

LENIENCY AND SEVERITY IN CHINA'S DEATH PENALTY DEBATE

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Abstract

China has implemented an initial wave of death penalty reforms that returned final review power of all capital cases to the Supreme People's Court and reportedly significantly curbed executions. After reviewing recent legal developments concerning capital cases, this Article explores how the initial push to reduce use of the death penalty has given way to a more complex and nuanced debate over what factors should determine when the death penalty is appropriate. At this juncture in the reform trajectory, the dilemma of when to be lenient and when to be severe is particularly acute as public opinion chafes against a rapid decline in executions, especially when those treated leniently are affluent and/or politically well-connected.

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INTRODUCTION

In the global discourse on the death penalty, China is known for a stark characteristic: its sheer volume of executions.¹ Although the actual number of executions remains a state secret, estimates are that China executes many thousands of people annually.² To put this in context, Amnesty International reported that Iran had the second highest rate of executions in 2009 with at least 388.³ China “executed more people than the rest of the world put together[,]” but Amnesty refrained from issuing an exact number because of the lack of transparency.⁴ Beneath the conspicuous debate about numbers lies a more nuanced discussion as the People’s Republic of China (PRC or China) gradually adopts reforms that are limiting use of the death penalty. When it comes to the debate in China over the death penalty, “leniency” has received more attention lately, but the emphasis on severity is still very prominent.

China has already implemented an initial wave of death penalty reforms that returned final review power of all capital cases to the Supreme People’s Court (SPC) in 2007 and reportedly significantly curbed executions.⁵ In 2010 and early 2011, reforms continued, but with the focus broadening from procedural changes to substantive revisions to the Criminal Law. On the procedural side, the five government bodies that participate directly in the criminal justice system issued a set of evidence rules aimed specifically at capital cases.⁶ On the substantive side, reports appeared during the summer of

¹ To clarify, articles that mention the high number of executions in China also commonly lament the various due process violations that occur during the Chinese criminal process in death penalty cases. See Jerome A. Cohen et al., *Report of the Mission to China of the Association of the Bar of the City of New York December 6–17, 2009*, 48 COLUM. J. TRANSNAT’L L. 519, 525–27 (2010) (reporting impediments to lawyers’ work in China). Chinese names in this article are written placing the family name first. English-language translations of the titles of cited works are used when provided by the works’ authors. All other translations are those of this article’s author and the editors at the *Columbia Journal of Asian Law*.

² See DAVID T. JOHNSON & FRANKLIN E. ZIMRING, *THE NEXT FRONTIER: NATIONAL DEVELOPMENT, POLITICAL CHANGE, AND THE DEATH PENALTY IN ASIA* 233 (2009) (“[T]he currency of discourse about executions in this country is adjectives rather than numbers.”). For 2008, Amnesty International gave a conservative estimate that “a minimum of 7,000 death sentences were handed down and 1,700 executions took place.” 2009 *Annual Report for China*, AMNESTY INT’L, <http://report2009.amnesty.org/en/regions/asia-pacific/china> (last visited Aug. 26, 2011).

³ See AMNESTY INT’L, *DEATH SENTENCES AND EXECUTIONS 2009*, at 21 (2010), available at <http://www.amnesty.org/en/library/asset/ACT50/001/2010/en/17348b70-3fc7-40b2-a258-af92778c73e5/act500012010en.pdf>.

⁴ *Id.*

⁵ See Steven Minas, “Kill Fewer, Kill Carefully”: An Analysis of the 2006 to 2007 Death Penalty Reforms in China, 27 UCLA PAC. BASIN L.J. 36, 42 (2009).

⁶ See 关于办理死刑案件审查判断证据若干问题的规定 [Rules on the Examination and Evaluation of Evidence in Capital Cases] (promulgated by the Sup. People’s Ct., Sup.

2010 that the National People's Congress (NPC) was debating amendments to the Criminal Law. One of the most contentious proposals was a decrease in the number of death-eligible crimes by thirteen, leaving a total of fifty-five death-eligible offenses.⁷ The amendments passed in February 2011 and took effect on May 1, 2011.⁸ Thus, while this symposium issue is focused on recent criminal procedure reforms, the current debate in China regarding the death penalty involves both procedure and substance.⁹ When it comes to furthering the broad admonition to *shaosha shensha* (少杀慎杀) (execute few and execute cautiously),¹⁰ a more holistic view of both procedure and substance is advisable.

People's Proc., Ministry of Public Security, Ministry of State Security & Ministry of Justice, June 13, 2010, effective July 1, 2010), SUP. PEOPLE'S PROC. GAZ. (P.R.C.), available at <http://www.spp.gov.cn/site2006/2010-06-25/0005428111.html> [hereinafter Death Penalty Evidence Rules]; 关于办理刑事案件排除非法证据若干问题的规定 [Rules on the Exclusion of Illegally Obtained Evidence in Criminal Cases] (promulgated by the Sup. People's Ct., Sup. People's Proc., Ministry of Public Security, Ministry of State Security & Ministry of Justice, June 13, 2010, effective July 1, 2010), SUP. PEOPLE'S PROC. GAZ. (P.R.C.), available at <http://www.spp.gov.cn/site2006/2010-06-25/0005428112.html>; see also 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 "Rules on the Examination and Evaluation of Evidence in Capital Cases" and "Rules on the Exclusion of Illegally Obtained Evidence in Criminal Cases"] (promulgated by the Sup. People's Ct., Sup. People's Proc., Ministry 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> [hereinafter 2010 Evidence Rules Notice]. English translations of the aforementioned rules and notice are available at <http://www.duihua.org/hrjournal/evidence/evidence.htm>.

⁷ See 刑法修正案 (八) 拟取消 13 个经济性非暴力犯罪死刑 [The Eighth Amendment to the Criminal Law Proposes to Eliminate Thirteen Non-Violent Death-Eligible Crimes of an Economic Nature], 中国人大新闻 [NAT'L PEOPLE'S CONG. NEWS] (Aug. 23, 2010), <http://npc.people.com.cn/GB/12515839.html>.

⁸ See 授权发布: 中华人民共和国刑法修正案 (八) [Promulgated Pursuant to Authorization: People's Republic of China Criminal Law Amendment Act (No. 8)], 新华网 [XINHUA NET] (Feb. 25, 2011), http://news.xinhuanet.com/2011-02/25/c_121124346.htm.

⁹ There is a tendency in China to clearly separate discussion of procedural law from substantive law. In this vein, I have been struck by the hesitancy of Chinese scholars who specialize in one area to comment on the other, or, when pressed, to preface their comments with a self-effacing remark that they are unfamiliar with the topic. In the United States, professors are, generally speaking, more likely to teach both substantive criminal law and criminal procedure (though their scholarship often focuses on one or the other), leaving less of a pronounced split among scholars.

¹⁰ See, e.g., 刘日 [Liu Ri], 关于我国死刑的适用仍要坚持“少杀慎杀”原则的建议 [Suggestions on Continuing to Adhere to China's Principle of "Execute Few and Execute Cautiously"], 法律快车 [LAWTIME], <http://www.lawtime.cn/info/lunwen/xingfaxflw/2006102644627.html> (last visited Mar. 10, 2011); 徐爱民 [Xu Aimin], “少杀慎杀”益处多

Today, the death penalty debate in China is increasingly focusing on what specific circumstances warrant application of the death penalty. Despite concerns about implementation, the new evidence rules are a notable step towards tightening lax scrutiny of the merits of capital cases, which has been blamed for leading to wrongful convictions and, subsequently, wrongful executions.¹¹ Beyond endorsing procedural measures that may enhance the accuracy of verdicts, increased cautiousness is also seen with respect to a rethinking of the types of criminal conduct that should give rise to the death penalty. This debate is captured by two discrete but related questions. First, what substantive offenses should be eligible for the death penalty? The recent amendment to the Criminal Law explicitly removed a bundle of non-violent offenses from the death penalty's scope, albeit offenses for which the death penalty was seldom used in practice.¹² Second, if a death-eligible crime is at issue, what individual circumstances are relevant in deciding whether to impose the death penalty? There are continuing discussions in legal circles regarding what mitigating and aggravating circumstances should be considered when sentencing a defendant and, from a procedural perspective, whether to bifurcate the guilt and sentencing phases. Indeed, at a time when reports indicate that sentences of death with a two-year reprieve, or *sihuan* (死

[*The Many Benefits of "Execute Few and Execute Cautiously"*], 中国法院网 [CHINA COURTS] (Nov. 1, 2006), <http://www.chinacourt.org/html/article/200611/01/222106.shtml> (explaining policy). The phrase is sometimes translated more bluntly as "kill fewer and kill cautiously."

¹¹ See generally Ira Belkin, *China's Tortuous Path Toward Ending Torture in Criminal Investigations*, in the present symposium; Margaret K. Lewis, *Controlling Abuse to Maintain Control: The Exclusionary Rule in China*, 43 N.Y.U. J. INT'L L. & POL. 629 (2011) (analyzing the substance of and motivation behind the new evidence rules). For a prominent example of a wrongful conviction that led to the defendant's execution, see Benjamin Liebman & Tim Wu, *China's Network Justice*, 8 CHI. J. INT'L L. 257, 276-77 (2007) (describing the case of Nie Shubin). For a more recent example of a wrongful conviction and execution, see 朱顺忠 [Zhu Shunzhong], 男子被以奸杀罪执行死刑 9 年后疑似真凶现身 [*The Real Murderer Appeared Nine Years After an Innocent Man Was Executed for Rape and Murder*], 人民网重庆视窗 [WINDOWS OF CHONGQING, PEOPLE'S DAILY] (Aug. 4, 2009), <http://cq.people.com.cn/news/200984/200984155552.htm>; see also 康均心、韩光军 [Kang Junxin & Han Guangjun], 和谐语境下的刑事错案研究 [*A Study on the Misjudged Criminal Case in the Context of the Harmonious Society*], 9 西南政法大学学报 [J. SOUTHWEST U. POL. SCI. & L.], no. 2, 73 at 82 (2007) (bibliography listing a number of pre-2005 articles addressing wrongful convictions).

¹² See 赵蕾 [Zhao Lei], 减少死罪, 步子可以再大一些 [*Greater Steps Can be Taken to Reduce Death Penalty Crimes*], 南方周末 [SOUTHERN WEEKEND], Aug. 26, 2010, at A05, translated at <http://www.duihuahrjournal.org/2010/09/translation-commentary-greater-steps.html> (Interview with Zhou Guangquan, member of the Legal Committee of the National People's Congress and Tsinghua University professor) ("The 13 crimes for which we're eliminating the death penalty are mainly ones that, when looking at the 1997 Criminal Law, [the death penalty] had never been used or has been used only rarely.").

缓) (in this article referred to as "reprieved death sentences"),¹³ have now exceeded death sentences with immediate execution, at least in corruption cases, the question coming to the fore is whether the courts are exempting too many people from execution.¹⁴ Is severity being too quickly pushed aside in favor of leniency when the guiding principle of *kuanyan xiangji* (宽严相济), or "appropriately combine leniency and severity," demands both?

