officials began a campaign to eliminate "extended detention," a common practice where, despite the time limits set forth in the 1996 Criminal Procedure Law, police, prosecutors and courts, flouted the limits and kept suspects and defendants in custody for substantially longer periods of time than the law permitted. Largely through a nationwide political campaign, backlogs of cases were cleared and extended detention has been reduced from tens of thousands of cases a year to a handful. *4th Periodic Report of China to the Committee Against Torture*, ¶¶ 25-26, U.N. Doc. CAT/C/CHN/4, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/426/56/PDF/G0742656.pdf>.

raises suspicion in the mind of the court, the prosecution must produce evidence to persuade the court that the evidence was lawfully obtained. Third, the investigators who participated in the interrogation may be called to testify as witnesses. This is also unprecedented, as Chinese police generally do not testify in court. Moreover, in the context of a suppression hearing, it is the conduct of the police that will be judged, thus putting the police in a defensive posture. Again, this is unprecedented in China.⁵³

According to one of China's most respected criminal justice reformers, Professor Chen Guangzhong of the China University of Political Science and Law, under the exclusionary rule, if a defendant recants his out of court confession, a court should hold a hearing to determine whether his confession was unlawfully obtained. This is in stark contrast to current practice, whereby judges simply rely on out-of-court confessions and ignore the defendant's in-court profession of innocence.⁵⁴

There are, of course, other questions about the rules. For example, what kind of showing does a defendant have to make before a judge will order a hearing? What type of evidence must the police present to rebut a charge of using unlawful interrogation methods? What consequence will there be if police decline to testify? Will courts, prosecutors and police, all of whom answer to the same Chinese Communist Party political-legal committee, be able to depart from their traditional roles of working together to fight crime and exercise independent oversight over police conduct? These questions are significant, but even if they were resolved in a manner that made the rules user-friendly and effective there will be no significant progress made in addressing the fundamental problem of how to change police behavior and prevent coerced confessions unless other changes are also made.

III. WHY HAVEN'T THESE MEASURES WORKED?

As of May 2010, Chinese law had, for over a decade, made clear that coerced confessions were illegal and could not form the basis of criminal convictions. However, as noted above, this prohibition was primarily hortatory and appears not to have been implemented in practice. In fact, among published articles about coerced confessions in China, one of the most

⁵³ Over the past several years, the author has organized and participated in several mock hearings in China to demonstrate how suppression hearings in the United States are conducted. The feature of such hearings that always draws the greatest number of questions and comments is the fact that a police officer may be vigorously cross-examined by a defense attorney. A typical comment was, "Chinese police would never submit to such treatment."

⁵⁴ 王斗斗、李娜 [Wang Doudou & Li Na], 从余祥林到赵作海“亡者归来”凸显证据制度滞后 [From *She Xianglin to Zhao Zuohai—“Murder Victims Return from the Dead”—Revealing the Obvious Shortcomings of the Evidence System*], 法制日报 [LEGAL DAILY], June 1, 2010, at 5, available at http://news.xinhuanet.com/society/2010-06/01/c_12166858.htm (interview with Chen Guangzhong).

common phrases used to describe the situation in China is *lǚjīn búzhǐ* (屡禁不止), which means, “frequently prohibited but does not cease.”⁵⁵ There are several possible explanations for this failure. As noted above, the new exclusionary rule addresses some but not all of them.

First, while all Chinese law enforcement officials are bound by legislation such as the Criminal Procedure Law, implementing regulations are only binding on the entity that issues them. Thus, the SPC and SPP rules that more specifically state that coerced confessions may not be used as the basis for criminal charge or convictions and must be “excluded,” were binding upon prosecutors and the courts but not binding upon the police. The new exclusionary rule was jointly issued by all five law enforcement and judicial entities and thus addresses this problem.

Second, the Chinese legal system is overseen by political-legal committees of the Chinese Communist Party. These committees are generally led by the local Chief of Police, with the local Chief Procurator and Chief Judge playing subordinate roles.⁵⁶ This hierarchy would tend to give even less weight to the SPC and SPP rules on coerced confessions. Thus, in a high-profile case, all components of the criminal justice system would have to answer to the party political-legal committee, which, as noted above, is headed by the police. This appears to have been a significant factor in the wrongful conviction of Zhao Zuohai, as prosecutors report that the political legal committee had reached consensus that Zhao Zuohai should be charged and convicted despite the prosecutor’s reservations about the evidence.⁵⁷ Again, since the Ministry of Public Security and the Ministry of State Security joined in issuing the new exclusionary rule this obstacle also seems to have been addressed.

