

Community Corrections Programs in China: New Forms of Informal Punishments?

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INTRODUCTION

In China, community corrections programs were introduced as a pilot program in 2003, implemented nationwide in 2009, and included in the Criminal Law¹ in 2011. However, the Criminal Law² does not clearly define community corrections and what these programs entail. The Announcements issued by the Supreme People's Court ("SPC"), the Supreme People's Procuratorate ("SPP"), the Ministry of Public Security ("MPS"), and the Ministry of Justice ("MJ") in 2003 provide the only official definition of community corrections and community corrections programs. In China, community corrections are defined as public surveillance ("PS"), suspended sentence, parole, temporary service of sentence outside prison, and deprivation of political rights³ under the

¹ The Criminal Law of the People's Republic of China is a codified compilation of China's criminal statutes.

² Government documents in China do not make a clear distinction between community corrections and community corrections programs. They are all expressed in 'she qu jiao zheng, 社区矫正.' In this article, community corrections and community corrections programs are distinguished according to the contexts of government documents. Community corrections denote the punishments that serve as an alternative to imprisonment by managing and supervising offenders in the community itself instead of in prison; while community corrections programs refer to correctional programs attached to existing community corrections.

³ With Amendment VIII in 2011, deprivation of political rights was excluded from community corrections programs. *Zhonghua Renmin Gongheguo Xingfa* (中华人民

Criminal Law and the Criminal Procedure Law.⁴ This definition further explains that community corrections programs refer to measures that are the opposite of custodial dispositions.⁵ During determined sentencing periods, criminals under community corrections programs receive assistance to address their respective mental and behavioral problems, and are reintegrated into society by specialized state organs with the assistance of non-governmental organizations (“NGOs”) and volunteers. Thus, community corrections programs are designed to attach supplementary rectification and educational approaches to existing community corrections.

From the outset of the implementation of community corrections programs, there has been an ongoing debate about whether the attached rectification and educational approaches will turn into new forms of informal punishments.⁶ The term, informal punishments, may have different meanings for different scholars. The features of informal punishments identified here are similar to those used by S. Jiang and Lambert:⁷ their grounds are morality or policy rather than law, and they are operated by unofficial controlling individuals and groups. Traditionally, formal and informal punishments coexist in China. Historically, Chinese leadership relied heavily on informal means to maintain social order and settle disputes, and established a minimalist law enforcement authority. The Chinese law enforcement authority was only responsible for serious crimes and settling conflicts beyond the scope of informal mechanisms.⁸ In China, the tendency towards harsh punishment is known as heavy penaltyism (zhong xing zhu yi, 重刑主义), and under heavy penaltyism, punishments at the low end of punishment spectrum are

共和国刑法) [PRC Criminal Law] (promulgated by the Nat'l People's Cong., July 1, 1979, effective as amended Feb. 25, 2011) (China).

⁴ Guan Yu Kai Zhan She Qu Jiao Zheng Shi Dian Gong Zuo De Tong Zhi (关于开展社区矫正试点工作的通知) [Announcement on the Development of Pilot Locations for Community Corrections] art. 2 (issued by the SPC, SPP, MPC, and MJ, 2003) (China).

⁵ The custodial dispositions in China are imprisonment and criminal detention (ju yi, 拘役).

⁶ Liu Renwen (刘仁文), *Hou Lao Jiao Shi Dai De Fa Zhi Zai Chu Fa (后劳教时代的法治再出发)* [Several Issues in Promoting Rule of Law After the Abolition of RTL], 23 J. NAT'L PROSECUTORS C. 146, 147-49 (2015); Robert Williams, “Community Corrections” and the Road Ahead for Re-Education through Labor, CHINA FILE (2014), <https://www.chinafile.com/community-corrections-and-road-ahead-re-education-through-labor>.

⁷ Shanhe Jiang & Eric G. Lambert, *Views of Formal and Informal Crime Control and Their Correlates in China*, 19 INT'L CRIM. JUST. REV. 5, 7 (2009).

⁸ Wei Wu & Tom Vander Beken, *The Evolution of Criminal Interrogation Rules in China*, 40 INT'L J. L. CRIME & JUST. 271, 271-95 (2012).

rarely enforced. S. Jiang and Lambert's study shows that, in terms of effectively controlling crime, most Chinese had a slightly more favorable view toward informal measures, as opposed to formal measures.

In 2013, the Chinese Communist Party ("CCP") abolished the most notorious informal punishment, re-education through labor ("RTL" lao dong jiao yang, 劳动教养),⁹ and promoted community corrections programs simultaneously.¹⁰ To date, beyond an official proclamation, the government has made no authoritative claims as to what the transition will look like for RTL.¹¹ Evidently, the concurrent abolition of RTL and implementation of community corrections programs has led many observers to postulate that the community corrections programs were new informal punishments in and of itself.¹² Otherwise, new forms of informal punishments may be created in the near future.

Party officials nevertheless said that the community corrections programs were not meant as replacements for RTL. At a press conference, the Vice Minister of Justice, Zhao Decheng, said that China's community corrections programs would not evolve into a new form of RTL, and the community corrections programs were designed to educate convicts. As such, a convicted person would not be held in a detention center, but instead would be required to receive rectification education in the community in which s/he lived.¹³ Moreover, Jiang Aidong, the director of the Community Corrections Administration Bureau of the MJ, claimed

⁹ RTL was imposed on persons whose wrongdoings were so minor that it did not constitute a criminal offence. The wrongdoers under RTL were detained and forced to work for one to three years, with a one year extension whenever necessary. Police departments issues regulations regarding RTL. After the police investigated, they judged and enforced RTL cases. There had been debate on whether RTL was an administrative punishment, an administrative coercive measure, or an informal punishment. The Administrative Punishment Law was issued in 1996 and the Administrative Coercion Law was promulgated in 2011. Nonetheless, RTL was neither on the lists of administrative punishments nor on the lists of administrative coercive measures. In fact, RTL violated the Legislative Law and the Constitution. Article 8 of the Legislative Law prescribes that mandatory measures and penalties involving restrictions on the freedom of persons shall only be governed by law. Article 37 of the Constitution prohibits unlawful detention or deprivation or restriction of citizens' freedom. RTL did not have a solid legal basis as the NPC never promulgated any specific laws concerning RTL. Therefore, this article considers RTL as an informal punishment.

¹⁰ Guan Yu Quan Mian Shen Hua Gai Ge Ruo Gan Zhong Da Wen Ti De Jue Ding (关于全面深化改革若干重大问题的决定) [Resolution Concerning Some Major Issues in Comprehensively Deepening Reform], (issued by the Central Committee of the CCP on 15 November 2013) (China).

¹¹ Liu Renwen, *supra* note 6; Williams, *supra* note 6.

¹² Liu Renwen, *supra* note 6; Williams, *supra* note 6.