The debate about the proper roles of leniency and severity has deep roots in the Chinese criminal justice system¹⁵ but, in recent years, the phrase *kuanyan xiangji* (宽严相济) has conspicuously risen to prominence in criminal justice parlance.¹⁶ The phrase does not lend itself to easy translation. Generally

¹³ See 中华人民共和国刑法 [People's Republic of China Criminal Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, amended by the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) art. 50, STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.) [hereinafter PRC Criminal Law] ("判处死刑缓期执行的, 在死刑缓期执行期间, 如果没有故意犯罪, 二年期满后, 减为无期徒刑。" ["If a person sentenced to death with a suspension of execution does not intentionally commit a crime during the period of suspension, he is to be given a reduction of sentence to life imprisonment upon the expiration of the two-year period."]). Although sometimes termed a "suspended" death sentence, I use "reprieved" because the increasingly common pattern is not only that the sentence be put on hold for two years but also that it is seldom actually carried out once the two-year period expires.

¹⁴ See 尹鸿伟 [Yin Hongwei], 贪官死缓此起彼伏 死缓背后是缓死还是“免死” [The Prevalence of Death Sentence with a Suspension of Execution among Corrupt Officials—Is It a Suspension or “Exemption”?], 南风窗 [SOUTHERN WINDOW], no. 19, 2010, available at <http://news.sohu.com/20100914/n274920184.shtml>. ("西南政法大学刑法学教授赵长青说, ‘尽管两种情况在中国的刑法概念里都属于死刑, 但是目前贪官被判处’ 死缓’ 的情况已经明显多于’ 执行死刑。” ["Criminal law professor Zhao Changqing at Southwest University of Political Science and Law said, 'Although both [suspended execution and immediate execution] are considered capital punishment under Chinese criminal law, under the current circumstances, more corrupt officials are sentenced to death with a suspension of execution than with immediate execution.'"]).

¹⁵ See, e.g., 马克昌 [Ma Kechang], 宽严相济刑事政策刍议 [Suggestions on Policy Considerations of "Tempering Justice with Mercy"], 人民检察 [PEOPLE'S PROCURATORIAL SEMIMONTHLY], no. 19, Oct. 2006, at 15, available at <http://www.yadian.cc/paper/78216/> (explaining "宽严相济刑事政策的历史渊源" ["the historical background of tempering justice with mercy"], which phrase is translated by Ma as "tempering justice with mercy" and in this article as "appropriately combining leniency and severity"). Article 1 of the 1979 Criminal Law included the similar but slightly different phrase "combining punishment with leniency" (惩办与宽大相结合) (*chengban yu kuanda xiang jiehe*). See 中华人民共和国刑法 (1979) [People's Republic of China Criminal Law (1979)] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980); see also Dai Yuzhong, *The Pursuit of Criminal Justice, in CHINA'S JOURNEY TOWARD THE RULE OF LAW* 155, 191–92 (Cai Dingjian & Wang Chenguang eds., 2010) (providing historical overview of the policy of "combining punishment with leniency" and stating that "[c]ombining punishment with leniency has been a criminal policy long-maintained by China").

¹⁶ China certainly is not alone in tussling with the issue of when the criminal justice system should treat offenders leniently and when to take a severe approach. See

translated in the official Chinese media as “tempering justice with mercy,”¹⁷ authors also use “balancing leniency and severity,”¹⁸ “combining severe punishment with leniency,”¹⁹ and various other formulations. The first character *kuan* (宽) expresses the leniency aspect, and the second character *yan* (严) expresses severity. This character for severity is the same as seen in the phrase for the notorious *yanda* campaigns (严打) (strike hard) that are used to crack down on crime.²⁰ The final two characters *xiangji* (相济) indicate that there is a symbiotic relationship between the two concepts, almost as if they interact in a way that is beneficial and forms a cohesive whole.²¹ The idea is that both leniency and severity are necessary, but the nettlesome question is when to be lenient and when to be severe. To capture this sentiment, I use the translation “appropriately combine leniency and severity.”²² This phrasing taps into a general human desire for justice that is neither too harsh nor too mild while leaving the nuts and bolts of when to be lenient or severe tremendously vague.

generally DAVID GARLAND, *THE CULTURE OF CONTROL* (2002) (analyzing changes in attitudes in America and Britain toward crime and punishment in recent decades).

¹⁷ *China Tempers Justice with Mercy by Amending Criminal Law*, GLOBAL TIMES (Aug. 4, 2010), <http://china.globaltimes.cn/chinanews/2010-08/566542.html> (explaining that the then-pending amendment to the Criminal Law “is meant to further implement the policy of tempering justice with mercy”).

¹⁸ Susan Trevaskes, *The Shifting Sands of Punishment in China in the Era of “Harmonious Society”*, 32 L. & POL’Y, 332, 332–33 (2010) (“This recent move that is attempting to temper the widespread use of harsh punishment has been promoted through a new policy called ‘Balancing Leniency and Severity’ (*kuanyan xiangji*)”).

¹⁹ Although the Chinese phrase *chengban yu kuanda xiang jiehe* (惩办与宽大相结合) is commonly translated as “combining punishment with leniency”, Dai, *supra* note 15, at 191–92, sometimes this same English translation is used for *kuanyan xiangji* (宽严相济). See generally 李蕴辉 [Li Yunhui], 宽严相济刑事政策定位及实现的路径选择 [The Positioning of the Criminal Policy of Combining Severe Punishment with Leniency and Its Path Choice], 24 法学论坛 [LEGAL F.], no. 2, 2009 at 16 (analyzing challenges of applying the flexible standard of “combining severe punishment with leniency”).

²⁰ See, e.g., 公安部召开电视电话会议部署 “2010 严打整治行动” [The Ministry of Public Security Launches the “2010 Strike Hard Campaign”], NEWS.SOHU.COM (June 13, 2010), <http://news.sohu.com/20100613/n272785675.shtml> (announcement from the Ministry of Public Security).

²¹ I use the word “symbiotic” because it expresses “the living together in more or less intimate association or close union of two dissimilar organisms.” See MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/symbiosis> (last visited Aug. 26, 2011). Likewise, leniency and severity are dissimilar, and even contrasting, concepts, yet are intimately linked together by the policy of *kuanyan xiangji*.

²² I am particularly indebted to the extraordinary translator June Mei for helping me to brainstorm possible translations for the phrase *kuanyan xiangji*.

Part I below briefly introduces the reform trajectory for capital cases prior to 2010, including the seminal decision to return final review power to the SPC in 2007. Next, Part II turns to developments in 2010 and early 2011, focusing on efforts to curb the number of death-eligible crimes. With these reforms as background, Part III explores how the 2006–07 reform's initial push to reduce use of the death penalty has given way to a more complex and nuanced debate over what factors should determine when the death penalty is appropriate. Despite the government's exhortations that China will reduce application of the death penalty and calls from scholars for a gradual move toward abolition,²³ the foreseeable future is one of a retentionist country that continues to calibrate use of the death penalty.

At this juncture in the reform trajectory, the dilemma of when to be lenient and when to be severe is particularly acute as public opinion chafes against a rapid decline in executions, especially when those treated leniently are affluent and/or politically well-connected.²⁴ Concerns about excessive leniency are compounded by awareness that what is commonly translated as a "life sentence"²⁵ in English often actually translates into a far shorter time than life behind bars.²⁶ Pushing past the more abstract debates about leniency and

²³ See Minas, *supra* note 5, at 45 (describing government policy that, at present, "China may not abolish the death penalty but shall gradually reduce its application"); Zhao, *supra* note 12 ("Abolition of the death penalty in China must proceed in stages."); 刘仁文 [Liu Renwen], 注射死刑, 刑法的人道化历程 [*Death By Lethal Injection: The Course of Humanization of the Criminal Law*], 360DOC.COM (June 17, 2009), translated at <http://www.duihuahrjournal.org/2009/06/translation-course-of-humanization-of.html>. ("The Chinese government has always indicated that, in the long term, we eventually want to abolish the death penalty, but the present conditions are not yet ripe.")

²⁴ See, e.g., 刘伟 [Liu Wei], 孙伟铭成都醉驾致死案二审检方建议不判极刑 [*The Prosecution Recommended that Sun Weiming Not Receive a Death Sentence in his Fatal Drunk Driving Case*], 南方报业网 [SOUTHERN DAILY] (Sept. 5, 2009), <http://nf.nfdaily.cn/nanfangdaily/nfx/200909050016.asp> (reporting case of Sun Weiming, whose death sentence for a fatal drunk driving accident was commuted to a reprieved death sentence after Sun's family agreed to pay over one million renminbi to the victims' families: "加上之前支付的 11.4 万元赔偿款, 共赔偿 111.4 万元, 三家被害人亲属也在谅解书上签了字。" [Including the prior compensation of 114,000 renminbi, the compensation totaled 1,114,000 renminbi; the families of the three victims signed the letter of reconciliation.]).

²⁵ *Wuqi tuxing* (无期徒刑) (life imprisonment).

²⁶ See 陈兴良 [Chen Xingliang], 宽严相济刑事政策研究 [*Study on the Criminal Policy of Combining Punishment with Leniency*], 27 法学杂志, [L. SCI. MAG.], no. 2, 2006 at 17, 23 (2006) (explaining calculation of life sentences in China and noting that, prior to the 2011 amendments, a reprieved death sentence was generally equivalent to twenty-four years in prison). As amended in 2011, the Criminal Law now provides for twenty-five years of fixed-term imprisonment upon the expiration of the two-year period in which the prisoner does not commit any intentional crimes. See 刑法修正案(八) 草案八大亮点引人关注 [*Eight Highlights of the Eighth Draft Amendment to the Criminal Law*], 新华网 [XINHUA NET] (Aug. 24, 2010), http://news.xinhuanet.com/politics/2010-08/24/c_12477402.htm (explaining proposed revision to Article 50 of the Criminal Law). As

severity reveals the concrete, underlying question of *who* decides when to be lenient and when to be severe. The political slogan masks the more complicated question of what actors in the criminal justice system make the crucial decision. Accordingly, Part III also analyzes the web of players involved in deciding when the death penalty is appropriate in a given case. This symposium issue is devoted to looking back at recent reforms; however, as we reflect on the past, we should also tie this reflection to the future. In conclusion, I suggest that China consider adopting a more direct channel for the expression of public opinion in individual cases.

I. DEATH PENALTY REFORMS PRIOR TO 2010

The death penalty has been a consistent component of China's criminal justice system.²⁷ The most cruel execution method of *linchi* (凌迟) (death by a thousand cuts) was only used through the Qing Dynasty,²⁸ but the use of the death penalty in less shocking forms continued during the Republican Era. Since the founding of the PRC, the death penalty has been a potent weapon in the government's response to crime. Mao Zedong recognized the finality of the death penalty, stating, "[C]utting off heads isn't like cutting up chives. Chives regrow, heads don't."²⁹ However, he was hardly shy in using it. Because there was no comprehensive, formal criminal law for the first three decades of the PRC, criminal justice was meted out based on a few written regulations combined with broader policy directives.³⁰

Following Mao's death and Deng Xiaoping's rise to power, the ideological shift from class struggle to building the economy paved the way for a renewed emphasis on formal law. The Criminal Law and Criminal Procedure Law were part of the first batch of major laws passed after the official call in 1978 to

revised, Article 81 of the Criminal Law provides for the possibility of parole after serving thirteen years of a life sentence. See 赵超、刘奕湛 [Zhao Chao & Liu Yizhan], 我国修改刑法严格规范判处死缓和无期徒刑罪犯的减刑 [Amendment to China's Criminal Law Strictly Standardizes Reprieved Death Sentences and Life Imprisonment], 新华网 [XINHUA NET] (Feb. 25, 2011), available at http://news.xinhuanet.com/legal/2011-02/25/c_121124011.htm.