Third, the previous rules themselves did not set forth a mechanism for their enforcement and, even if enforced, could not deter police misconduct. The SPC rules were merely conclusory; that is, they stated that coerced confessions could not form the basis of conviction, but they never instructed courts how to determine if a confession was coerced and how to go about excluding it from consideration. The SPP rules are more specific but focus only on whether the specific statement was coerced and thereby tainted. The SPP rules provide that reinvestigation, not exclusion, is the remedy for a coerced confession. Once the police obtained a confession by whatever means, legal or

⁵⁵ 崔敏 [Cui Min], 再论遏制刑讯逼供 [Discussing Once Again Deterring Coerced Confessions], 山东公安专科学校学报 [SHANDONG PUB. SEC. VOCATIONAL SCH. J.], no. 6, at 64, 64 (2001); 马维秋、丁影 [Ma Weiqiu & Ding Ying], 证据与刑事错案关系探讨——证据法语境下的刑事错案成因分析 [A Study of the Relationship Between Evidence and Wrongful Conviction], 法制与经济 [LEGAL & ECON.], no. 7, at 51, 53 (2009).

⁵⁶ 申欣旺 [Shen Xingwang], 被协调的正义—详解政法委书记兼任公安局长 [Justice Coordinated: An Examination of Political Legal Committee Secretaries Also Serving As Police Chiefs], 中国新闻周刊 [CHINA NEWSWEEK], Mar. 29, 2010, at 34, available at http://news.xinhuanet.com/legal/2010-03/25/content_13245075.htm (Over half the provinces have police chiefs serving as the secretaries of the party political legal committee overseeing all of the justice system work in their jurisdiction).

⁵⁷ Zhao Zuohai’s Prosecutor Was Under Pressure, *supra* note 5.

not, it was up to the prosecutors to confirm it before going forward with criminal charges.

As noted above, the new exclusionary rule sets forth specific procedures for prosecutors and courts to follow to determine if a confession has been coerced. Thus, the lack of a mandated procedure also appears to have been resolved.

Fourth, Chinese law, including the new exclusionary rule, only addresses confessions that are obtained in violation of existing Chinese law, which, as noted above permits the police to conduct interrogations under inherently coercive conditions. The "exclusionary rule" does not change the fundamental nature of Chinese criminal investigations. All of the procedural opportunities for the police to obtain confessions are still in place. As noted above, under the CPL, Chinese police have the lawful authority to detain suspects for lengthy periods of time and subject them to repeated, secret interrogations. Such interrogations, provided they do not involve physical abuse or deprivation of sleep or food or other abuses, would apparently be lawful even if the police used the length of detention, isolation and repeated interrogations to overcome the will of the suspect and extract an involuntary confession.⁵⁸

Fifth, the rule is unlikely to change the way police conduct investigations. Because the rule does not contemplate a defendant's right to refuse questioning, at best, it is intended to exclude only *false* confessions that were obtained unlawfully. A defendant who succeeds in persuading a court that his confession was coerced must still answer the court's questions about his guilt or innocence and the factual allegations against him. In the case of an unlawfully obtained confession that is truthful, suppression is, at best, a Pyrrhic victory. This appears to be consistent with the intent of the rule. As Professor Chen Guangzhong found, the rule may provide a remedy for a defendant who recants his confession. For the defendant who was tortured before giving a true confession, however, there will be no relief.

Because a true confession, no matter how unlawfully obtained, will still lead to a conviction, police will continue to have the same incentives as before to obtain confessions. Those incentives place a premium on obtaining a confession and providing the police with the opportunity to detain and interrogate suspects over a long period of time without any interference or supervision by any third party. Since most defendants will never even be

⁵⁸ There is no explicit definition of "torture" in Chinese law; nor is there a definition of the commonly used Chinese phrase *xingxun bigong* (刑讯逼供), which is officially translated as "extorting confessions by torture." However, it appears that when Chinese use the term they are referring to a level of abuse that goes beyond the coercive conditions of detention and includes some physical or psychological abuse or deprivation of sleep, food or other mistreatment. The United Nations Committee Against Torture has been urging China to enact an authoritative definition of "torture" that is consistent with the CAT. Office of the U.N. High Comm'r for Human Rights, Committee Against Torture, Concluding observations of the Committee Against Torture, ¶¶ 32-33, U.N. Doc. CAT/C/CHN/CO/4 (Dec. 12, 2008) ("The Committee is concerned that the provisions relating to torture refer only to physical abuse and do not include the infliction of severe mental pain or suffering.").

represented by counsel police have little to fear from a rule that may exclude some confessions if they are proven to have been both unlawfully obtained and false.