¹³ Yan Shaohua & Yang Xiuchan, *Dui Guan Zhi Xing De Li Shi Kao Cha Yu Zai Ren Shi*, 116 *THEORY J.* 34 (2003).

that community corrections and RTL were two distinct legal systems differing in nature. Community corrections would only be applied to adjudged criminals rather than administrative offenders.¹⁴

This article examines the actual nature of community corrections programs. Are they a new type of informal punishment, or are they simply rehabilitation and social service programs attached to existing community corrections? From a penological point of view, retracing the roots of China's penal system helps to clarify the CCP's criminal policy choices and the complexity, and perhaps even the prospects, of community penalties in contemporary China. Part One of this article explores the roots of China's penal system, and includes an examination of the coexistence of informal and formal punishments, as well as the heavy penaltyism of formal punishments in China. Part Two of this article explores the development of community corrections programs in contemporary China.

Since 2003, China has strived to formalize and professionalize traditional, informal, and semiformal community-based corrections.¹⁵ However, in terms of the system design and current practice, local officers are likely to deviate from the program's good intentions. While the CCP insisted that reform and assistance should be the main focus of community corrections programs, there are several barriers obstructing their proper implementation. In practice, the reform and assistance functions are frequently subordinated to supervision functions. Additionally, the local bureaus of justice make significant efforts to recruit assistants to community corrections officers and workers in grassroots organizations, to serve as social workers and volunteers in order to reinforce routine supervision practices pursuant to the local regulations on community corrections, albeit without legal authorization. The general public seems to play a more effective role in supervision rather than in correction and assistance. Therefore, in many ways, community corrections programs show signs of informal punishments.

I. THE COEXISTENCE OF INFORMAL AND FORMAL PUNISHMENTS IN HISTORY

Through China's history, informal and formal punishments have coexisted, with a strong emphasis on the former. If someone committed a minor offense, s/he was more likely to receive an informal punishment rather than a formal one. In traditional China, the informal punishments were mainly clan (zong zu, 宗族) punishments; in socialist China, the most widely applied informal punishment was RTL.

¹⁴ Q. Cui & W. Yang, *Exclusive interview for Jiang Aidong, the director of Community Correction Administration Bureau of the Ministry of Justice*, GOV.CN (2014), http://www.gov.cn/jrzg/2014-01/05/content_2560187.htm.

¹⁵ Shanhe Jiang et al., *Community Corrections in China: Development and Challenges*, 94 THE PRISON J. 75 (2014).

The regular application of severe and excessive informal punishments means that criminal punishments at the low end of the punishment spectrum were rarely applied. The formal justice system constitutes a key element of the social control system, but was more of a last resort.¹⁶ In practice, formal punishments were mainly responsible for punishing serious offenses, and authorities were more inclined to impose the harshest allowable penalties.¹⁷ Therefore, heavy penaltyism is prevalent throughout Chinese history.

A. *Clan Punishments and the Five Punishments (wu xing, 五刑) in Traditional China*

1. Confucianization of Law

One of the distinct characteristics of Chinese imperial culture was its astonishing consistency throughout its two-thousand-year history. From the beginning of the Han Dynasty (206 B.C.E.-220 C.E.) to the late Qing Dynasty (1644-1911), China possessed a highly developed and sophisticated system of penal law, and the legal provisions survived centuries of development without much change.¹⁸ Accordingly, the philosophies upon which the penal laws were based essentially did not change for two thousand years.¹⁹

Although somewhat legalist in spirit, western academics have described the penal law of imperial China as legalist in form and predominantly Confucian in spirit.²⁰ On the other hand, most Chinese scholars describe it as “Legalism with a Confucian façade.”²¹ Confucianism and legalism, the two established schools of thought in East Zhou Dynasty (1046 B.C.E.-771 B.C.E.), exerted a major influence on penal philosophy in imperial China. As two competing schools of thought, there was an endless tug of war regarding how best to punish offenders.

¹⁶ Xiaoming Chen, *Social and Legal Control in China: A Comparative Perspective*, 48 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 523 n.13 (2004).

¹⁷ Before Deng’s legal reform, punishments were often harsher than the most severe statutory sentences.

¹⁸ Zhang Jing (张荆), *Beijing She Qu Jiao Zheng Mo Shi Te Se Yu Wen Ti Dian Fen Xi* (北京社区矫正模式特色与问题点分析) [Assessment on the Characteristics and Problems of Community Correction in Beijing], 163 J. PEOPLE’S PUB. SECURITY U. CHINA (Social Sciences Edition) 45 (2013).

¹⁹ *Id.*

²⁰ Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* 1-2 (U. of Ga. Press 1996).

²¹ Victoria Tin-Bor Hui, *How China Was Ruled*, The American Interest Mar/Apr 2008. (2008); Demei Zhang, *Jia Zuo Ben Wei Shi Jiao Xia De Fa Lu Ru Jia Hua*, 76 J. COMP. L. 29 (2011).

Confucianists advocated that rulers should exercise prudence and restraint before punishing criminals. According to Confucianists, “[w]henver the net of legal entanglements could be bypassed, or whenever jurisdictional control could be avoided, or whenever there was no question of intimation, the individual would still be evil since he had undergone no change of heart.”²² Punishment would only temporarily deter people from committing crimes.²³

To prevent criminal activity, Confucianists placed great value on moral education. Education would enable a person to be consciously aware of shame and not suffer from evil intentions.²⁴ To Confucianists, proper education was the most thorough, fundamental, and successful way to attain their social aims, including crime control.²⁵ The codes of ethics and canons of proper behaviors were known as “rites” (li, 礼),²⁶ and these rites were “the rules of propriety, that furnish the means of determining the relatives, as near and remote; of settling points which may cause suspicion or doubt; of distinguishing where there should be agreement, and where difference; and of making clear what is right and what is wrong.”²⁷ “Punishments prevent what has already happened” while “rites prevent what is going to happen.”²⁸ Faith in their ruler was based on their faith in the rite system (li yuezhi, 礼制). For those who broke the rules of rites, Confucianists believed that it was possible to reform them through the influence of moral education. “The fleabane growing in the field of hemp becomes straight itself without support.”²⁹ Consequently, the moral influence of rites would function as a more effective deterrent than punishment.

As a last resort, Confucius accepted that there might be extraordinary circumstances in which a ruler had to punish irredeemable wrongdoers. However, even in such extraordinary circumstances, Confucius stressed that the ruler must exercise great moral restraint before

²² TONGZU QU, LAW AND SOCIETY IN TRADITIONAL CHINA § 4 (Mouton 1947).

²³ CONFUCIUS, LUN YU, IN THE COLLECTION OF CHINESE CLASSICS 6 (Bojun Yang ed. 1980) (1996).

²⁴ *Id.*

²⁵ QU, *supra* note 22.

²⁶ CONFUCIUS, LUN YU, IN THE COLLECTION OF CHINESE CLASSICS 6 (Bojun Yang ed. 1980) (1996).

²⁷ WANG WENJIN (王文锦), LI JI YI JIE (礼记译解) 13 (Zhonghua Book Company 2001).

²⁸ BAN GU (班固), HAN SHU (汉书) 74 (Shigu Yan Ed., Zhonghua Book Company 1962).

²⁹ ZHOU SHANG, XUN ZI (YUAN GU ZHEN YAN) 25 (China Worker Press. 2002).

penalizing offenders.³⁰ The imposition of capital punishment before informing the public was considered cruel.³¹ Furthermore, Confucianists believed in the malleability of human beings.³² Confucius said, “not to mend the fault one has made is to err indeed.”³³ As such, wrongdoers should have the opportunity to correct their mistakes.