²⁷ See generally HONG LU & TERANCE D. MIETHE, CHINA'S DEATH PENALTY: HISTORY, LAW, AND CONTEMPORARY PRACTICES (2007) (providing a legal, historical, and comparative overview of the death penalty in China).

²⁸ See JOHNSON & ZIMRING, *supra* note 2, at 246-47 n.19.

²⁹ MICHAEL DUTTON, POLICING CHINESE POLITICS: A HISTORY 83 (2005).

³⁰ See Dai, *supra* note 15, at 157 ("Criminal cases during this period [1949-79] were handled primarily according to policies issued by the Party or central government and sometimes even in the form of mass movements.").

strengthen the country's legal system.³¹ As is common in countries that fall into the broad category of civil law jurisdictions, China has both a Criminal Procedure Law and a Criminal Law that set forth the framework for the operation of criminal justice. These laws are written at a relatively high degree of abstraction and are supplemented by an array of regulations, rules, interpretations, and other forms of legislative and administrative guidance, some publicly available and some available only for internal consultation by relevant government officials.³² In line with this pattern, following the reestablishment of the legal system and promulgation of the main laws governing the criminal process, various government bodies issued supplemental documents, such as the Decision Regarding the Severe Punishment of Criminals Who Seriously Sabotage the Economy³³ and the Supplemental Provisions Concerning the Punishment of the Crime of Smuggling.³⁴

On the substantive side, the number of death-eligible crimes gradually increased over the 1980s and into the 1990s as China's rapid social transformation and economic growth generated concerns about rising crime. The comprehensive revision of the Criminal Law in the mid-1990s crystallized

³¹ See 中国共产党第十一届中央委员会第三次全体会议公报 [Communiqué of the Third Plenum of the 11th Central Committee of the Communist Party of China] (Dec. 22, 1978) ("In order to safeguard people's democracy, it is imperative to strengthen the socialist legal system."); PRC Criminal Law, *supra* note 13; 中华人民共和国刑事诉讼法 [People's Republic of China Criminal Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 1979, amended Mar. 17, 1996, effective July 1, 1979), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.) [hereinafter PRC Criminal Procedure Law]; see also JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 263 (2008) ("It is therefore not surprising that the 1979 Criminal Law embodied strong Soviet influence, though it also reflected the then political policy for ensuring social stability, order and economic development.").

³² See generally 中华人民共和国立法法 [People's Republic of China Legislation Law] (promulgated by the Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.), available at http://www.novexc.cn.com/legislat_law_00.html. The Legislation Law details the hierarchy of laws, regulations, and rules at various levels of government.

³³ 全国人民代表大会常务委员会关于严惩严重破坏经济的犯罪的决定 [Decision of the Standing Committee of the National People's Congress Regarding the Severe Punishment of Criminals Who Seriously Sabotage the Economy] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 8, 1982, effective Apr. 1, 1982), translated at http://www.novexc.cn.com/sabotage_economy_crim.html.

³⁴ 全国人民代表大会常务委员会关于惩治走私罪的补充规定 [Supplementary Provisions of the Standing Committee of the National People's Congress Concerning the Punishment of the Crimes of Smuggling] (promulgated by the Standing Comm. Nat'l People's Cong., Jan. 21, 1988, effective Jan. 21, 1988), SUP. PEOPLE'S CT. GAZ. (P.R.C.), translated at http://www.isinolaw.com/isinolaw/english/detail.jsp?searchword=catalog%3D0+and+isenglish%3E%3D1&channelid=77270&record=91&iscatalog=1&statutes_id=131587&skind=110.

this trend: the number of death-eligible offenses increased from twenty-eight in the 1979 Criminal Law to sixty-eight in the 1997 Criminal Law.³⁵

On the procedural side, in 1983, the Standing Committee of the NPC delegated the SPC's power to conduct final review of all death penalty cases to provincial high courts.³⁶ This move coincided with the first "strike hard" campaign that marked a resurgence of campaign-style criminal justice.³⁷ SPC review of the surge in death sentences during the campaign would have strained even a well-established court system, let alone China's fledgling system of the early 1980s.³⁸ For over twenty years, the high courts retained this power, yet domestic and international calls for China to reconsider its use of the death penalty began to gain traction. In 2007, the SPC reclaimed exclusive final review power following the notorious cases of She Xianglin, who was convicted of murdering his wife when she in fact was still alive, and Nie Shubin, who was executed for a murder he did not commit.³⁹ A series of documents in 2006 and 2007 orchestrated this change, including an amendment to the Organic Law of the People's Courts and documents from the SPC itself.⁴⁰ The influx of cases generated by the return of final review to

³⁵ JOHNSON & ZIMRING, *supra* note 2, at 271 ("The main exception to this pattern is the elimination of most types of capital theft in the 1997 law, which resulted in steep declines in executions for theft in at least some jurisdictions." (citing Shenghui Qi, *Strike Hard*, 33 CHINA REV. 6 (2005))).

³⁶ 全国人大常委会关于修改《中华人民共和国人民法院组织法》的决定 (1983) [Decision of the Standing Committee of the National People's Congress Regarding the Revision of the Organic Law of the People's Courts of the People's Republic of China (1983)] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1983, effective Sept. 2, 1983), translated at http://www.novexc.cn/revise_organic_law.html; see also Kandis Scott, *Why Did China Reform Its Death Penalty?*, 19 PAC. RIM L. & POL'Y J. 63, 65-67 (2010) (noting delegation of power to provincial courts in 1980s).

³⁷ See generally Murray Scot Tanner, *State Coercion and the Balance of Awe: The 1983-1986 "Stern Blows" Anti-Crime Campaign*, 44 CHINA J. 93 (2000) (assessing the historical and institutional lessons of the 1983-86 strike hard campaign).

³⁸ Cf. *id.* at 94 ("[T]he campaign very possibly resulted in over 10,000 executions in three-and-a-half years.").

³⁹ See Liebman & Wu, *supra* note 11, at 274-76 (discussing cases of She and Nie).

⁴⁰ See 最高人民法院关于统一行使死刑案件核准权有关问题的决定 [Decision of the Supreme People's Court on the Issues Concerning Unification Exercise of Ratification Power on Death Penalty Cases] (promulgated by the Sup. People's Ct., Dec. 28, 2006, effective Jan. 1, 2007), SUP. PEOPLE'S CT. GAZ. (P.R.C.), translated at <http://www.lawinfochina.com/NetLaw/display.aspx?db=law&sen=rLdDdW4drhdDdWrdLdydWn drLdDdWfdgDdvdWcd/dd5dWud/dd5dWld9hdYdWhd9hdYdWud&Id=5741&> (Article 13 of the "Organic Law of the People's Courts of the People's Republic of China" shall be revised as Article 12 to state: "Apart from the death penalty being lawfully sentenced by the Supreme People's Court, other death penalties pronounced shall be submitted to the Supreme People's Court for ratification."); 全国人民代表大会常务委员会关于修改《中华人民共和国人民法院组织法》的决定 [Decision of the Standing Committee of the National People's Congress on Amending the Organic Law of the People's Courts of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's

the SPC required the hiring of hundreds of new judges and other court personnel.⁴¹ Even allowing some margin of error for hyperbole, the sizeable hiring needs imply that the SPC has taken on thousands of new cases annually. At the same time, the government announced a policy of "execute few and execute cautiously."⁴²

Renewed SPC scrutiny reportedly coincided with a substantial drop in executions.⁴³ Although it is difficult if not impossible to discern to what extent SPC review is directly responsible for the reported drop, the decrease is at least partially attributable to the SPC's returning of cases to lower courts because of evidentiary questions and commuting death sentences with immediate execution to reprieved death sentences. Another question is whether lower courts are taking a harder look at capital cases in order to avoid being overturned by the SPC, which could be further driving down the number of death sentences.

Despite the praise for the 2007 reforms, concerns remain regarding problems with the quality of judgments in capital cases.⁴⁴ Just as American jurisprudence emphasizes that "death is different,"⁴⁵ Chinese commentators

Cong., Oct. 31, 2006, effective Jan. 1, 2007), SUP. PEOPLE'S CT. GAZ. (P.R.C.), *translated at* <http://www.lawinfochina.com/NetLaw/display.aspx?db=law&sen=rLdDdW4drhdDdWrdrLdydWnDrLd5dWddgDdvdWfdrddDdWud/LdwdWhdrDdYdWhdghdYdWud&Id=5600&>; 最高人民法院关于复核死刑案件若干问题的规定 [Provisions of the Supreme People's Court on Several Issues Concerning Review of Death Penalty Cases] (promulgated by the Judicial Comm. Sup. People's Ct., Jan. 22, 2007, effective Feb. 28, 2007), SUP. PEOPLE'S CT. GAZ. (P.R.C.), *translated at* <http://www.lawinfochina.com/NetLaw/display.aspx?db=law&sen=rLdDdW4drhdDdWrdrLdydWnDrLdDdW4dgDdvdWPdrdd6dWud/ddDdWdd/hdydWud/ddTdWud9Dd+&Id=5902&>.

⁴¹ See, e.g., 最高法扩编备战死刑复核 重大案件复核可能听证 [The Supreme People's Court Increased Personnel to Prepare for Death Sentence Reviews; Hearings May be Granted When Reviewing Important Cases], NEWS.SINA.COM (Nov. 3, 2005), <http://news.sina.com.cn/c/2005-11-03/04467341590s.shtml> ("此番为准备死刑复核的人员编制将达 300-400 人" [reporting increase in personnel reaching 300-400 in preparation for the review of death sentences]).

⁴² Xu, *supra* note 10.

⁴³ See Minas, *supra* note 5, at 60 ("Responding to the work report, the San Francisco-based Dui Hua Foundation estimated that there were 25 to 30 percent fewer executions in 2007 than in 2006. This estimation is not far from the official SPC position of December 2007 that the rate fell by thirty-three percent in 2007.") (footnotes omitted).

⁴⁴ See 内地明确以刑讯逼供所获口供不能作为定案根据 [Mainland China Clarifies that Evidence Obtained Through Coerced Confessions Cannot Be the Basis of A Verdict], 凤凰网 [IFENG.COM] (May 30, 2010), http://news.ifeng.com/mainland/detail_2010_05/30/1566576_0.shtml (noting continuing problems with the system for handling capital cases despite 2007 reforms).

⁴⁵ Ford v. Wainwright, 477 U.S. 399, 411 (1986) ("This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976))); see also Jeffery Abramson, *Death-is-Different Jurisprudence*

cite the common idiom “*ren ming guan tian*” (人命关天) (human life and death is a matter that concerns the heavens), expressing that a case involving human life is to be treated with the utmost care.⁴⁶ Accordingly, as the 2007 reforms solidified, debate turned to how China might deepen and broaden reforms so as to judiciously apply the death penalty. The next Part turns to two major developments regarding the death penalty, one procedural and the other substantive.

II. 2010–2011 PROCEDURAL AND SUBSTANTIVE REFORMS

In 2010, the next phase of contemplated reforms came to the fore. First, debate quickened regarding which offenses should be subject to the death penalty. The Eighth Amendment to the Criminal Law (中华人民共和国刑法修正案(八)) (hereinafter Eighth Amendment) marks a shift from the previous practice of consistently increasing the number of death-eligible crimes.⁴⁷ The Eighth Amendment, which took effect in May 2011, decreased the number of death-eligible crimes from sixty-eight to fifty-five.⁴⁸ Even after the passage of

and the Role of the Capital Jury, 2 OHIO ST. J. CRIM. L. 117, 117 n.1 (listing Supreme Court quotes expressing this concept).