In this connection, it is worth noting that the exclusionary rule does not include any provision regarding the "fruit of the poisonous tree," that is, the rule does not prohibit the police from using a coerced confession to obtain leads to physical evidence. Such physical evidence would still be admissible to prove the guilt of the accused.⁵⁹ Thus, the incentive for police to obtain a confession by any means is still present.

Sixth, not all confessions are equally probative and none of the reforms take into account the question of how to evaluate the voluntariness of a confession. Indeed, Chinese law does not require that a suspect's statement be voluntary in order to be admissible. While attempting to balance the needs of law enforcement and the rights of the accused, Chinese law creates an irreconcilable contradiction. On the one hand, the law permits inherently coercive conditions for police interrogations so that the police can obtain a confession. On the other hand, the law prohibits the police from coercing confessions. The law does not define what constitutes "extorting a confession by torture," nor does it require that statements be voluntary.

This lack of clarity in the law and the contradiction inherent in the encouragement of police to use coercive conditions to obtain confessions but, at the same time, to refrain from coercing confessions, is at the heart of the problem of coerced confessions in China. Despite the rhetoric and regulation prohibiting torture, Chinese law still reflects a strong preference for the police to obtain confessions to make prosecutions and convictions simpler.

A confession, voluntary or not, may be useful to support a conviction, including a conviction of an innocent person. However, only a voluntarily made statement is of value to investigators whose goal is to discover reliable evidence of criminal conduct. With such a statement in hand, investigators can test the veracity of the information provided and the reliability of the declarant by following the leads the statement provides and discovering whether other evidence corroborates or contradicts the witness' account. By contrast, a coerced statement merely parrots the police theory of the case, which may be flawed.

For example, in the She Xianglin case, a witness named Nie Maiqing told police that she had seen She Xianglin's "murdered" wife alive. Instead of following up the leads she provided, she was locked up for three months until she changed her testimony to fit the police theory of the case. Her initial, voluntarily made statement had some value and could have been followed up. Her coerced statement was worse than useless as it perpetuated a false theory of the case and contributed to She Xianglin's wrongful conviction.

⁵⁹ Interestingly, the exclusionary rule refers to "unlawfully obtained physical evidence." However, since Chinese law has no equivalent to the fourth amendment and virtually no legal requirements for the search and seizure of physical evidence beyond purely ministerial measures, it is unclear how physical evidence could be determined to have been "unlawfully obtained."

Chinese law does not afford Chinese citizens a choice about whether to answer interrogators' questions. As noted earlier, there is no right to silence or privilege against self-incrimination. All those interrogated must answer their interrogators' questions. Under these circumstances, the confession is still the "king" of evidence and the fundamental way Chinese police investigate crimes, by zeroing in on a suspect, obtaining a confession and gathering evidence to support the confession, has not changed. Thus, it should not be surprising that such a system still produces high numbers of wrongful convictions based upon coerced false confessions.

Finally, while an exclusionary rule for coerced confessions is a necessary part of any program to eradicate police torture in criminal investigations, as has been demonstrated in the United States, an exclusionary rule, by itself, may not provide a sufficient deterrent to unlawful police conduct.⁶⁰

A. In Defense of Torture

Not surprisingly, it is difficult to find any academic literature that offers a defense of obtaining confessions by torture. However, in 2001, Professor Cui Min of the Chinese People's Public Security University, asked the rhetorical question, "Are we serious about eliminating coerced confessions?"⁶¹ He then frankly examined a series of comments he had heard from students and colleagues within the ranks of the police, including those in leadership positions. As demonstrated below, those statements advocated that extorting confessions by torture was necessary and beneficial. The ideology and attitude reflected by these arguments are perhaps the greatest obstacles to reform because they depict a police culture that still believes it is acceptable to beat a confession out of a suspect. Among these arguments cited by Professor Cui Min in support of coercing confessions are:

All things that work in practice are reasonable. The reason coerced confessions can't be stopped is that they are necessary and reasonable. Criminals are more and more slippery. You can argue policy with them until your mouth starts to bleed and they still won't confess. Give them a little taste and they will immediately give it up. The majority of their confessions are truthful. Even if there are occasional cases of false confessions and wrongful convictions of innocent people, the benefits still outweigh the costs so you cannot completely eliminate coercive interrogations.