According to Confucius, punishments should pertain to rites, and the severity of punishment should be proportional to the seriousness of the crime: “When rites do not flourish, punishments will not be exactly right; when punishments do not be exactly right, the populace will be puzzled about how to behave acceptably.”³⁴ The notion of the “exactly right” punishment refers to the principle of proportionality and penal parsimony. Indeed, Confucius articulated that if punishments were lenient, the punishment would not deter the general populace from committing crimes. The ruler would then need to over-correct by imposing severe penalties. On the other hand, if the ruler imposed severe punishments, the rule would oppress his subjects, and the ruler would need to implement lenient punishments. Therefore, the ideal result was the balance and proportionality of crime and punishment.³⁵

Over time, in opposition to Confucius’ original teachings, Confucianists believed that punishment played a more significant role in deterring crime. Mencius and Xunzi, two of the most renowned Confucianists in history, believed that punishment should play a lesser role than moral education, but, unlike Confucius, they regarded punishment as an effective tool to deter crime.³⁶ Without punishment, they argued, there would be injustice. For example, Mencius said, “[v]irtue alone is not sufficient for the exercise of government; laws alone cannot carry themselves into practice.”³⁷ Likewise, Xunzi said, “If people are punished without education, penalties will be enormous and evil cannot be overcome; if they are educated without punishment, evil people will not be punished.”³⁸

³⁰ CONFUCIUS, LUN YU, IN THE COLLECTION OF CHINESE CLASSICS 42 (Bojun Yang ed. 1980).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ ZUO QIUMING (左丘明), ZUO ZHUAN ZHENG ZONG (左传正宗) § 6 (Suo Li ed., Huaxia Publishing House 2011).

³⁶ QU, *supra* note 22.

³⁷ *Id.*

³⁸ *Id.*

The Confucians emphasized moral education over punishment to deter crime but contrarily, the legalists denounced moral education as an effective crime deterrent. The legalists argued that moral education was the work of moralists.³⁹ Moralists may persuade some people to abstain from committing crime, but moralism would fail to prevent control crime within the general populace.⁴⁰ In their view, many people were evil by nature, and moral education alone could not reform these people.⁴¹

Accordingly, legalists were concerned with people's potential for evil.⁴² Legalists viewed punishment as the most effective and efficient way to prevent crime.⁴³ To objectively determine the proper penalty for a crime, legalists advocated for enacting a uniform law.⁴⁴ The function of law was to punish criminals and deter potential criminals, and not to encourage doing good.⁴⁵ "For good man who committed no crime and the bad man who feared punishment so much that he dared commit no crime, their overt behavior was the same, and there was no need to concern oneself with what was in the heart."⁴⁶

Legalism emphasized the deterrent effect of punishment. Legalists objected to pardons and argued that if minor offenses were pardoned, crime would flourish.⁴⁷ Indeed, if the smallest offense received the most severe punishment, then, in the end, people would cease to commit crime, and punishment therefore would become unnecessary.⁴⁸ In the Hanfeizi (韩非子), the legalist scholar Han Fei states:

Now all of those who do not know how to rule said that heavy punishments were harmful to the populace, and should light punishments be able to prevent evil, there would be no need to use heavy ones. Such discourse is the result of not knowing how to govern. That which is to be prevented by severe punishment is not always prevented by

³⁹ HAN FEI & CHEN QIYOU (韩非 & 陈奇猷), HAN FEI ZI JI SHI (韩非子集释) 51 (Shijie Book Company 1972).

⁴⁰ QU, *supra* note 22.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ GUAN ZHONG & LI XIANGFENG (管仲 & 黎翔凤), GUAN ZI JIAO ZHU (管子校注) 228 (Zhonghua Book Company 2004).

⁴⁸ GEOFFREY MACCORMACK, THE SPIRIT OF TRADITIONAL CHINESE LAW 2-3 (U. of Ga Press 1996).

light ones, but that which is to be prevented by light punishment must also be prevented by heavy ones. Therefore, when heavy punishment is applied, all crime will be prevented, and as all crimes are prevented, why will it be harmful to the populace.⁴⁹

Legalists referred to this process as abolishing punishments with punishments.⁵⁰

Legalists are credited with creating the legal system that ultimately led to the Qin Dynasty's dominance. Qin established the first unified empire in China in 221 B.C.E. The empire, however, survived for only five years, the briefest dynasty in Chinese history. The politicians and scholars of the ensuing Han dynasty attributed the fall of the Qin Empire to both the despotism of legalism and the deviation from Confucian virtue.⁵¹ Han Emperor Wu, who ruled China from 140 B.C.E. to 87 B.C.E., established Confucianism as the official ideology of the state.⁵² The political leaders of the Han Dynasty and successive dynasties recognized the practical need for an expansive penal code. These leaders learned from the Qin Dynasty's unification of China that a centralized empire requires a uniform penal system to exercise control over its subjects.⁵³

Laws and rites were coextensive, as were penal codes and clan codes. The codes in imperial China were the embodiment of the ethical norms of Confucianism.⁵⁴ To reinforce Confucian morality, the penal law punished behavior that violated the rites.

2. Clan Punishment System

The ethical norms in Imperial China were roughly divided into four levels, of which were rites (li, 礼), righteousness (yi, 义), honesty (lian, 廉) and shame (chi, 耻).⁵⁵ Rites and shame were the highest and lowest ethical norms respectively. The rites system was duty-oriented. The

⁴⁹ HAN FEI & CHEN QIYOU, *supra* note 39, at 43.

⁵⁰ DENG JIANPENG (邓建鹏), *ZHONG GUO FA ZHI SHI* (中国法制史) 85-91 (Peking U. Press 2011); GUOHUA SUN, § JURISPRUDENCE (China's Procuratorate Press 1997).

⁵¹ QU, *supra* note 22.

⁵² CAO DEBEN (曹德本), *ZHONG GUO ZHENG ZHI SI XIANG SHI* (中国政治思想史) 309-312 (Senior Educ. Press. 2012); LECHEN FU, *THE HISTORY OF CHINA* 41-44 (China Publisher Company 1972).

⁵³ LECHEN FU, *THE HISTORY OF CHINA* 65-72 (China Publisher Company 1972).

⁵⁴ QU, *supra* note 22.

⁵⁵ SIMA GUANG (司马光), *ZI ZHI TONG JIAN* (资治通鉴) 276-277 (Cent. Compilation and Translation Press 2011).