⁴⁶ *Mainland China Clarifies that Evidence Obtained Through Coerced Confessions Cannot Be the Basis of A Verdict*, *supra* note 44 (using phrase “人命关天”); see also 《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》将出台 [The Passing of the “Rules on the Examination and Evaluation of Evidence in Capital Cases” and “Rules on the Exclusion of Illegally Obtained Evidence in Criminal Cases”], 安徽刑事辩护网 [ANHUI CRIM. DEF. NET] (May 24, 2010), <http://www.148china.com/display.asp?id=1322> (interview with Professor Fan Chongyi, China University of Political Science and Law, explaining that capital cases were singled out in the new evidence rules because they are important, complex, and sensitive).

⁴⁷ See 中华人民共和国刑法修正案(八) [Eighth Amendment to the People’s Republic of China Criminal Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 25, 2011, effective May 1, 2011), STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (P.R.C.), translated at <http://florasapio.blogspot.com/2010/10/drafts-amendments-rough-and-untimely.html> [hereinafter Eighth Amendment] (preliminary translation by Flora Sapio). In addition to reducing the number of death-eligible crimes, the Eighth Amendment includes several other amendments, such as curbing use of the death penalty for offenders who are at least seventy-five. See, e.g., *id.* art. 49 (“The death penalty shall not be applied to those who have reached the age of seventy-five at the time of adjudication, with the exception of those who cause the death of another by particularly cruel means.”); *Should the Death Penalty Have an Age Ceiling?*, BEIJING REV., Sept. 30, 2010, at 46, available at http://www.bjreview.com.cn/print/txt/2010-09/26/content_300472.htm (discussing proposal to exempt people from the death penalty who are age seventy-five and older).

⁴⁸ See *Promulgated Pursuant to Authorization: People’s Republic of China Criminal Law Amendment Act (No. 8)*, *supra* note 8 (printing full text of Eighth Amendment, effective May 1, 2011); see also *Greater Steps Can be Taken to Reduce Death Penalty Crimes*, *supra*

this amendment, many non-violent offenses are within the scope of the death penalty, including counterfeiting currency, fraud, and embezzlement involving large amounts.⁴⁹ Nonetheless, the Eighth Amendment did strike thirteen non-violent, largely economic crimes from the Criminal Law, such as smuggling cultural relics, fraudulent use of letters of credit, and tomb robbing.⁵⁰ Reports that the Eighth Amendment decreased the number of death-eligible crimes by 19.1%—a simple mathematical formula dividing thirteen offenses by the original sixty-eight offenses—sounds more dramatic than the expected percentage decrease in actual executions. In reality, the reforms will likely have a much smaller impact on the total number of executions because the death penalty was seldom imposed for those crimes anyway.⁵¹ Put simply, the sheer number of death-eligible crimes is a poor proxy for measuring the state's support of the death penalty or the frequency with which it is carried out.⁵²

Prior to announcement of the Eighth Amendment in August 2010, procedural reforms took center stage. The five government bodies with the most hands-on involvement in the criminal justice system—referred to in shorthand as the *liangyuan sanbu* (两院三部) (two institutions and three ministries)—issued new evidence rules aimed specifically at capital cases (hereinafter referred to as the “Death Penalty Evidence Rules”) at the end of

note 12; Cao Li, *Moves to Cut Down Executions*, CHINA DAILY, July 24, 2010, available at http://www.chinadaily.com.cn/china/2010-07/24/content_11044407.htm.

⁴⁹ 赵蕾 [Zhao Lei], 刑法酝酿第八次大修: 死刑少了, 坐牢久了 [Deliberating the Eighth Amendment to the Criminal Law: Less Capital Punishment, Longer Sentences], 南方周末 [SOUTHERN WEEKEND], July 22, 2010, at A04, available at <http://www.infzm.com/content/47991> (discussing current capital crimes and proposals for reform).

⁵⁰ See Eighth Amendment, *supra* note 47.

⁵¹ See 王作富 [Wang Zuofu], 刑法专家赞同 13 个罪名取消死刑 [Criminal Law Experts Agree with Abolishing the Death Penalty for 13 Crimes], 中国人大网 [NAT'L PEOPLE'S CONG. NET] (Aug. 30, 2010), http://www.npc.gov.cn/huiyi/lfzt/xfxza8/2010-08/30/content_1593786.htm (“拟取消 19.1% 罪名的死刑: ‘这一步迈得不易’” [reporting view of scholars that the contemplated abolition of the death penalty for 19.1% of crimes is not an easy step to take]).

⁵² Although the Eighth Amendment signals a shift towards curbing the death penalty, the actual impact of the reforms are expected to be very limited. See *Greater Steps Can be Taken to Reduce the Death Penalty*, *supra* note 12 (“The 13 crimes for which we’re eliminating the death penalty are mainly ones that, when looking at the 1997 Criminal Law, [the death penalty] had never been used or has been used only rarely.”). Other scholars ascribe greater significance to changes in the number of death-eligible crimes, even when the death penalty is seldom used for those crimes. See JOHNSON & ZIMRING, *supra* note 2, at 272 (“The addition and subtraction of offenses that can be punished by death is, by contrast, one fairly reliable indicator of political sentiment toward capital punishment in Beijing even though it is by no means clear that the death-eligible crimes that come and go in the penal code are a major source of capital prosecutions or executions.”).

May 2010, and they took effect on July 1.⁵³ The announcement of these rules closely followed the disclosure of another wrongful conviction scandal involving an innocent farmer named Zhao Zuohai who was convicted of murdering his neighbor.⁵⁴ The details of the Death Penalty Evidence Rules and their companion rules, which address evidentiary issues more generally, are discussed elsewhere in this issue.⁵⁵ For purposes of this article, the new Death Penalty Evidence Rules are significant for honing in on the following question: if a death-eligible crime is at issue, what procedures should be used before a person is sentenced to death and before the execution is carried out? At a minimum, the Death Penalty Evidence Rules reflect recognition by the highest levels of government that there are major problems with procedures used during the investigation and adjudication stages, including heavy reliance on confessions, and that these problems are leading to the executions of innocent people.⁵⁶

Notably, however, these evidentiary reforms have come in the form of rules, and the possibility of incorporating corresponding changes into the Criminal Procedure Law itself remains in limbo. Long-awaited reforms to the Criminal Procedure Law are simmering but remain stymied in part because of reported opposition from the powerful public security forces. To the extent that integrating the new Death Penalty Evidence Rules would increase prosecutorial and judicial scrutiny of police actions, pushback from the public security forces is hardly surprising. Moreover, evidence reforms are far from the only sticking point that is complicating amendment of the Criminal Procedure Law. For example, the separate debate over the future of *laodong jiaoyang* (劳动教养) (re-education through labor) and, in particular, the Ministry of Public Security's reluctance to introduce judicial oversight is further complicating efforts to amend the Law.⁵⁷ That being said, reports are once again circulating that the NPC will revise the Criminal Procedure Law in 2011 or 2012.

During 2010, discussions also continued regarding the creation of sentencing guidelines that would, for example, provide judges with guidance on mitigating and aggravating circumstances that should be considered when deciding whether to impose the death penalty. These discussions have not yet coalesced into concrete sentencing guidelines for capital cases, but there has

⁵³ See Death Penalty Evidence Rules, *supra* note 6.

⁵⁴ For details of the case, see Tini Tran, *Chinese Wrongly Jailed for 11 Years Given \$96,000*, ABCNEWS.GO.COM (May 13, 2010), <http://abcnews.go.com/International/wireStory?id=10632838>; 检讨赵作海案 [Examining the Zhao Zuohai Case], 中国新闻周刊 [CHINA NEWSWEEK], June 7, 2010, at 41, available at <http://news.sina.com.cn/sd/2010-06-03/11520403624.shtml>.

⁵⁵ See Belkin, *supra* note 11.

⁵⁶ See Lewis, *supra* note 11 (analyzing motivations behind the Death Penalty Evidence Rules and companion evidence rules).

⁵⁷ See generally Fu Hualing, *Re-education in Historical Perspective*, 184 CHINA Q. 811 (2005) (discussing historical and contemporary use of re-education through labor).

been some limited movement with respect to articulating factors for courts to consider when issuing sentences.⁵⁸ The SPC is also promoting the use of guiding cases in hopes of increasing uniformity across China.⁵⁹ Beneath these more practical debates regarding sentencing guidelines, specific death-eligible crimes, and evidentiary rules, lay the broader principles that shape the trajectory of China's death penalty reforms. It is to these principles that we now turn.

III. BEYOND "EXECUTE FEW AND EXECUTE CAUTIOUSLY" TO "APPROPRIATELY COMBINE LENIENCY AND SEVERITY"

The actual number of executions remains shrouded in secrecy, but conventional wisdom holds that the initial push to reduce the use of the death penalty has indeed led China to execute fewer and execute more cautiously. This does not mean that China is inexorably marching towards abolition of the death penalty. Rather, now that "appropriately combine leniency and severity" has taken a central position in China's criminal justice vernacular,⁶⁰ the crux of the issue is *when* to be severe and impose the death penalty, not whether the death penalty should be taken off the table entirely. As previously noted, the debate over the role of leniency and severity in criminal justice has deep historical roots in China as seen, for example, in the phrase "combining punishment with leniency" (惩办与宽大相结合) (*chengban yu kuanda xiang jiehe*), which was included as a fundamental principle in the 1979 Criminal

⁵⁸ See Wang Jingqiong, *Guidelines Make Sentences More Transparent, Standardized*, CHINA DAILY, Sept. 17, 2010, available at http://www.chinadaily.com.cn/china/2010-09/17/content_11314707.htm (reporting guidelines to be implemented on a trial basis that include specific base sentences for fifteen types of offenses); Death Penalty Evidence Rules, *supra* note 6, art. 36 (listing factors to consider when sentencing such as whether the defendant has shown remorse); see generally Xiaoming Chen, *The Chinese Sentencing Guideline: A Primary Analysis*, 22 FED. SENT'G REP. 213 (2010), available at <http://www.vera.org/files/FSR-Chinese-Sentencing-Guideline-Primary-Analysis-April-2010.pdf> (tracing debate in China regarding development of sentencing guidelines).

⁵⁹ See 最高人民法院关于案例指导工作的规定 [Supreme People's Court Provisions on Case Instructions] (promulgated by the Sup. People's Ct., Nov. 26, 2010, effective Nov. 26, 2010), available at <http://law.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=chl&Gid=143870>.

⁶⁰ See, e.g., 高铭喧 [Gao Mingxuan], 宽严相济刑事政策与罚金刑改革 [The Criminal Policy "Temper Justice with Mercy" and the Reform of Fine Penalties], 24 法学论坛, [LEGAL F.], no. 2, 2009 at 5, 5-6 (discussing meaning and function of *kuanyan xiangji*); 翁凯一 [Weng Kaiyi], 宽严相济在刑事立法中的适用及前景 [On Application and Its Future in Criminal Legislation about "Temper Justice With Mercy"], 法学杂志, [L. SCI. MAG.], no. 6, 2009 at 36, 36 (analyzing the Seventh Amendment to the Criminal Law and how it reflects *kuanyan xiangji*); 龙宗智 [Long Zongzhi], 经济犯罪防控与宽严相济刑事政策 [Prevention & Control of Economic Crimes and Criminal Policy: "Temper Justice with Mercy"], 27 法学杂志 [L. SCI. MAG.], no. 4, 2006 at 4, 4 (discussing various responses to illegal economic activity in light of *kuanyan xiangji*).