What difference does it make if you hit a bad person a few times? Criminals do horrible things, murder, robbery, rape. There is no evil they won't do. You can't show these thugs any mercy or weakness.

⁶⁰ See Margaret Lewis, *Controlling Abuse to Maintain Control: The Exclusionary Rule in China*, 43 N.Y.U. J. INT'L L. & POL. 629 (2011).

⁶¹ See Cui, *supra* note 55.

When the time is right, if you don't step up, what kind of man are you?

Who cares if it's a black cat or a white cat? As long as it can catch mice it's a good cat. Solving cases is a very real world problem. You can't solve cases with a book of theories. The truth is the caseload piles up, our responsibility is heavy and our orders are to solve cases. There are even times when our leadership demands that we solve an important case. What use is it to say anything? No matter what methods we use, if we solve the case we are heroes.

The important thing is whether or not you know how to give a beating. In reality, you don't beat up just anyone who gets arrested. It is only those suspects you know are guilty but they refuse to confess no matter what. In those cases, you apply a little pressure to get them to tell the truth and hit them a couple of times. The point is to get them to tell the truth not to kill or maim them. Interrogation requires experience, and technique. You can't just beat someone up randomly. If you beat someone to death or disable them, isn't that just asking for trouble?

Extorting confessions by torture has been a successful experience. We should make an effort to compile all that experience instead of completely denying it." When one points out to them that law and policy forbids torture, they respond: "Of course, the law has to say that and the policy has to be publicized that way. But what we say publicly and what we do in reality are two different things. If we investigated cases the way we say we do we would never solve any cases. If one asks them, "what about those people who are prosecuted for extorting confessions by torture?", they say, "if you are going to do this kind of work there are going to be mistakes. If you frequently walk by the river's edge your shoes will get wet. They should not be punished too severely. After all, they are not bad people. In their excitement, they just happened to hurt the wrong people. They should be shown mercy."⁶²

In another comment that reflects a similar attitude, others report that the police refer to extorting confessions by torture as being like "stinky bean curd," a popular Chinese snack. "It smells bad but tastes good."⁶³ In other words, it may not be proper but it works.

Undoubtedly, coercion produces many confessions that are truthful.

⁶² *Id.* Professor Cui Min, in his essay, made a series of eloquent, logical, utilitarian and moral arguments demonstrating how the thinking represented by these remarks is completely erroneous and that using unlawful methods to enforce the law was causing great harm to China's criminal justice system.

⁶³ Ma & Ding, *supra* note 56, at 50.

When the police obtain truthful confessions through torture it reinforces their belief that torture is necessary and beneficial. A system that has few checks and balances, however, makes it difficult to distinguish between a coerced confession that is true and one that is false. Moreover, even the guilty are entitled to be protected from torture.

It is, of course, impossible to know how widespread the attitude expressed in the above comments is among police and their leadership today. There is no question, however, that despite repeated warnings, Chinese officials have moved gingerly and incrementally in addressing what is officially and unofficially understood to be a serious problem in criminal justice in China. There is also no question that the Zhao Zuohai wrongful conviction case, coming so soon after the She Xianglin case, shook the Chinese criminal justice system to the core and became a catalyst for reform.

For the reasons stated above, however, it does not appear that the exclusionary rule, by itself, will solve the problem of coerced confessions in China.

IV. PRESCRIPTIONS FOR REFORM

A. Chinese Proposals to Curb Police Torture

More than a decade into the debate within China over how to eradicate torture and coerced confessions, there are Chinese judges, prosecutors, police, lawyers and legal scholars who have all reached similar conclusions about what needs to be done to achieve meaningful reform. One of their conclusions is that an exclusionary rule should be adopted so that coerced confessions cannot be used as evidence of guilt of the accused. Advocacy for that reform laid the groundwork for the exclusionary rule adopted after the Zhao Zuohai case.

The following is a summary of other recommendations gleaned from academic articles written by representatives of all of the above groups. While not all members of academia, the judiciary, the procuracy, the police and the bar may agree on all of these reforms, at least some representatives from each interest group support them.