Confucians held that “filial piety is the basic rite.”⁵⁶ The primary value orientation of an individual was filial piety to one’s parents, responsibility to one’s family and the loyalty to one’s ruler.⁵⁷ “Few of those who are filial and fraternal will show disrespect to their rulers.”⁵⁸ As kinship is a priority in the rite system, Confucians also advocated that the ruler should not infringe on clan affairs. A good, Confucian family would supervise the behavior of its own members and punish errant behavior accordingly.⁵⁹ A family should enforce punishment privately rather than publicly. Accordingly, moral remediation was the family’s collective duty.⁶⁰ Since the Han Dynasty, emperors recognized that the Confucian emphasis on family and communal solidarity benefited society as a whole.⁶¹ Conflict resolution within the family and within the community in an amicable way would build deeper community ties and reduce magistrate caseload. Clan leaders were entrusted with the authority to self-regulate its members.⁶²

Accordingly, those who committed minor offenses were often punished by clan leaders pursuant to their respective clan code rather than by magistrate under the criminal code.⁶³ Thus, the clan, which is the exogamous patrilineal group of males descended from founding ancestors, could adopt rules for the personal conduct of its members.⁶⁴ Clan leaders were not elected, but rather inherited their positions.⁶⁵ In every clan, several men of integrity and ability were selected by the clan leaders as judges.⁶⁶ The clan leaders tended to send their clan codes to magistrates for approval.⁶⁷ Magistrates administered all aspects of government on

⁵⁶ ZUO QIUMING, *supra* note 35.

⁵⁷ CONFUCIUS, LUN YU, in THE COLLECTION OF CHINESE CLASSICS 43 (Bojun Yang ed. 1980) (1996).

⁵⁸ *Id.*

⁵⁹ QU, *supra* note 22.

⁶⁰ KLAUS MUHLHAHN, CRIMINAL JUSTICE IN CHINA: A HISTORY 16 (Harvard U. Press. 2009; JINFAN ZHANG, THE TRADITION AND MODERN TRANSITION OF CHINESE LAW 229 (Springer 2013).

⁶¹ MUHLHAHN, *supra* note 60; ZHANG, *supra* note 60.

⁶² MUHLHAHN, *supra* note 60; ZHANG, *supra* note 60.

⁶³ MUHLHAHN, *supra* note 60; ZHANG, *supra* note 60.

⁶⁴ MUHLHAHN, *supra* note 60; ZHANG, *supra* note 60.

⁶⁵ MUHLHAHN, *supra* note 60; ZHANG, *supra* note 60.

⁶⁶ Gao Qicai & Luo Chang (高其才 & 罗昶), *Zhong Guo Gu Dai She Hui Zong Zu Shen Pan Zhi Du Chu Tan* (中国古代社会宗族审判制度初探), 45 J. HUAZHONG NORMAL U. HUMAN. & SOC. SCI. 98-101 (2006); Zheng Ding & Ma Jianxing (郑定 & 马建兴), *Lun Zong Zu Zhi Du Yu Zhong Guo Chuan Tong Fa Lu Wen Hua* (论宗族制度与中国传统法律文化), 32 JURIST 12-19 (2002).

⁶⁷ Gao Qicai & Luo Chang (高其才 & 罗昶), *Zhong Guo Gu Dai She Hui Zong*

behalf of the emperor, including holding a court. Although it was not an obligation, magistrates encouraged the clan leaders to do so.⁶⁸

If a clan member committed a minor offense, the clan would convene in their ancestral hall and deliberate as to the proper recourse.⁶⁹ To be summoned to appear before the entire clan and its leaders was a humiliation in itself.⁷⁰ Examples of penalties for minor offenses include: recording the offense, payment of fines, denial of income for a period of time, a slap in the face, and standing or kneeling in a corner during the clan's meeting.⁷¹ One of the most severe and effective forms of punishment was expulsion from the clan. The convicted person was shut out from the community consisting of all members of the clan, either living or dead.⁷²

3. Five Punishments

Ancient societies used tort law, rather than criminal law.⁷³ In ancient China, the Five Punishments were the symbolic system of punishments under criminal law.⁷⁴ However, the content of the Five Punishments was frequently changed by rulers.⁷⁵ Pre-sixteenth century B.C.E., the primitive Han tribes, the dominant nationality in China, exercised two forms of punishments: stick-beating and exile.⁷⁶ Stick-beating was utilized as a means to educate criminals, while exile meant the expulsion of criminals from the tribe.⁷⁷ Later, the Five Punishments from the Miao, a minority nationality in China, were introduced. The specific punishments included tattooing, cutting off a person's nose, severing a

Zu Shen Pan Zhi Du Chu Tan (中国古代社会宗族审判制度初探), 45 J. HUAZHONG NORMAL U. HUMAN. & SOC. SCI. 98-101 (2006); Zheng Ding & Ma Jianxing (郑定 & 马建兴), *Lun Zong Zu Zhi Du Yu Zhong Guo Chuan Tong Fa Lu Wen Hua* (论宗族制度与中国传统法律文化), 32 JURIST 12-19 (2002).

⁶⁸ The magistrates administered all aspects of government on behalf of the emperor, including holding a court. ZHANG, *supra* note 60, at 178.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Gao Qicai & Luo Chang, *supra* note 66, at 85; SYBILLE VAN DER SPRENKEL, LEGAL INSTITUTIONS IN MANCHU CHINA: A SOCIOLOGICAL ANALYSIS (Athlone Press 1966).

⁷³ HENRY S. MAINE, ANCIENT LAW 92 (Henry Holt & Co. 1906).

⁷⁴ CAI SHUHENG (蔡枢衡), ZHONG GUO XING FA SHI (中国刑法史) 175 (China's Legal Sys. Press 2005).

⁷⁵ VAN DER SPRENKEL, *supra* note 72, at 3.

⁷⁶ CAI SHUHENG, *supra* note 74, at 175.

⁷⁷ *Id.*

person's feet, castration, and the death penalty (mo, yi, fei, gong, da pi; 墨, 劓, 剕, 宫, 大辟).⁷⁸ The Chinese character of 'xing' (刑), which means "punishments" in modern-day Chinese, meant corporal punishment and capital punishment in ancient Chinese.⁷⁹ Exile, criminal servitude, and fines were enforced forms of punishment, but were not regarded as types of 'xing'. In ancient times, codified punishments were limited to irreversible penalties.⁸⁰ With the exception of tattooing as an imposition of shame for offenders, the primary purposes of other forms of punishment were deterrence and incapacitation.

Irreversible punishments violated Confucian doctrine. Thus, Emperor Wen of the West Han Dynasty, who ruled China from 180 B.C.E. to 157 B.C.E., abolished tattooing, cutting off noses, and severing feet, and introduced stick beating as an alternative.⁸¹ He justified his reforms with Confucian doctrine.⁸² In his edict, he said that, in ancient times, the ruler merely marked a criminal's clothing. Doing so would bring public shame and would, in turn, deter them from committing future crimes.⁸³ Moreover, Emperor Wen argued that, despite the harsh punishments, crime was still a pervasive issue. The emperor believed that the increasing crime rate was due to his own failure to encourage moral education. Moral education was applied before punishment, but moral education failed. He therefore promoted moral values and social reforms, and gave criminals the opportunity to reintegrate into society.⁸⁴

The more severe corporal punishments were denounced for economic reasons, as they often crippled able-bodied agricultural workers. However, in the Chinese context, stick-beating was meant to correct errant behavior and educate wrongdoers.⁸⁵ The Chinese character for "beating with the smaller stick" has the same pronunciation as "shame." According to Confucianism, if a person was perceived as having no sense of shame, then that person might be considered beyond moral reach, and thus was even feared by the devil.⁸⁶ Stick-beating was supposed to shame criminals, and the sense of shame would encourage criminals to repent. Furthermore, the sense of repentance would prevent criminals from committing further

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ CAI SHUHENG, *supra* note 74, at 175.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ SIMA GUANG, *supra* note 55, at 215.