Law. But the heavy emphasis on the phrase “appropriately combine leniency and severity” (宽严相济) (*kuanyan xiangji*) is new and noteworthy. Anecdotal, when Chinese scholars were asked the difference between the policies of “combining punishment with leniency” and “appropriately combine leniency and severity” at a meeting I attended in May 2011, one responded that “punishment” comes first in the former and “leniency” in the latter, thus indicating a greater push towards leniency in the latter policy. Whether this word order is a distinction without a difference is a matter of debate. What became clear from the conversation was both the current importance of “appropriately combine leniency and severity” in criminal justice rhetoric and the lack of clarity with respect to how this policy should translate into practice.

Specifically with respect to the death penalty, reforms to date have been relatively easy in that they have been directed at avoiding wrongful convictions and generally being careful about whom to execute. This is not to say that reforms thus far have sailed through without obstacles, but a compelling issue behind the increased support for reforms is that factually innocent people are being executed. Looking ahead to the next phase of reforms, the reported initial drop in executions in the past few years is giving way to a more complicated period where a continuing decline in executions is far from certain.⁶¹

Following clear calls for “appropriately combining leniency and severity” by the central PRC leadership in 2004,⁶² both the SPC and Supreme People’s Procuratorate (SPP) issued documents attempting to explain how the policy should be applied in practice. In a 2006 opinion, the SPP emphasized the need to give differentiated treatment to criminal cases, which requires looking at both the offense’s harm to society and the individual characteristics of the defendant.⁶³ A 2007 SPC opinion similarly detailed how to apply the policy,⁶⁴

⁶¹ *China rejects “strike hard” anti-crime policy for more balanced approach*, PEOPLE’S DAILY (Mar. 13, 2007), http://english.peopledaily.com.cn/200703/14/eng20070314_357516.html (reporting shift away from “strike hard” policy towards crime).

⁶² See Dai, *supra* note 15, at 197 (describing 2004 Conference on Political and Legal Work at which Luo Gan called for “correct implementation of the justice tempered with mercy policy”).

⁶³ See 最高人民法院关于在检察工作中贯彻宽严相济刑事司法政策的若干意见 [Supreme People’s Procuratorate on Several Issues Concerning Implementing the Criminal Justice Policy of Appropriately Combining Leniency and Severity] (promulgated by the Sup. People’s Proc., Jan. 15, 2007), SUP. PEOPLE’S PROC. GAZ. (P.R.C.), available at <http://www.chinabianhu.com/show.aspx?id=2645> [hereinafter 2006 SPP Opinion]; see also Li, *supra* note 19, at 18 (discussing 2006 SPP Opinion).

⁶⁴ 最高人民法院关于为构建社会主义和谐社会提供司法保障的若干意见 [Some Opinions of the Supreme People’s Court on Providing Judicial Safeguards for Building a Socialist Harmonious Society] (promulgated by the Sup. People’s Ct., Jan. 15, 2007, effective Jan. 15, 2007), SUP. PEOPLE’S CT. GAZ. (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=115852 (Section 5 on “坚持宽严相济，确保社会稳定” [“upholding the policy of combining leniency and severity, ensuring society’s stability”]).

and the policy again appeared in a 2010 SPC opinion.⁶⁵ The SPC and SPP undoubtedly play a crucial role with regard to giving structure to the overarching policy, but they are only two of several players who are involved in the leniency/severity calculus. Unpacking the many layers that give texture to the debate emphasizes that no one actor is flipping a coin to decide whether the death penalty is appropriate in a particular case. Rather, a complex mix of forces operationalizes the policy.

Complicated interplay among the many actors in the criminal justice system is of course not unique to China. As is the case in all countries, meting out criminal justice in China involves a substantial amount of discretion at various stages of a case's handling. Taking broad policy goals and incorporating them into regulations, rules, or other guidance for individuals who work in the criminal justice system will invariably leave gaps that must be filled by the judgment of police, prosecutors, and judges working on individual cases. This discretion is not necessarily a negative trait of the system. Any attempt to formulate rules with such precision as to avoid discretion could result in a lack of flexibility to fully consider the idiosyncratic circumstances of a given case. Likewise, I do not advocate that China reduce "appropriately combine leniency and severity" into a precise mathematical formula of factors that would dictate whether the death penalty is appropriate. What I do advise is a clear recognition that the policy is so vague that it is really up to those implementing it to determine when to be lenient and when to be severe. In that connection, one must not limit the focus to official actors—the police, prosecutor and judges—but rather one must also examine behind-the-scene actors like the political-legal committees. This requires moving past the agreeable-sounding slogans and taking a harder look at how direct actors in the criminal justice system as well as the larger government/Party apparatus mediate these slogans in their daily work. This process stretches from the pinnacle of power in Beijing down to the police on the beat.

First, a discussion of criminal justice reforms in China would be incomplete without recognizing the pivotal role of the central government and Party apparatus in setting the overall tone.⁶⁶ Macro-trends encapsulated in short, often four-character phrases, commonly emanate from the center.⁶⁷

⁶⁵ See 关于贯彻宽严相济刑事政策的若干意见 [Several Issues Concerning Implementation of the Policy of Appropriately Combining Leniency and Severity] (promulgated by the Sup. People's Ct., Feb. 8, 2010, effective Feb. 8, 2010), SUP. PEOPLE'S CT. GAZ. (P.R.C.), available at http://www.law-lib.com/law/law_view.asp?id=310425; see also Trevaskes, *supra* note 18, at 332 ("In the [2010 SPC] Opinion, eight articles are devoted to 'severity,' eleven to 'leniency,' and eleven to describing what is meant by 'striking a balance' and how that is to be achieved in crime determination and sentencing.").

⁶⁶ JOHNSON & ZIMRING, *supra* note 2, at 284 ("Political reform of all kinds comes to China at the discretion of the party and the government, so a secure and stable party-state is apt to be a greater friend of moderation in execution than one that feels threatened by political competition.").

⁶⁷ A ubiquitous example of such a slogan is "harmonious society," as set forth by the Central Committee of the Communist Party of China. See 中共中央关于构建社会主义和谐社会若干重大问题的决定 [Resolution of the Central Committee of the Communist

Following this pattern, the highest reaches of government are promoting “appropriately combining leniency and severity.”⁶⁸ In particular, the Central Political-Legal Committee under the leadership of Zhou Yongkang oversees the entire criminal justice system. Beneath this Committee are the local political-legal committees, which have a direct supervisory role over cases within their jurisdiction and thus can bring more abstract debates to bear on decisions in individual cases. These local political-legal committees are positioned to direct the opinions of judges hearing a case and impose their decision as to whether the court should hand down a death sentence.

Turning to the actual law-making process, the NPC is another actor in the process of taking the policy from the realm of theory to practice.⁶⁹ Specifically, it is the vehicle by which the government and Party’s policies are translated into black-letter law. This role was clearly at work with the Eighth Amendment. Extracting a set of offenses from the scope of the death penalty removed the discretion previously held by other actors in the system to execute an offender for committing one of those offenses. However, as noted below, other actors may use the discretion they do have to find alternative

Party of China on Major Issues Concerning the Building of a Socialist Harmonious Society”] (Oct. 11, 2006), available at <http://www.jzrd.gov.cn/xinxi/list.asp?id=2736>; see also 中国共产党第十六届中央委员会第六次全体会议公报 [Communiqué of the Sixth Plenum of the 16th Central Committee of the Communist Party of China] (Oct. 12, 2006), translated at <http://www.china.org.cn/english/congress/226989.htm>. This slogan has led to witty parodies, such as artist/activist Ai Weiwei’s banquet that he was barred from attending but at which guests dined on “river crabs,” a Chinese homonym for “harmony.” See Tania Branigan, *Ai Weiwei Supporters Gather for Party at Condemned Studio*, GUARDIAN (UK) (Nov. 7, 2010), <http://www.guardian.co.uk/artanddesign/2010/nov/07/china-artist-ai-weiwei-party-studio> (“Partygoers held up posters of Ai, sang songs and dined off river crabs—their name in Chinese being a homonym for the government’s buzzword, harmony. ‘In a harmonious society, we eat river crabs,’ they chanted.”). At the time of writing, Ai Weiwei remains detained on charges of tax evasion. See Sharon LaFraniere, *China: Dissident Artist is Accused of Tax Evasion*, N.Y. TIMES, May 21, 2011, at A6, available at <http://www.nytimes.com/2011/05/21/world/asia/21briefs-China.html>. [EDS.: Ai Weiwei has been released from custody since this article was written.]

⁶⁸ See 顾瑞珍 [Gu Ruizhen], 周永康: 以攻坚克难精神推进司法体制改革不断取得人民满意的改革 [Zhou Yongkang: Use the Spirit of Conquering Difficulties to Advance the Judicial System Reform to Constantly Achieve People’s Satisfaction], 全国网络反腐中心 [NATIONAL INTERNET ANTI-CORRUPTION CENTER] (Apr. 29, 2010), <http://www.wlffzx.com/plus/view.php?aid=193>; 2006 SPP Opinion, *supra* note 63 (“宽严相济是我们党和国家的重要刑事司法政策, 是检察机关正确执行国家法律的重要指针。” [“Combining leniency and severity is our Party’s and country’s important criminal justice policy; it provides critical guidance to the procuratorate’s correct execution of our country’s law.”]).

⁶⁹ See, e.g., 刘晶瑶 [Liu Jingyao], 刑法修订回应现实, 宽严相济重在执行 [Amendment to the Criminal Law Should Reflect Reality; Appropriately Combining Leniency and Severity Should Focus on Enforcement], 新华网 [XINHUA NET] (Aug. 24, 2010), http://news.xinhuanet.com/politics/2010-08/24/c_12477209.htm (reporting how the Eighth Amendment then pending before NPC reflects policy of *kuanyan xiangji*).

ways of emphasizing severity. Most obviously, prosecutors often have options when it comes to charging decisions and could be more assertive in pursuing charges for one of the fifty-five offenses that are still death eligible.

The direct channel by which the NPC can impact the lenient or severe handling of different categories of crimes raises the question as to why it removed only thirteen offenses. Looking to the future, is the NPC poised to pass an amendment that mandates lenient, or at least not capital, punishment for a much broader swath of offenses? At first glance, the NPC—and the PRC government more generally—appear well-positioned to pursue top-down, counter-majoritarian reforms because they do not live with the threat of being tossed out in the next election cycle. However, the death penalty debate reflects a need to be seen as responding to public opinion in order to shore up legitimacy.⁷⁰ Although the public does not have a direct channel to influence criminal justice policy (e.g., through free, democratic elections of representatives to the NPC), *minyi* (民意) (“public opinion,” or similar phrasing such as “the feelings of the masses,” *renmin qunzhong de ganjue*, 人民群众的感觉), is still an integral part of the debate.⁷¹ By way of example, the intense force of public opinion was on display in 2003 when the notorious gangster Liu Yong obtained a reprieved death sentence but was then quickly executed following a public outcry.⁷² In this vein, Zhou Guangquan, member of the Legal Committee of the NPC and Tsinghua University professor, explained the strategy behind the Eighth Amendment in an interview by *Southern Weekend*: “Legislators also intend this [revision] as an experiment: first you eliminate a few [capital crimes] and then check the level of society’s tolerance.”⁷³

Moving away from the central authorities in Beijing, the day-to-day application of “appropriately combining leniency and severity” falls to the people who actually handle individual cases. Beginning where most criminal cases originate, the police (usually in the form of local public security

⁷⁰ Cf. DAVID GARLAND, *PECULIAR INSTITUTION* 128 (2010) (“The use and character of capital punishment are—and have always been—shaped by the structure of state institutions and the decisions of state officials acting in accordance with their perception of strategic governmental interests.”).