1. Change the ideology and thinking of law enforcement officials

Promote equal emphasis on fighting crime and protecting human rights. Promote equal emphasis on procedural justice and substantive justice. Eliminate erroneous notions that extorting confessions by torture is beneficial.⁶⁴

⁶⁴ See Cui, *supra* note 55; Nie, *supra* note 6; Chang, *supra* note 20; Yang & Zhao, *supra* note 21.

2. *Adopt a presumption of innocence*

In imperial China, there was a presumption of guilt that grew out of a respect for and obedience to the office of official investigators. If they suspected someone of a crime, that person was presumed to be guilty.⁶⁵ To provide a counterweight to this outdated way of thinking and to bring Chinese criminal justice in line with international human rights standards, China should adopt an explicit presumption of innocence.⁶⁶

3. *Adopt a right to silence and a privilege against self-incrimination*

As an antidote to extracting confessions by torture and as a means of protecting the human dignity of suspects and defendants, some Chinese prosecutors, judges and scholars advocate that Chinese law should confer on its citizens a right to refuse police questioning.⁶⁷

4. *Permit lawyers to be present during police interrogations*

One of the reasons coerced confessions can take place is because police interrogations occur in secret. Allowing lawyers to be present during interrogation protects the rights of the defendant and ensures that unlawful interrogation techniques will not be used.⁶⁸

5. *Audiotape and videotape the entire process of police interrogation*

Unlawful interrogation techniques can more easily take place if police interrogations take place in secret. Audio and video recording of police interrogations can both prevent unlawful interrogations and preserve evidence of the process of interrogation.⁶⁹

6. *Provide additional investigative resources and technology to police to enable them to use modern methods to gather evidence and avoid reliance upon oral*

⁶⁵ See Chang, *supra* note 20.

⁶⁶ See also 陈光中、刘玫 [Chen Guangzhong & Liu Mei], 中国刑事证据制度的改革 [Reform of China's Criminal Evidence System], 北大法律信息网 [PEKING UNIV. INFO. NETWORK] (May 12, 2008), available at <http://www.njpf.gov.cn/web/Info/2008-05/122022007482.html>.

⁶⁷ Professors Chen Guangzhong, Yang Yuguang, et al., Judge Nie Zhaowei, and Prosecutor Chang Jianzhong hold this view. Nie, *supra* note 6; Chang, *supra* note 20; Yang & Zhao, *supra* note 21; Chen & Liu, *supra* note 66. Police University Professor Cui Min dissents from this point of view. Cui, *supra* note 55.

⁶⁸ Cui, *supra* note 55; Nie, *supra* note 6; Chang, *supra* note 20; Yang & Zhao, *supra* note 21; Chen & Liu, *supra* note 66.

⁶⁹ Cui, *supra* note 55; Nie, *supra* note 6; Chang, *supra* note 20; Yang & Zhao, *supra* note 21; Chen & Liu, *supra* note 66.

confessions

Police need to be weaned off of their reliance on confessions and encouraged to use modern techniques to gather tangible evidence. For this transition to be effective, police must be given additional resources and trained in modern evidence gathering techniques.⁷⁰

These are all excellent suggestions and their adoption would improve the quality of criminal investigations while also protecting the human rights and human dignity of Chinese citizens. While the adoption of these measures might not eliminate all coerced confessions and all wrongful convictions, they would go a long way towards accomplishing those goals.

Giving Chinese citizens a right to refuse police questioning would provide the police with an incentive to obtain voluntary statements from those they interrogate and would give citizens a tool to reinforce the prohibition against coerced confessions. A presumption of innocence would clarify that the burden of investigating and proving crime is on the police and prosecution. In the short term, however, perhaps the most effective measure China could enact to reduce the number of coerced confessions is a requirement that all police interrogations be videotaped and audiotaped in their entirety. China has already been experimenting with this practice for years and extending the practice to all criminal investigations would be easier than enacting a new set of measures entirely. In addition, research in the United States indicates that electronically recording interrogations can minimize the likelihood that a false confession will lead to a wrongful conviction.⁷¹

The real question is, how can reformers persuade their colleagues, leaders and the public to change their attitudes about extorting confessions by torture and enlist their support for meaningful measures, including the ones above, to end police torture?