⁸⁵ CAI SHUHENG, *supra* note 74, at 175.

⁸⁶ Jin Li, et al., *The Organization of Chinese Shame Concepts?*, 18 COGNITION & EMOTION 27-34 (2004).

crime.⁸⁷ This causal relation between stick-beating and moral education was embodied in the Chinese penal code. The Tang Code, which was promulgated in 653 B.C.E., was the earliest surviving code from which one can view an accurate picture of the range of laws in imperial China.⁸⁸ Almost every penal code in subsequent dynasties copied the Tang Code, albeit with slight changes.⁸⁹ In the Tang Code, chi (笞) means “to beat,” and also means chi (耻) or “to shame.” If a person commits a minor offense, then the law must discipline that person. Therefore, a beating is used to shame a criminal. The Tang Code quotes a statement of Hanshu 汉书: “Beating is employed in teaching persons to behave morally.”⁹⁰ Emperor Wen’s reforms were remarkable because moral education was one of the established objectives of the criminal law system.

In the Tang Code, penal servitude was also meant to shame criminals.⁹¹ The rationale for imposing penal servitude on criminals and shaming them and their families were also codified. Penal servitude meant slavery (nu, 奴), and slavery was considered very shameful.⁹² The sense of shame was supposed to encourage criminals to repent and correct their behavior. Furthermore, the criminal’s repentance would prevent the shamed criminal from committing future crimes.⁹³ Exile and the death penalty were meant to penalize criminals deemed to have no sense of shame.⁹⁴ The Tang Code explained that, a sentence of strangulation or decapitation was the most extreme of punishments. Embracing Confucian leniency, emperors often could not bear to inflict too many death penalties, and thus reduced the penalties from execution to exile.⁹⁵

After the Sui Dynasty (581 B.C.E. - 618 B.C.E.), the Five Punishments became “beating with a small stick, beating with a large stick, penal servitude, life exile, and death penalty” (chi, zhang, tu, liu, si; 笞, 杖, 徒, 流, 死). Since the Tang Dynasty (618-907), the content of the Five Punishments basically remained the same. Comparing the Great Qing Code, the last code in imperial China, with the Tang Code, the Five

⁸⁷ *Id.*

⁸⁸ ZHANGSUN WUJI (長孫無忌), TANG LU SHU YI (唐律疏議) 69 (Zhonghua Book Company 1983).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

Punishments are almost identical.⁹⁶ There are five types of recognized punishments, prescribed according to a scale of increasing intensity.

The penal code was the second moral boundary, and it handled the serious crimes that could not be resolved by the first moral boundary, i.e., the clan code. Yet, the punishable crimes in the clan codes and the penal code overlapped. The old texts of the clan codes inferred that the overlaps were mainly about theft, fraud, gambling, drug abuse, adultery, and other petty offenses within the clans. The punishments at the low end of the punishment spectrum in the national code, including stick-beating and penal servitude, were also incorporated into the clan codes. Since most petty offenses were handled internally amongst the clans, formal punishments primarily dealt with very serious crimes and were relatively harsh.

4. Dual Legal System in the Imperial Era

The clan codes and penal code formed the dual legal system in Imperial China.⁹⁷ The principles of the penal code and the clan codes were nearly the same.⁹⁸ The clan codes were based on the penal code and patriarchal custom. Like the penal code, the clan codes were also the embodiment of Confucian rites. The punishable offenses in the clan codes and penal code overlapped. Because the clan played the primary role of social control, the overlaps between the clan codes and penal code should only be the minor offenses within the clans. Indeed, the old texts of the clan codes show that the overlaps were mainly about minor offenses such as theft, fraud, gambling, drug problems, and adultery. The minor punishments in the penal code, including stick-beating and penal servitude, were also introduced into the clan codes. If a clan found one of its members guilty of a serious and indictable offense, a charge against this member would also be brought before the magistrate, in addition to the imposed clan.⁹⁹ Derk Bodde summarized the longstanding custom of unofficial jurisdiction as “extra-legal organs and procedures, then, were what the Chinese everyman normally looked to for guidance and sanction, rather than to the formal judicial system per se. Involvement in the latter was popularly regarded as a road to disaster and therefore to be avoided at all cost.”¹⁰⁰

⁹⁶ *Id.*

⁹⁷ QU, *supra* note 22.

⁹⁸ *Id.*

⁹⁹ Gao Qicai & Luo Chang, *supra* note 66, at 210; VAN DER SPENKEL, *supra* note 72, at 40.

¹⁰⁰ Derek Bodde, *Basic Concepts of Chinese Law: The Genesis and Evolution of Legal Thought in traditional China*, 107 PROC. AMERICAN PHIL. SOC'Y 375 (1963).

5. Disproportionate Clan Punishments in the Imperial Era

Despite the virtues of clan self-regulation, the power of the clan leaders to punish its members was generally excessive and unchecked by the imperial government.¹⁰¹ Emperor Daoguang, who ruled China from 1821 to 1850, ordered that “any affair within a clan, whether serious or trivial, shall be judged by the patriarch.”¹⁰² Thus, the imperial government did not limit the severity of clan punishments. Punishments received by clan members were not proportionate with the severity of the crimes committed.¹⁰³ Members were punished with stick-beating for either cutting a tree branch near an ancestral grave or cursing their parents. Likewise, members were punished with penal servitude for misbehaving while offering sacrifices to their ancestors. In extreme cases, members were executed for adultery, theft, or mining coal near an ancestral grave.¹⁰⁴ Moreover, wrongdoers punished within the clan rarely had an opportunity to appeal to official magistrates.¹⁰⁵ As such, clan codes imposed a duty on its members to avoid quarrels, often forbade members from suing in official courts, and forced them to plead their cases to their clan leaders. If the clan members violated this stipulation, they were punished. For example, according to the clan code of Pi Ling Liu Shi 毗陵刘氏 in 1900, those who were involved in lawsuits without the clan leaders’ permission were punished with ten slaps to the face.¹⁰⁶ Thus in many cases, the clan punishments could be harsher and more barbaric than the criminal punishments prescribed by the penal code.

6. Heavy Penaltyism of Formal Punishments During the Imperial Era

The principle of heavy penaltyism was a Legalist concept. However, harsh penalties also fit within Confucian doctrine.¹⁰⁷ According to Confucius, punishments should pertain to rites, and the severity of punishment should be proportionate to the seriousness of the crime: “When rites do not flourish, punishments will not be exactly right; when punishments do not be exactly right, the populace will be puzzled about how to behave acceptably.”¹⁰⁸ Although the proportionality principle was a

¹⁰¹ ZHANG, *supra* note 60, at 175.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Songsong Tu, *On the Types and Implementation of the Traditional Clan Punishments*, GOUZHOU NAT'LITY U. 98 (2013); Ruili Wang, *Studies on Gens Criminal Law in Ancient China*, 25 J. FOSHAN U. 23 (Soc. Science Edition) (2007).

¹⁰⁵ ZHANG, *supra* note 60, at 175.