⁷¹ See 最高法院院长王胜俊：群众感觉应作为是否判死刑依据之一 [Chief Justice of the Supreme People’s Court, Wang Shengjun: Public Sentiment Should be Factored into the Determination of Whether to Impose the Death Penalty], 新华网 [XINHUA NET] (Apr. 11, 2008), available at http://news.xinhuanet.com/politics/2008-04/11/content_7956341.htm (“判不判死刑应该有三个依据，其中之一就是要把“社会和人民群众的感觉”作为依据。” [“Whether to impose the death penalty should depend on three bases, one of which is ‘the sentiments of society and the masses.’”]).

⁷² Eva Pils, *Yang Jia and China’s Unpopular Criminal Justice System*, 1 CHINA RTS. F. 59, 59 (2009) (“Liu Yong exemplified a return to a ‘popular’—or populist—form of criminal justice, in which the judiciary uses the notion of public sentiment about a case to push for a particular decision.”).

⁷³ *Greater Steps Can Be Taken to Reduce the Death Penalty*, *supra* note 12.

officers)⁷⁴ are not directly involved in sentencing, but the police are the usual channel through which cases, and the supporting evidence, reach prosecutors. If the police decide to concentrate their resources on specific cases, or certain types of cases, it is more likely that those cases will ultimately land in court. This screening function of police is obvious yet often unspoken, as is most clearly seen when police focus resources on particular types of crime or groups of alleged criminals as part of a “strike hard” campaign.⁷⁵ For example, Murray Scot Tanner describes the 1983-86 “strike hard” campaign as “the bloodiest chapter in post-Mao Chinese politics’ . . . with an estimated 10,000 criminals executed in the 3-year period.”⁷⁶ Beyond their investigative powers, the police generally dominate political-legal committees and their influence permeates all aspects of local criminal justice policy. In short, although the police’s direct influence on death sentencing may be limited, their indirect influence is substantial.

The role of Chinese prosecutors in the decision whether to impose the death penalty differs from their counterparts in the United States, who must specifically announce that they will seek the death penalty.⁷⁷ Nonetheless, prosecutors in China make critical charging decisions.⁷⁸ Especially if China

⁷⁴ Although the “police” are not a unitary entity in China, for purposes of this article, “police” is used as shorthand for the various government agents who enforce public security. See KAM C. WONG, CHINESE POLICING: HISTORY AND REFORM 157 (2009) (“In China the police have been referred to as *gong’an* [literally “public peace”] and more recently as *jingcha* (police).”); see generally Murray Scot Tanner & Eric Green, *Principals and Secret Agents: Central Versus Local Control Over Policy and Obstacles to “Rule of Law” in China*, 191 CHINA Q. 644 (2008) (detailing structure of public security bodies in China).

⁷⁵ Cf. JOHNSON & ZIMRING, *supra* note 2, at 227 (“China’s vast size and population have prevented it from supporting professional police forces that are as large, per capita, as those in neighboring countries, let alone in industrialized nations. This is one reason why it has frequently been attracted to ‘cheap deterrence’ strategies such as the ‘Strike Hard’ (*yanda*) campaigns, which rely heavily on public cooperation and activism in order to maintain social control.”).

⁷⁶ Susan Trevaskes, *Yanda 2001: Form and Strategy in a Chinese Anti-Crime Campaign*, 36 AUSTL. & N.Z. J. CRIMINOLOGY 272, 273 (2003) (quoting Tanner, *supra* note 37, at 93); see also *id.* (“Yanda 2001, which ran for 2 years, is the largest campaign since 1983 and the death toll in this campaign is no less shocking: in the first 5 months of the campaign from April to the end of August 2001, more than 3000 criminals had been executed.”).

⁷⁷ See FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 125 (5th ed. 2007) (sec. 3.01, Death Penalty Procedures) (“The government must provide written notice to the court and the defendant that it will seek the death penalty.”). Another significant difference between American and Chinese prosecutors is that Chinese prosecutors are part of the procuracy (or procuratorate) whose formal role extends to legal supervision over criminal proceedings. See PRC Criminal Procedure Law, *supra* note 31, art. 8.

⁷⁸ See PRC Criminal Procedure Law, *supra* note 31, art. 141 (“When a People’s Procuratorate considers that the facts of a criminal suspect’s crime have been ascertained, that the evidence is reliable and sufficient and that criminal responsibility

continues to whittle down the number of death-eligible crimes, charging decisions could play an increasingly important role in determining whether the death penalty is even an option. In addition to specific charging decisions, the extent to which prosecutors argue for lenient or severe handling in a particular case can influence the sentence handed down by the court.⁷⁹ Debate continues in China whether prosecutors should formally recommend a sentence and what influence any such recommendation should have on the court's ultimate ruling. Because China does not bifurcate the guilt and sentencing phases of trial, debate regarding sentencing is intertwined in the same proceeding as a determination whether the defendant actually committed the crime charged. From the defense's perspective, this can create the precarious position of simultaneously arguing that the defendant is innocent but, if found guilty, should be given a lenient sentence.

When a case is transferred from the procuratorate to the courts, "appropriately combining leniency and severity" most clearly comes into play, for it is the courts that issue the ultimate sentence. Even within the courts, there are several layers of actors who impact sentencing decisions. The adjudication committee stands behind the judges hearing the case and can direct them to impose the death penalty. Adjudication committees are established within courts at various levels and, among other responsibilities, step in when there are important or difficult cases.⁸⁰

A further step removed from the courthouse, decisions on the local level are also shaped by guidance from the SPC—both the explanatory documents discussed above and more informal guidance.⁸¹ For instance, in a 2008 speech to a court in Zhuhai, SPC President, Wang Shengjun, discussed maintaining the policy of "appropriately combining leniency and severity" but made sure to emphasize the continued use of the "severity" aspect.⁸² And, in April 2010, the SPC conducted wide-scale judicial trainings on how to implement the policy.⁸³

should be investigated according to law, it shall make a decision to initiate a prosecution and shall, in accordance with the provisions for trial jurisdiction, initiate a public prosecution in a People's Court.").

⁷⁹ See Dai, *supra* note 15, at 188 (explaining the formal role of the procuratorate under the Criminal Procedure Law in supervising the entire criminal process).

⁸⁰ 中华人民共和国人民法院组织法 [People's Republic of China Organic Law of the People's Courts] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, effective July 1, 1979, amended by the Standing Comm. Nat'l People's Cong., Sept. 2, 1983, amended by the Standing Comm. Nat'l People's Cong., Oct. 31, 2006) art. 11, STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.).

⁸¹ See *supra* notes 62–65 and accompanying text; see also Trevaskes, *supra* note 18, at 339 (discussing SPC guidance issued to lower courts for consideration in applying the death penalty).

⁸² See *supra* note 71 (reporting speech by Wang).

⁸³ 张先明 [Zhang Xianming], 把宽严相济刑事政策的基本精神落实到每一起案件 [Apply the Basic Principal of Appropriately Combining Leniency and Severity to Every Case] (Apr. 26, 2010), 中国法院网 [CHINA COURTS], <http://www.chinacourt.org/public/detail>

The SPC impacts local court decisions even more directly through its final review power.⁸⁴ Indeed, the pressures and policy preferences can be quite different at the central and local levels. The SPC is removed from the pressure of local police and victims who may press for the death penalty in a case where more detached analysis would lean towards a less severe outcome.

The *gongjianfa* (公检法) (police, prosecutors, courts) trifecta that determines the outcomes in individual cases starkly leaves out a fourth player, lawyers. At present, lawyers are limited in their ability to argue for leniency over severity due to the many constraints on their work. The obstacles that Chinese defense lawyers face are well documented and beyond the scope of this short article, but it is important to emphasize that they are heavily restricted in their ability to be zealous advocates for their clients.⁸⁵ Looking to the future, if China decides to adopt sentencing guidelines that specify mitigating and aggravating circumstances that courts should consider in issuing death sentences, lawyers will be crucial to meaningful implementation of any such guidelines. It is difficult to imagine mitigating circumstances being seriously raised and explored without defense lawyers and, in particular, lawyers who have the ability and means to conduct research and gather evidence.⁸⁶ In the United States, lawyers, including pro bono lawyers from the highest echelons of law firms, have played a vital role in arguing against the death penalty.⁸⁷ In the future, Chinese lawyers hopefully will be able to take on an increasingly robust role in the capital sentencing process. At present, however, prospects for such an engaged role seem bleak.⁸⁸

.php?id=406047# (“据了解，这次培训是新中国成立以来规模最大的刑事审判业务集中培训，也是以贯彻宽严相济刑事政策为主题，全面总结和具体部署人民法院刑事审判工作的一次工作会议。” [reporting that the March 2010 judicial training program on the policy of appropriately combining leniency and severity was, according to the author’s understanding, the largest centralized training for criminal adjudication since the founding of the PRC]).

⁸⁴ See *supra* notes 40–41 and accompanying text (explaining return of final review power to SPC).

⁸⁵ See, e.g., Cohen et al., *supra* note 1; HUMAN RIGHTS WATCH, “WALKING ON THIN ICE”: CONTROL, INTIMIDATION, AND HARASSMENT OF LAWYERS IN CHINA (2008), available at <http://www.hrw.org/en/reports/2008/04/28/walking-thin-ice-o> (detailing “consistent patterns of abuses against legal practitioners” in China).

⁸⁶ See Jerome A. Cohen, *The Plight of China’s Criminal Defense Lawyers*, 33 H.K. L.J. 231, 238–39 (2003) (discussing obstacles to lawyers obtaining evidence in mainland court proceedings).

⁸⁷ See Susan Levine, *Luring Pro Bono Lawyers For Death Row’s Forgotten*, WASH. POST, Nov. 30, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A20742-2004Nov29.html> (reporting on the American Bar Association’s Death Penalty Representation Project).

⁸⁸ See, e.g., 莫少平 [Mo Shaoping], 中国律师面临的制度风险 [The Systematic Risk Faced by Chinese Lawyers], 财经网 [CAIJING] (July 20, 2010), <http://www.caijing.com.cn/2010-07-20/110482410.html>.

As previously alluded to, another player in the mix is the public. The public's role is less defined and not nearly as hands-on as the other actors described above, but the role of public opinion pervades the rhetoric surrounding how to appropriately combine leniency and severity. Conventional wisdom holds that the Chinese public remains firmly behind the death penalty.⁸⁹ This is not surprising seeing as abolition efforts in other countries have frequently originated from a push by elites instead of from a sea change in mainstream public opinion.⁹⁰ In China, public concern over rampant corruption is widely credited with the decision not to remove bribery and other crimes associated with corrupt dealings from the scope of the death penalty.⁹¹

Public concern over a shift towards leniency also finds clear expression in the debate over the use of reprieved death sentences. This practice of sentencing people to death with little chance that the execution will actually be carried out allows for a diluted use of the death penalty without full abolition. Yet the expansion of reprieved death sentences is already garnering attention in the press and could generate even more dissatisfaction among the populace if reprieved death sentences are increasingly associated with selective enforcement along socio-economic and political-power lines.⁹² Using a twist on Monopoly phrasing, is a reprieved death sentence really just a get-out-of-death card available to wealthy and powerful defendants? These sentiments are expressed in Chinese phrases like *tan guan mian si* (贪官免死)

⁸⁹ See Yu Xiaodong, *More Than a Legal Issue*, NEWS CHINA, Nov. 2010, at 26–27 (“Public opinion contrasts sharply with that of experts, with overwhelming support for the death penalty, in particular as punishment for corruption. . . . A more recent online survey conducted by *sina.com.cn* in late August [2010], after the proposed amendment was announced, found that 92.9 percent of 14,891 respondents were against the abolition of the death penalty for all non-violent economic crimes.”).