B. The American Experience

Although it is difficult to make direct comparisons between criminal justice systems of different countries, it might be instructive to look at how another society grappled with abusive police practices and substantially reduced its criminal investigators' dependence upon coerced confessions.

In the 1920s and 1930s in the United States, the so-called "third degree," an idiomatic expression for obtaining confessions by torture, was standard police practice in interrogating criminal suspects. Over a period of several decades, however, the police themselves and prominent citizen reformers and scholars helped transform the American criminal justice system to one that no longer

⁷⁰ Cui, *supra* note 55; Nie, *supra* note 6; Chang, *supra* note 20; Yang & Zhao, *supra* note 21; Chen & Liu, *supra* note 66.

⁷¹ Jon B. Gould & Richard A. Leo, *Justice in Action, One Hundred Years Later: Wrongful Convictions After A Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 850 (2010).

countenances the use of torture to obtain confessions. That process may be instructive to those in China who wish to bring about similar reforms.

By the late 1920s and 1930s, the American criminal justice system was experiencing a crisis of its own making. Abusive police practices during interrogation had caused the American public to lose trust in the police and the criminal justice system. American police statements at the time defending the “third degree” bear a striking resemblance to the statements of Chinese police described by Professor Cui Min in defense of coercive interrogation techniques:

Police perceived that a suspect “is usually guilty but he will not talk and if the third degree is not applied, he will go unpunished. . . . This is the police point of view: it [the third degree] is a necessary evil, but the police must not be caught using it.”

A Los Angeles police chief insisted that the police investigators would be “helpless” if they could not use the third degree. “The thug who refuses to talk deserves to get his ribs rattled and his toes stepped on.” The third degree was only used against hardened criminals and repeat offenders or “individuals known to be guilty.”⁷²

These statements and similar ones were made by police to investigators working for a Commission appointed by President Herbert Hoover to study police abuses in the American criminal justice system. The National Commission on Law Observance and Enforcement, popularly known as the Wickersham Commission, issued a Report on Lawlessness in Law Enforcement in 1931 detailing abusive police practices, collectively called the “third degree.”⁷³

The Wickersham Commission Report proved to be a watershed event in the history of criminal justice in the United States. Over the next several decades, police and academics combined to promote greater professionalism among police and more scientific methods of criminal investigation that did not rely so heavily on obtaining confessions from the accused. Those reforms culminated in the famous United States Supreme Court decision of *Miranda v. Arizona*, which paid tribute to the Commission:

The conclusion of the Wickersham Commission Report, made over 30 years ago, is still pertinent:

To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey): “It is not admissible to do a great right by doing a little wrong . . . It is

⁷² RICHARD LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 41–77 (2008).

⁷³ NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931).

not sufficient to do justice by obtaining a proper result by irregular or improper means." Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, "It is a short-cut, and makes the police lazy and unenterprising." Or, as another official quoted remarked: "If you use your fists, you are not so likely to use your wits." We agree with the conclusion expressed in the report, that "The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of Justice is held by the public."⁷⁴

When the Court decided *Miranda*, in 1966, the Court noted that for years the FBI had already been using what came to be known as *Miranda* warnings for years:

Over the years, the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice, and, more recently, that he has a right to free counsel if he is unable to pay.⁷⁵

Thus, what are now commonly referred to as "*Miranda* warnings" were actually warnings developed and used effectively by the FBI for years before the *Miranda* decision required them to be used. In a sense, the police themselves, as well as journalists, scholars, concerned citizens and the public, brought about reforms, which were then adopted by the Court and mandated for all police nationwide.⁷⁶

⁷⁴ *Miranda v. Arizona*, 384 U.S. 436, 447-48 (1966).

⁷⁵ *Id.* at 483 (citations omitted).

⁷⁶ This is not to suggest that the American criminal justice system is perfect or that it has solved the problem of false confessions and wrongful convictions. There is a growing body of literature in the United States suggesting that even non-physical coercive techniques can induce false confessions, especially among young and mentally or emotionally weak suspects. See, e.g., LEO, *supra* note 72; Richard Leo, *The Problem of False Confession in America*, 31 THE CHAMPION 30 (2007), available at <http://tinyurl.com/4atrstt>; Rob Warden, *The Role of False Confessions in Illinois Wrongful Murder Convictions since 1970*, NORTHWESTERN LAW SCHOOL CENTER ON WRONGFUL CONVICTIONS (May 12, 2003), <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/falseconfessions/FalseConfessionsStudy.html>. The United States is also struggling with a resurgence of what some call "harsh Interrogation" techniques and others call torture in one category of investigations, that is, investigations of acts of terrorism and suspected terrorists. However, there seems to

What does America's experience with the third degree in the 1930s have to offer China in the early twenty-first century? As in the United States, what may be needed in China is more transparency in police practices and more public recognition that extorting confessions by torture brings much more harm than good to Chinese law enforcement and society and ultimately results in less, rather than more, social stability. Such disclosures might be bitter medicine for the police in the short term but would, without doubt, enhance the reputation of the government and the criminal justice system in the long term.