¹⁰⁶ Songsong Tu, *supra* note 104.

¹⁰⁷ ZHANG, *supra* note 60, at 175.

¹⁰⁸ CONFUCIUS, LUN YU, IN THE COLLECTION OF CHINESE CLASSICS 29 (Bojun Yang ed. 1980) (1996).

central tenet, Confucius accepted that a deteriorating public order was an exception to the proportionality principle. The severity of enforced punishments was adjusted according to the state of public order. If there was a high crime rate, punishments were relatively harsh.¹⁰⁹

Later Confucians and neo-Confucians rarely discussed the proportionality of punishment and emphasized the role of punishment in crime prevention more so than Confucius. Their penal philosophy reflected “the confucianization of law,” which reflected both a legalist and Confucian spirit. Neo-Confucians still stressed the value of moral education, but moral education alone was insufficient to prevent crime. In comparison, punishments were a more effective tool. Zhu Xi, a well-known neo-Confucian scholar, even advocated heavy penaltyism to deter crime: “laws should be strict, in essence, with lenient rules as supplements.”¹¹⁰

The heavy penaltyism with supplementary moral education proposed by the neo-Confucians was tailored to the rulers in imperial China. Rulers surrounded themselves with the aura of Confucian benevolence, while in actuality embracing legalist principles.¹¹¹ Most rulers in Imperial China used deteriorating public order as a justification to impose more severe punishments than the penal code prescribed. Furthermore, the immediate effects of severe punishments on public order were usually emphasized. The alleged effectiveness influenced the vast majority subliminally. As a result, the overarching heavy penaltyism was not only embraced by the authorities, but also supported by a high proportion of the population. Therefore, most Chinese scholars insist that the penal system was virtually legalism with a Confucian façade.¹¹²

7. Normalization of Illegal Punishments

In Imperial law, only the Five Punishments were enforceable penalties. Imperial China, however, was a society ruled by man, and various cruel punishments were openly practiced. Corporal punishments were gradually abolished in the periods of the Wei, Jin, Northern, and

¹⁰⁹ Ma Kechang (马克昌), *Kuan Yan Xiang Ji Xing Shi Zheng Ce De Yan Jin* (宽严相济刑事政策的演进), 59 JURIST 37 (2008); Wang Tongqing & Wang Chunli, *Lun Kuan Yan Xiang Ji De Xing Shi Zheng Ce Zai Gou Jian She Hui Zhu Yi He Xie She Hui Zhong De Zuo Yong* (论宽严相济的刑事政策在构建社会主义和谐社会中的作用) [On The Criminal Policy Of Temper Justice With Mercy And Its Function In Construction Of Socialist Harmonious Society], 64 L. SCI. MAG. 86 (2008).

¹¹⁰ Zhang Jing, *supra* note 18, at 8, 175.

¹¹¹ ZHANG, *supra* note 60, at 175.

¹¹² Nicholas Calcina Howson, *Ru Jia Hua Zhi Si?* (儒家化之死?), ORIENTAL MORNING POST (2008), <http://news.guoxue.com/article.php?articleid=18601>; Victoria Tin-Bor Hui, *How China Was Ruled*, THE AMERICAN INTEREST (Mar. 1, 2008), <https://www.the-american-interest.com/2008/03/01/how-china-was-ruled/>.

Southern Dynasties (220-589). Likewise, the death penalty was restricted to strangulation and decapitation during the Tang Dynasty. Despite these reforms, a variety of cruel punishments, such as stick-beating, tattooing, dismemberment (ling chi, 凌迟), exposure of the head (xiao shou, 梟首), and desecration of the corpse (lu shi, 戮尸) were unwritten penalties. In the Ming Dynasty (1368-1644) and Qing Dynasty, dismemberment and desecration of the corpse were incorporated into the law to intimidate potential criminals and to stabilize the imperial government.¹¹³

Illegal punishments in Imperial China were illustrated by paintings in Europe in the nineteenth century. Europeans considered these punishments horrible and barbaric.¹¹⁴ There were two collections; one was titled “The Punishments of China,”¹¹⁵ and the other was titled “The Criminal Punishments of the Chinese.”¹¹⁶ During the Enlightenment, Confucian principles were introduced in Europe. Enlightenment thinkers such as Leibniz, Voltaire, Diefrich, and Feuerbach highly respected China’s imperial regime.¹¹⁷ However, since the nineteenth century, European assessment of China’s imperial regime has been negative.¹¹⁸ The Enlightenment scholars George Mason and J. Dadley were confused by the contradictions between criminal law and its enforcement in Imperial China: “This instance of justice, moderation, and wisdom, in the Laws of China, receives an unfavorable contrast in the decree, which pronounces the wearing of a particular ornament to be capital crime; and in the custom of attending to the fallacious information, extorted by the Rack.”¹¹⁹ George Cruikshank even concluded that the Chinese were Barbarians. He said: “It was essential to put the Chinese down.”¹²⁰

These brutal punishments were mainly inflicted on criminals who perpetrated “the Ten Abominations” (shi’ e, 十恶).¹²¹ The Ten

¹¹³ ZHANG, *supra* note 60, at 175.

¹¹⁴ GEORGE HENRY MASON & JOHN. DADLEY, *THE PUNISHMENTS OF CHINA* 1-10 (William Miller 1801); GEORGE CRUIKSHANK & PERCY CRUIKSHANK, *THE CRIMINAL PUNISHMENTS OF THE CHINESE* 2 (Darton and Company 1858).

¹¹⁵ MASON & DADLEY, *supra* note 114, at 2.

¹¹⁶ CRUIKSHANK & CRUIKSHANK, *supra* note 114, at 4-5.

¹¹⁷ ZHANG, *supra* note 60, at 175.

¹¹⁸ *Id.*

¹¹⁹ MASON & DADLEY, *supra* note 114, at 4-5.

¹²⁰ CRUIKSHANK & CRUIKSHANK, *supra* note 114, at 4-5.

¹²¹ The ten abominations first appeared in legislation in Beiqi Dynasty (550-577), then were slightly revised in Sui Dynasty. The substance of the ten abominations had been remained the same since then. They were plotting rebellion (mou fan, 谋反), plotting sedition (mou da ni, 谋大逆), plotting treason (mou pan, 谋叛), contumacy (e’ ni, 恶逆), depravity (bu dao, 不道), irreverence (da bu jing, 大不敬), lack of filial piety (bu xiao, 不孝), discord (bu mu, 不睦), unrighteousness (bu yi, 不义) and incest (nei

Abominations were the most serious violations of the Confucian rites. According to Confucius, these crimes were more serious than homicide.¹²² Imperial rules applied legalist principles by imposing harsh punishments for the most minor of violations against the Confucian rites. For example, gossiping about the royal family was punished very severely.