⁹⁰ See FRANKLIN E. ZIMRING, *THE CONTRADICTIONS IN AMERICAN CAPITAL PUNISHMENT* 22–23 (2003) (“The usual pattern for the end of the death penalty in developed nations over the first three postwar decades was what one commentator called leadership ‘from the front’ The end of the death penalty was engineered by governing elites at a time when public opinion still favored capital punishment for murder.”).

⁹¹ See 杜萌 [Du Meng], 专家称中国三十年内不会取消贪污贿赂罪死刑 [*Expert Claims that China will Not Abolish the Death Penalty for Corruption and Bribery Within Thirty Years*], 法制日报 [LEGAL DAILY], Sept. 3, 2010, at 4, available at <http://www.chinacourt.org/html/article/201009/03/426310.shtml>; China Not to Drop Death Penalty for Corruption Crimes: Legislator, 新华网 [XINHUA NET] (Sept. 29, 2010), http://news.xinhuanet.com/english2010/china/2010-09/29/c_13534415.htm (“However, the draft amendment also sparked criticisms that abolishing the death penalty for economic-related and non-violent offences would be taken as a tool to help privileged officials involved in corruption crimes escape capital punishment.”).

⁹² See JOHNSON & ZIMRING, *supra* note 2, at 282 (“There have also been complaints from victims and their families, and some analysts worry that their discontent could cause the number of executions to rebound.”).

(corrupt officials are exempted from death)⁹³ and *mian si pai* (免死牌) (death exemption card).⁹⁴ Beyond avoiding execution, public concern over excessively lenient treatment for well-connected convicts may stem, in part, from the secrecy surrounding post-conviction sentencing reductions. Once it is decided that the convict will not be executed, can the public be confident that he will serve a lengthy sentence instead of using back-door dealings to obtain even more lenient treatment?

While the decision of the central government to retain the death penalty for severe embezzlement and other corruption-related offenses reflects the seriousness attached to these crimes, there is a bit of a pot-calling-the-kettle-black phenomenon at work: the government is promoting a stern response to corruption, but it is government officials themselves who are viewed as corrupt. One way to understand this position is that the higher-ups in Beijing are trying to distance central policy from local misconduct and, indeed, the central government is often hampered in its ability to even gather accurate information about local activities.⁹⁵ For example, in late January 2011, Premier Wen Jiabao made a public appearance at the State Bureau for Letters and Visits (国家信访局) (*guojia xinfang ju*) at which he “asked officials to address people’s complaints and to create conditions for the public to criticize and supervise the government.”⁹⁶ This was far from the first time that Premier Wen and other members of the top leadership have openly recognized public dissatisfaction with government officials and the need to combat corruption.⁹⁷ And it is extremely unlikely that this meeting will usher in a vigorous period of “letting a hundred flowers bloom and a hundred schools of thought contend.”⁹⁸ Nonetheless, such public appearances highlight that, far from

⁹³ See, e.g., “贪官免死”背后的民意焦虑 [Public Anxiety Regarding “Avoidance of Death by Corrupt Officials”], 环球网 [GLOBAL TIMES], (Aug. 30, 2010), <http://opinion.huanqiu.com/picture/2010-08/1058317.html>.

⁹⁴ 贪官“免死牌”该不该下? [“Death-Exemption Card” for Corrupt Officials: Should It Be Played?], 北京晨报 [BEIJING MORNING POST] (Aug. 29, 2010), <http://www.morningpost.com.cn/sibian/pinglun/2010-08-29/69740.shtml>.

⁹⁵ See generally Carl F. Minzner, *Riots and Cover-Ups: Counterproductive Control of Local Agents in China*, 31 U. PA. J. INT’L L. 53 (2009) (analyzing use of cadre responsibility systems to address principal-agent problems that the central government faces in governing a large authoritarian bureaucracy); Kenneth Lieberthal, *Introduction: The “Fragmented Authoritarianism” Model and Its Limitations*, in BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 1 (Kenneth Lieberthal & David M. Lampton eds., 1992) (explaining central-local tension in governing China).

⁹⁶ *Premier Drops by to Meet Petitioners*, 新华网 [XINHUA NET] (Jan. 26, 2011), http://news.xinhuanet.com/english2010/china/2011-01/26/c_13707506.htm

⁹⁷ See, e.g., *Wen Jiabao Touches Villagers’ Hearts*, STRAITS TIMES, Oct. 29, 2003.

⁹⁸ Cf. JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 539–43 (2d ed. 1999) (describing brief Hundred Flowers Movement in 1956 during which Mao called for open debate but then promptly cracked down on those who had aired grievances with Party policies).

being immune to public opinion, the government is aware of the need to cultivate a responsive image in order to shore up its legitimacy. Maintaining the death penalty to strike against corruption is a clear expression to the public that Beijing is taking their concerns seriously.⁹⁹

Official recognition of public concerns, particularly regarding corruption, is not a new phenomenon, but it appears to be becoming more pronounced. Looking a decade ago, the central government's stern public face was starkly on display at a 2000 press conference. Premier Zhu Rongji caused a stir when, in response to a question from a German reporter regarding whether China could solve the problem of corruption without giving up one-party rule, he retorted, "The Chinese have made tremendous achievements in its anti-corruption fight in recent years. Did your countries execute as many corrupt criminals as we did?"¹⁰⁰ While the top leadership has thus far navigated the central-local dynamic in a fairly adept manner, it remains to be seen whether the central government can maintain its less besmirched reputation vis-à-vis local officials in the long term.

The concern about unduly lenient handling of cases is not limited to crimes commonly connected to corrupt dealings. Netizens have focused some of the most virulent criticism on vehicular homicides.¹⁰¹ The phrase, "Li Gang is my father" (我爸是李刚) (*wo ba shi Li Gang*) went viral after twenty-two-year-old drunk driver, Li Qiming (李启铭), hit two university students, killing one and seriously injuring the other.¹⁰² When stopped after the hit-and-run, he brazenly challenged that he was untouchable because his father was a prominent local official. The news erupted in the blogosphere as Li Qiming became the focus of a "human flesh search engine" (人肉搜索) (*renrou sousuo*),¹⁰³ but news then subsided as the government sought to dampen

⁹⁹ See INFO. OFFICE OF THE ST. COUNCIL, CHINA'S EFFORTS TO COMBAT CORRUPTION AND BUILD A CLEAN GOVERNMENT (2010), available at http://english.gov.cn/official/2010-12/29/content_1775353.htm ("To crack down on corruption in line with law and discipline, China has been enacting and continuously improving substantive laws and regulations that punish violations of law and discipline, including criminal punishment, Party discipline and administrative discipline."); Dai, *supra* note 15, at 169-72 (providing historical overview of the "Strengthening Punishment of Crimes by State Employees" since the 1979 Criminal Law).

¹⁰⁰ Premier Zhu Rongji Takes Questions about China's Focal Issues (2000), 中华人民共和国中央人民政府 [GOV.CN] (Mar. 15, 2000), http://www.gov.cn/english/official/2005-07/25/content_17144.htm.

¹⁰¹ See, e.g., Liu, *supra* note 24 (reporting case of Sun Weiming whose death sentence for a fatal drunk driving accident was commuted to a reprieved death sentence).

¹⁰² See Latest Drunk-Driving Incident Sparks Outrage, WALL ST. J. CHINA REAL TIME REP. (Dec. 7, 2010, 11:20 PM), <http://blogs.wsj.com/chinarealtime/2010/12/07/latest-drunk-driving-incident-sparks-outrage/>.

¹⁰³ See "我爸是李刚" 案开庭 [The "Li Gang is My Father" Case Is Now on Trial], 财新网 [CAING.COM] (Jan. 26, 2011), <http://policy.caing.com/2011-01-26/100221295.html> (网友对"李刚"进行了"人肉搜索" [reporting that internet users did a "human flesh search" for Li Gang]).

public scrutiny of the case.¹⁰⁴ Reports later surfaced that a settlement was being reached with the victims' families.¹⁰⁵ When Li Qiming's trial started in late January 2011, reports noted the lenient handling of his case.¹⁰⁶ he was charged under Article 133 of the Criminal Law (causing a traffic accident) rather than Article 115 (endangering public security).¹⁰⁷ Whereas Article 133 carries a maximum penalty of imprisonment, Article 115 is a death-eligible crime. In January 2011, Li Qiming was sentenced to six years in prison.¹⁰⁸

This case underscores how, at the same time that concern is mounting regarding excessively lenient handling of criminal cases, the official push for increased criminal reconciliation (刑事和解) (*xingshi hejie*) is working in tension with a desire for horizontal justice across cases.¹⁰⁹ Article 6 of the

¹⁰⁴ See Michael Wines, *China's Censors Misfire in Abuse-of-Power Case*, N.Y. TIMES, Nov. 18, 2010, at A1, available at <http://www.nytimes.com/2010/11/18/world/asia/18li.html> ("[P]arty propaganda officials moved swiftly after the accident to ensure that the story never gained traction."); CCTV's *Fatal Error In Reporting On "Car Accident Gate" At Hebei University*, 东南西北 [EASTSOUTHWESTNORTH] (Oct. 26, 2010), <http://www.zonaeuropa.com/201010a.brief.htm#029>, translated at <http://shehui.daqi.com/article/2996041.html> (discussing initial CCTV coverage of Li's family crying "in an attempt to cool down the public opinion storm" and criticizing CCTV for "ignor[ing] the need for the family members of the victims to express their feelings").

¹⁰⁵ See *Cop Coughs up \$73,000 for Son's Victim*, WALL ST. J. CHINA REAL TIME REP. (Nov. 18, 2010, 10:45 PM), <http://blogs.wsj.com/chinarealtime/2010/11/18/cop-coughs-up-69000-for-sons-victim/>.

¹⁰⁶ See *The "Li Gang is My Father" Case Is Now on Trial*, *supra* note 103 ("陈家向法院提交了法律意见书... 请求法院对李启铭进行从轻处罚" [reporting that the victim's family submitted a letter to the court requesting that the court punish Li Qiming on the lenient side]).

¹⁰⁷ See *id.*

¹⁰⁸ See 白明山、岳文婷 [Bai Mingshan & Yue Wenting], "10-16" 交通肇事案李启铭一审被判刑 6 年 [Li Qiming Sentenced to Six Years for the October 16 Traffic Accident], 财经网 [CAIJING] (Jan. 30, 2011), <http://www.caijing.com.cn/2011-01-30/110631798.html>.