It is too early to tell if the Zhao Zuohai case will be a tipping point for criminal justice reform in China. Not surprisingly, early reports from the official media in China are underscoring positive changes that the police, prosecutors and courts have all made in the wake of the Zhao Zuohai case. For example, in Henan, where the Zhao Zuohai case occurred, Chief Judge Zhang Liyong announced that the court had, on its own initiative, undertaken a review of over 16,000 convictions and found insufficient evidence to prove the guilt of seventy-three defendants and, therefore found them not guilty.⁷⁷ China's official legal newspaper, the Legal Daily also reported that Shandong Province police have installed video and audio recording equipment in all of their interrogation rooms and have begun recording interrogations.⁷⁸ A Shanghai court recently announced that it reversed the murder conviction of a defendant because his pre-trial confession, which he recanted at trial, was contradicted by the physical evidence in the case.⁷⁹ These are all positive developments and are undoubtedly being highlighted as part of the effort to win back public confidence in the legal system.⁸⁰

While these developments are significant, however, it is not clear whether these ad hoc steps augur fundamental reform.

CONCLUSION

Chinese officials have been struggling with the problem of coerced confessions for decades. With the disclosure of each new scandal, a new

be a consensus that the days when it was standard police procedure to use torture to obtain confessions are over. LEO, *supra* note 72.

⁷⁷ Li, *supra* note 33.

⁷⁸ Zhang, *supra* note 50.

⁷⁹ *Id.*

⁸⁰ In contrast, however, the Supreme People's Court seems to have ignored the plea of defense lawyer Zhu Mingyong, who publicized his request for a suppression hearing by posting on the Internet a videotaped account of torture suffered by his client, Fan Qihong, during the crackdown on corruption in Chongqing. Jerome A. Cohen & Eva Pils, *China's Criminal Justice and Chongqing's Anti-triad Campaign: Law v. Practice*, US-ASIA LAW INSTITUTE (Aug. 31, 2010), <http://www.usasialaw.org/?p=4091>.

reform is announced. Despite these commendable reforms, the problem persists. The Kunming case of an innocent police officer, Du Peiwu, framed for the murder of his wife and another police officer, caused the Supreme People's Procuratorate to issue a Notice instructing prosecutors to be on the lookout for coerced confessions and to order reinvestigations of any suspicious confessions. The embarrassing case of She Xianglin falsely convicted of murdering his wife—who was, in fact, still alive—triggered a years-long process of improving the appellate review procedures for death penalty cases. The gross injustice handed to peasant Zhao Zuohai broke a logjam in the debate over whether to enact an exclusionary rule for coerced confessions.

While each of these reforms was welcome, none addressed the root of the problem—the over-reliance by Chinese police on obtaining confessions as the principal investigative tool to solve cases. As a result, they remain dependent on traditional methods of solving crimes, which often means doing whatever it takes to obtain a confession.

As long as that traditional method of criminal investigation is allowed to persist, police torture during interrogation will also likely persist and the foreseeable scandals it produces will continue to erupt. Moreover, as Chinese society becomes increasingly more open, such scandals will become publicly known and bring further disrepute to the criminal justice system. While incremental reform makes sense in some cases, must each step in reform be preceded by a new scandal? It is not fair to citizens or the police and it is certainly not beneficial to the legitimacy of the criminal justice system or the government to hold back reforms while waiting for a new scandal to surface.

Until there is fundamental reform, scandals involving the convictions of innocent people for crimes they did not commit will continue to occur and bring disrepute to the Chinese legal system. Other high Chinese officials may find themselves in the uncomfortable position of having to bow and apologize to ordinary citizens who were unjustly convicted just so the police can continue to use unlawful and inhumane practices to coerce confessions and “solve” crimes.