The emperor tended to impose more severe penalties on criminals who committed the ten abominations than was allowable by law. In Imperial China, the emperor's authority was not constrained. Imperial decrees regarding crime and punishment supplemented the penal code, but in actuality, played a more prominent role.¹²³ "The emperor's imperial orders could not only overtop the law, but also take the place of some stipulations of the law, and could be added up as the new stipulations of the law."¹²⁴ Because the emperor also possessed supreme judicial authority, imperial decrees were subject to change at the emperor's discretion.¹²⁵ Accordingly, the abolished harsh punishments in were repeatedly enforced. As a result, the illegal punishments were standard practice.¹²⁶

B. *Dual System in the Late Qing Dynasty (1901-1911) and the Republic Era (1912-1949)*

Since the New Deal of the late Qing Dynasty, a period of political reform, Chinese authorities have made numerous efforts to incorporate Western systems of punishment.¹²⁷ Modeled after the civil law tradition,¹²⁸

luan, 内乱).

¹²² CONFUCIUS, LUN YU, IN THE COLLECTION OF CHINESE CLASSICS 6 (Bojun Yang ed. 1980) (1996).

¹²³ ZHANG, *supra* note 60, at 175.

¹²⁴ Zhang Jing, *supra* note 18, at 106-12.

¹²⁵ ZHANG, *supra* note 60, at 175.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ In the late Qing Dynasty and the Republic Era, the system and contents were taken from the continental legal system. According to Jinfan Zhang, there were three main reasons. See ZHANG, *supra* note 60, at 569-571. First, in traditional China, there were concepts of nationalism similar to that in European countries. Nationalism characterized by the monopoly of legislature by the state. Second, there was the tradition of codified law in both traditional China and countries with the civil law tradition. Third, in modern China, judicial officials lacked familiarity with the common law. Although the central and local governments established modern legal schools, it was impossible to train many highly qualified judicial officials who could make use of legal precedents in a very short time and thus, China did not have the tradition of legal precedents. Therefore, comparatively speaking, it was more feasible to adopt the continental legal systems. Finally, the success of the Japanese Meiji Reformation had played an enlightening role for the transplantation of continental legal systems in modern China, because there were not only similar origins of legal culture between China and Japan, there were also many

the authorities during the late Qing Dynasty and the Republic Era all made their own Six Codes (liu fa, 六法),¹²⁹ which included the Constitution, the Civil Law, the Criminal Law, the Civil Procedure Law, the Criminal Procedure Law, and the Administrative Law.¹³⁰ In the New Qing Criminal Law,¹³¹ the Provisional Criminal Law,¹³² and the Criminal Law of the Republic of China,¹³³ criminal penalties were divided into principal punishments and supplementary punishments.¹³⁴ Principal punishments were the death penalty, life imprisonment, fixed-term imprisonment, criminal detention (ju yi, 拘役),¹³⁵ and fines. Deprivation of political rights and confiscation of property were supplementary punishments.¹³⁶ The primary reason for legal reform was extraterritoriality. Several Western countries promised to cede extraterritorial rights if the Qing government modernized its legal system.¹³⁷ Although the extraterritorial

similarities between the national situation of Japan before Meiji Reform and that of China before the modern transition of legal system. Hence, the success of Japanese Meiji Reform had brought China great enlightenment.

¹²⁹ The Six Codes refer to the six main legal codes that make up the main body of law in the late Qing Dynasty and the Republic Era, and the main body of law in contemporary Japan, South Korea, and Taiwan.

¹³⁰ CAI SHUHENG, *supra* note 74, at 36-37.

¹³¹ The draft of the New Qing Penal Law was promulgated in 1907 and the final version was never officially issued. *Id.*

¹³² The Provisional Criminal Law was promulgated in 1912. *Id.*

¹³³ The Criminal Law of the Republic of China was promulgated in 1928 and amended in 1935. *Id.*

¹³⁴ *Id.*

¹³⁵ Criminal detention is a form of short-term imprisonment in China. In the New Qing Penal Law, it can range from one day to a month. In the current criminal code in Taiwan, which is based on the Criminal Law of the Republic of China, it is from one day to 60 days. In accordance with the current Chinese criminal law, criminals under criminal detention are incarcerated, but they may go home for one to two days each month, and an appropriate remuneration may be given to those who participate in labor while incarcerated. Criminals sentenced to fixed-term imprisonment do not have these privileges. Sentencing can range from one month to six months, while fixed-term imprisonment can range from six months to 15 years. Because the sentence term of criminal detention is relatively short, detained criminals held in detention houses rather than in prison. For a criminal who commits several crimes before a judgment is pronounced, the term of criminal detention may not exceed the maximum of one year.

¹³⁶ Jérôme Bourgon, *Abolishing 'Cruel Punishments': A Reappraisal Of The Chinese Roots And Long-Term Efficiency Of The Xinzheng Legal Reforms*, 37 MODERN ASIAN STUDIES 851 (2003); Lai Zaoxing (赖早兴), *Shen Jianben Yu Qing Mo Xing Fa Qing Huan Hua* (沈家本与清末刑罚轻缓化), CHINA LAW INFO (2004), <http://article.chinalawinfo.com/ArticleFullText.aspx?ArticleId=67095>.

¹³⁷ ZHANG, *supra* note 60, at 175.

rights of western countries were not completely abolished until 1946, incorporation of western legal systems resulted in legal modernization in China.¹³⁸

Legal reform did not change the coexistence of formal punishments and clan punishments. Judicial archives of the Republic of China reveal that prosecutors explicitly allowed clan leaders, *baozhang* 保长 or *jiazhang* 甲长¹³⁹ to handle minor criminal cases.¹⁴⁰ Moreover, prosecutors suggested that litigants first look to their clan leaders, *baozhang* or *jiazhang*, to settle their disputes.¹⁴¹ If the clan leader could resolve the issue, *baozhang* or *jiazhang*, the Procuratorate would not litigate the matter.¹⁴²

1. More Formalized Informal Punishments During the Republic Era

Although clan punishments were still heavily utilized, the clan leaders, *baozhang* or *jiazhang*, in the Republic Era held less authority to penalize criminal offenses. For example, informal punishments were subject to rigid judicial scrutiny.¹⁴³ Furthermore, clan punishments in the Republic Era were more lenient than in the Imperial Era. Severe punishments like penal servitude and execution were no longer enforced. Clan punishments were largely payment of fines, stick-beating, and expulsion from the clan. Additionally, clan codes specified more cases that required magistrate adjudication. These cases included different types of misdemeanors, such as abuse or abandoning a family member, theft, fraud, tax evasion, embezzling clan property, gambling, and drug use. In general, clan punishments were weakened by the legal reforms.¹⁴⁴

¹³⁸ *Id.*

¹³⁹ The *baojia* 保甲 system was a community-based system of legal enforcement and civil control. This system was invented by Wang Anshi, who was a prime minister in the Song dynasty from 1070 to 1076. In the early days of the Republic Era, this system was terminated. Later in the Republic Era, the *baojia* system was reintroduced. Generally, ten homes constitute a *jia* 甲 and ten *jias* constitute a *bao* 保. CAI SHUHENG, *supra* note 74, at 175.

¹⁴⁰ CAI SHUHENG, *supra* note 74, at 79-81.

¹⁴¹ *Id.*

¹⁴² Hu Ming & Zhang Jian (胡铭 & 张健), *Zhuan Xing Yu Cheng Xu: Min Guo Shi Qi De Xing Shi He Jie* (转型与承续：民国时期的刑事和解), 44 J. ZHEJING U. HUMAN. & SOC. SOC'Y 54 (2014).