¹⁰⁹ See, e.g., 男子恋爱不成杀女友 用钱换减刑 金钱动摇了法律? [Man Killed Girlfriend after Failed Relationship—Money Exchanged for Reduced Sentence—Was Law Swayed by Money?], 华声在线 [VOC.COM] (Oct. 29, 2009), <http://www.voc.com.cn/article/200910/200910290758194098.html> (reporting controversy over granting of reprieved death sentence after defendant paid compensation as part of criminal reconciliation); 刑事和解引“买刑”争议 [Criminal Reconciliation Gives Rise to Controversies about "Buying Sentences"], 新华网广东频道 [XINHUA NET GUANGDONG CHANNEL] (July 30, 2010), http://www.gd.xinhuanet.com/newscenter/2010-07/30/content_20488534.htm ("今年以来, 禅城法院实施刑事和解制度, 已让 28 宗刑事案件达成和解, 38 名被害人获赔金额高达 190 万元。" [reporting that, as of July 2010, the courts in Changcheng District, Guangdong Province, had already resolved twenty-eight criminal cases through mediation that year and thirty-eight victims had received compensation]); see generally 时延安 [Shi Yan'an], 刑事和解正当性之辨 [The Debate on the Propriety of Criminal Reconciliation], 东方法学 [ORIENTAL L.], no. 3, 2010 at 86, 86 (analyzing the use of criminal mediation in China).

Criminal Procedure Law expressly states that the law applies equally to all citizens.¹¹⁰ Thus, a contradiction arises: concerns about disproportionately lenient treatment are most acute with respect to people of high socio-economic and political status, but it is precisely those people who are best situated to pay the victims and push for a settlement that might lead to a reduced sentence. As one anonymous poster wrote after a report on a court handing down a three-year prison sentence to a defendant who killed a pedestrian while speeding and perhaps drag racing: "[I'm] really speechless, barely 1,000,000 [Renminbi] + 3 years [in prison] = one human life" ("真无语, 100 多万 + 3 年 = 一条人命").¹¹¹ It is unclear to what extent the payment to the victim's family in this case influenced the final verdict, but even the *People's Daily* reported the public's dissatisfaction with the outcome: "In the case, the public hoped to charge the suspect with a more severe crime [W]ealthy people violating laws and escaping punishment by spending money has become quite common in many places. The public strongly resents dirty deals between power and wealth."¹¹²

There are of course strong arguments in favor of providing compensation to victims (or the victims' families in homicide cases) for their loss, and the government understandably desires to ameliorate the situation and dissuade victims and their families from publicly petitioning for more severe handling of the case. But whether the defendant and not the state should pay that compensation is a crucial decision. The attention given to the need for private compensation of victims raises broader concerns about citizens' lack of faith in a government-provided social safety net. Moreover, whether the depth of the defendant's pockets should directly influence her punishment highlights the issue of how wealth impacts a case's handling. Put starkly, can leniency be bought? Aside from direct payouts to victims, wealth can also affect a case from the perspective of representation. Skilled lawyers who have ample time to devote to a case are not cheap. Having the best defense counsel certainly does not guarantee leniency,¹¹³ but one would expect that having a talented lawyer would be beneficial to most defendants.

Perhaps concerns about widespread use of reprieved death sentences are overblown. Even if the defendant and public are fairly well convinced that a reprieved death sentence will never result in actual execution, this sentence

¹¹⁰ PRC Criminal Procedure Law, *supra* note 31, art. 6.

¹¹¹ Comment to 杭州飙车案胡斌被判 3 年 其母听到结果泪流不止[图], [Hu Bing Sentenced to Three Years for Speeding in Hangzhou, Mother Burst into Tears When Hearing the Result (Picture)], 天涯杂谈 [TIANYA.CN] (July 20, 2009, 7:13 PM), <http://www.tianya.cn/publicforum/content/free/1/1628323.shtml>.

¹¹² On China's "Second-Generation Rich", PEOPLE'S DAILY (Aug. 27, 2009), <http://english.peopledaily.com.cn/90001/90782/90872/6741171.html>.

¹¹³ See Liebman & Wu, *supra* note 11, at 281-82 (discussing 2003 case of a notorious gangster, Liu Yong, who obtained a reprieved death sentence when represented by one of China's top defense lawyers but was then quickly executed following a public outcry).

may still communicate more forceful condemnation than an overt, lengthy term of imprisonment.¹¹⁴ That being said, if reprieved death sentences become routine and are commonly shown to carry only a remote chance of execution, the communicative effect could be dramatically diluted.¹¹⁵ Similar to the question often raised in the United States whether there is a necessary percentage of cases that must go to trial to preserve a credible threat of trial during plea bargaining, must a certain percentage of people be executed to maintain the bite of reprieved death sentences?

The debate whether reprieved death sentences are swinging the pendulum too far towards the side of leniency is continuing into 2011. One aspect of this ongoing debate is whether China should increase prison terms or even adopt life without parole in certain cases.¹¹⁶ If indeed a “death” sentence becomes associated more with a long prison term than actual execution, then extending prison terms is a clear way to increase severity within the realm of reprieved death sentences. The Eighth Amendment takes a step in this direction by increasing the minimum length of prison time that a person must serve after a reprieved death sentence is commuted to a fixed-term sentence.¹¹⁷

CONCLUSION

For all the rhetorical emphasis on public sentiment, the public remains removed from the formal decision when to apply the death penalty. Perhaps it is time for China to implement more direct channels for public participation.¹¹⁸ The conventional wisdom is that the Chinese public overwhelmingly supports the death penalty.¹¹⁹ However, not only have scholars criticized the polling

¹¹⁴ Cf. GARLAND, *supra* note 70, at 19–20 (critiquing conventional wisdom that American capital punishment is “merely symbolic” and commenting that “[w]e have to regard symbolic measures as effective actions, not as empty gestures or mere talk”); JOHNSON & ZIMRING, *supra* note 2, at 283 (“This Maoist invention [reprieved death sentence] provides what can be touted as the moral equivalent of a death penalty for local police and prosecutors and perhaps even for some victims and survivors—a symbolic sanction that expresses severity and stigma.”).

¹¹⁵ Cf. Yin, *supra* note 14 (noting recent reports of rising use of reprieved death sentences).

¹¹⁶ See Chen, *supra* note 26.

¹¹⁷ See *Eight Highlights of the Eighth Draft Amendment to the Criminal Law*, *supra* note 26; Eighth Amendment, *supra* note 47, art. 50.

¹¹⁸ Cf. GARLAND, *supra* note 70, at 67 (discussing metaphor of “the people’s will” in which “the death penalty is depicted as a vital expression of local community sentiment, as moral outrage authentically expressed, as collective choice and community justice”).

¹¹⁹ See Yu, *supra* note 89, at 26–27 (reporting strong public support for the death penalty).

methods,¹²⁰ it is also worth questioning whether individuals would be so supportive if they were deciding life or death in an individual case. Answering a public opinion poller's question whether you support the death penalty is dramatically different from voting for death after actually hearing a case and looking a defendant in the eye. It is always possible that direct public participation could lead to an increase in death sentences, and there is the thorny question of how people would be selected to make this determination. Despite these challenges, at least a direct public voice would give real heft to the abstract notion of what the public wants.

Today, China only uses people's assessors (陪审员) (*peishen yuan*) in a mixed-bench system at some trials, which has given rise to questions as to whether they are mere bumps-on-the-bench or actual active participants in the decision-making process.¹²¹ Especially if China decides to bifurcate the guilt and sentencing phases, a jury (陪审团) (*peishen tuan*) could be used for the limited purpose of deciding whether to issue a death sentence. Even if the decision-making power of a jury is limited to the sentencing phase, it would still be critical that jurors be present for the entire trial so that they understand the facts of the case and are not basing their decision on media reports and other information that is extrinsic to the trial. Seeing as trials in China are generally brief affairs with witnesses appearing in but a small percentage of trials, it should not be particularly onerous to have jurors present throughout the proceedings. In fact, because evidence in the case file might not even be aired openly in court, it is worth considering granting jurors access to the file in addition to being present in court.

Shifting the sentencing decision towards a jury might also alleviate pressure on local prosecutors and judges who currently bear the brunt of public pressure to impose harsh punishments.¹²² Furthermore, direct public participation in sentencing might help quiet criticisms that privileged defendants are escaping severe punishment because of payouts to victims and *guanxi* (关系) (connections). Although a detailed exploration of the potential role of a sentencing jury is beyond the scope of this article, I simply wish to suggest that this idea, while a significant departure from current practice, actually complements current themes in China's criminal justice system.

The government's recent push to expand the number of people's assessors indicates that the trend is heading in the direction of a more robust public

¹²⁰ See Dui Hua Foundation, *Reducing Death Penalty Crimes in China: More Symbol than Substance*, DIALOGUE, Fall 2010, at 1, available at http://www.duihua.org/work/publications/nl/dialogue/nl_txt/nl41/nl41_1a.htm ("In fact, public opinion on the death penalty in China is talked about far more often than it is reliably measured. As researcher Zhou Guoliang has shown, polling on the subject has been sporadic and lacks statistical rigor.").

¹²¹ See Ira Belkin, *China*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 91, 105 (Craig M. Bradley ed., 2d ed. 2007).

¹²² Cf. Pils, *supra* note 72, at 59.

voice in the adjudicatory process.¹²³ This move appears primarily aimed at increasing public confidence in court judgments, and no category of cases is more highly charged and receives more public scrutiny than capital cases. Accordingly, enhancing public legitimacy of decisions when the death penalty is at issue is all the more important. At the same time, a sentencing jury could complement the push by scholars for stronger procedural reforms that are aimed at producing fairer and more accurate outcomes. Specifically, greater public participation has the potential to act as a check on corrupt practices that may take a defendant's connections into account when deciding whether to impose the death penalty. In light of the intense public outcry over corruption, a sentencing jury might actually swing the pendulum in the other direction such that well-connected defendants would find themselves *more* likely to be sentenced to death with immediate execution.

The future role of public participation is but one aspect in an increasingly nuanced and complicated debate surrounding the death penalty. At a minimum, the current heated discussions indicate that the continuing decline of the death penalty in China, let alone the realization of full abolition, is far from certain.¹²⁴ Just as the long tussle with the death penalty in my home country of the United States expresses a complex mix of domestic forces, China too has a unique blend of pressures weighing in on the debate. To paraphrase Tolstoy, "All abolitionist countries are alike; each retentionist country is retentionist in its own way."¹²⁵ Whether China will be a severe or lenient retentionist country, or somehow will manage to "appropriately" combine both, remains to be seen in the years ahead.

¹²³ See 最高法院：法院领导每年至少参加一次与网民交流活动 [The Supreme People's Court: Court Leaders Should Engage in Interactive Activities with Netizens At Least Once Each Year], 新华网 [XINHUA NET] (Apr. 14, 2009), available at http://news.xinhuanet.com/legal/2009-04/14/content_11184186.htm (announcing plans to increase number of people's assessors); see also Jerome A. Cohen, *A "People's Jury" Trial for China's Criminal Defendants?*, U.S.-ASIA LAW INSTITUTE (Mar. 15, 2011), <http://www.usasialaw.org/?p=5211> (discussing recent experimentation in China with increased public participation in trials).

¹²⁴ Cf. David F. Greenberg & Valerie West, *Siting the Death Penalty Internationally*, 33 L. & SOC. INQUIRY 295, 335 (2008) ("But a decline in executions need not culminate in their elimination. The circumstances that have favored elimination may not ever develop in some countries, and where they do, they may not produce the same outcomes as they have in Western Europe.").

¹²⁵ LEO TOLSTOY, *ANNA KARENINA* 1 (Richard Peaver & Larisa Volokhonsky trans., Penguin Books 2002) (1877) ("All happy families are alike; each unhappy family is unhappy in its own way."). Cf. GARLAND, *supra* note 70, at 309 ("America's death penalty may not be 'exceptional,' but it is certainly distinctive.").