¹⁴³ ZHANG, *supra* note 60, at 175.

¹⁴⁴ Liu Li (刘丽), *Shi Wei Zhong De Geng Sheng: Min Guo Shi Qi Zong Zu Fa Yan Jiu* (式微中的更生：民国时期宗族法研究), CENTRAL CHINA NORMAL U. 185 (2008).

2. Continuation and Transition of Heavy Penaltyism of Formal Punishments in the Late Qing Dynasty and the Republic Era

At the beginning of the twentieth century, the harsh image of formal punishments still held sway. Due to the legal reforms of the late Qing Dynasty, some scholars and practitioners endeavored to make the Chinese criminal justice system more lenient and humane.¹⁴⁵ Many Western concepts of criminal justice were introduced into China, such as the principle of proportionality and the principle of penal parsimony.¹⁴⁶ As discussed above, the New Qing Penal Law and the criminal codes in the Republic Era were modeled after the civil law tradition. For example, suspended sentences were first introduced in China's criminal code in the New Qing Penal Law.¹⁴⁷ Suspended sentences were meant to help rehabilitate criminals.¹⁴⁸

However, the implementation of the new penal system faced a number of issues. The majority of practitioners in the late Qing Dynasty and the early Republic Era doubted the practicability of Western rehabilitative ideas.¹⁴⁹ Notably, an officer named Feng Xu argued that many in China could not widely accept the Western understanding of rehabilitation. Although the primary purposes of punishment were retribution and deterrence, the principle of rehabilitation traditionally was also embodied in the penal systems. For example, criminals who were the sole breadwinners in their families could stay at home and care for their parents and grandparents.¹⁵⁰ Many people felt that most criminals did not deserve rehabilitation.¹⁵¹ In the early Republic Era, authorities tried to reintroduce stick-beating into the penal system. In 1913, the Minister of Justice, Liang Qichao, who was known as an enlightened reformer during the late Qing Dynasty and the early Republic Era, proposed a judicial reform program, in which he advocated resuming stick-beating as an alternative to short-term imprisonment to prevent overcrowded prisons.¹⁵² The judicial reform program was passed in 1914, and as a result, stick-beating was an alternative to short-term imprisonment. Later, the Minister of Justice published a regulation with stick-beating as an alternative to other punishments, which included fixed-term imprisonment less than

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Influenced by the civil law tradition at that time, the suspended sentence was the suspension of the length, not imposition of the sentence. *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

three months, criminal detention, and penalties under one hundred yuan for male criminals between 16 and 60 years old.¹⁵³ The only exception to the regulation was that if the criminal was an official or a retired official. The Ministry of Justice promulgated another regulation on exile as an alternative to imprisonment.¹⁵⁴ This regulation prescribed that criminals who were sentenced to fixed-term imprisonment more than five years or life imprisonment were subject to exile to one of the more undeveloped provinces.¹⁵⁵ Despite the fact that both of the regulations were overturned in 1916, the stick-beating alternative was still used between 1916 and 1919.¹⁵⁶ Due to warfare and revolution from 1912 to 1927, local governments changed frequently. Many local courts and procuratorates were taken over by local magistrates.¹⁵⁷

In 1928, the Nationalist Party (*guo min dang*, 国民党)¹⁵⁸ unified China and ended the tangled warfare among the various warlords. Thus, the government could apply uniform laws and regulations nationwide. Between 1928 and 1937, the Nationalist Party reformed the criminal justice system. The Criminal Law of the Republic of China was promulgated in 1928, and it referenced the New Qing Penal Law and the Provisional Criminal Law and its amendments, as well as the criminal codes of many Civil Law countries. It was then revised in 1935 to address problems in judicial and penal practice from 1931 to 1935. The number of death penalties was reduced, prisoner rehabilitation increased, and the requirements for suspended sentences and parole were relaxed.¹⁵⁹ Practically speaking, war prevented the full implementation of these reforms. The Nationalist Party unified China in name, but in fact, civil war between the nationalist party and the Community party continued.¹⁶⁰ At that time, authorities were still deeply exposed to the influence of neo-Confucianism.¹⁶¹ They were still inclined to instruct and intervene in the

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Jia Jian (贾健), *Lun Wo Guo Huan Xing Zhi Du Xian Dai Hua De "Chuan Tong Zhi Wei"* (论我国缓刑制度现代化的“传统之维”), 37 WESTERN L. REV. 15 (2014); Yang Hui, *Bei Yang Zheng Fu Shi Qu Yi Zuo Tiao Li Ping Jie* (北洋政府时期“易答条例”评介), 86 L. SCI. MAG. 34 (1995).

¹⁵⁷ Jia Jian, *supra* note 156; Yang Hui, *supra* note 156.

¹⁵⁸ The movement of the Chinese Nationalist Party helped overthrow the Qing Dynasty in 1912 and was the ruling party in China from 1927 until it had to retreat to Taiwan in 1949 after being defeated by the CCP during the Chinese Civil War.

¹⁵⁹ ZHANG, *supra* note 60, at 175.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

courts, and push them to impose harsh penalties in some cases to prevent the deterioration of public order. The deep-seated and widely used informal punishment system prevented the enforcement of minor, formal penalties. Prior to 1935, judges rarely allowed suspended sentences.¹⁶² When the revised criminal law was published in 1935, suspended sentences were actually put into practice.¹⁶³ Between 1935 and 1937, the ratio of suspended sentences rose to about 6%,¹⁶⁴ which represented the highest ratio in the Republic Era. Subsequently, amidst the chaotic war with Japan (1937 - 1945) and the civil war between the Nationalist Party and the Communist Party (1945-1949), the criminal justice system was greatly hindered by warfare.¹⁶⁵ During wartime, the government issued several ordinances.¹⁶⁶ Punishments under these ordinances were harsher than those under the Criminal Law, especially for criminals connected to war.¹⁶⁷

C. Community Penalties and RTL in the Mao Era

1. Nature of Crime in Socialist China

China's approach to crime and punishment in the Mao Era differed significantly from prior traditions.¹⁶⁸ The clan punishment system rapidly unraveled, and laws made by the Nationalist Party were abolished by the socialist revolutions.¹⁶⁹ The concept of crime in the People's Republic of

¹⁶² Georges Padoux, *Ge Guo Xing Fa Zhong Huan Xing Zhi Du Cai Yong Zhi Qu Shi*, 34 ZHONGHUA L. SCI. MAG. 98 (1932).

¹⁶³ Liu Yuewu (柳岳武), *Nan Jing Guo Min Zheng Fu Jia Shi Zhi Du Kao Lun (1927-1937)* (南京国民政府假释制度考论(1927~1937)), 65 J. HIST. SCI. 86-91 (2009); Xuan Gang (宣刚), *Zhu Ti Ren Tong: Lun Wo Guo Huan Xing Zhi Du De You Xiao Xing Chong Gou* (主体认同: 论我国缓刑制度的有效性重构), 43 J. GANSU INST. POL. SCI. & L. 108 (2014).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ These ordinances include 'Cheng zhi han jian tiao li', 'gong chan dang wen ti chu zhi ban fa' 'fang zhi yi dang huo dong ban fa', 'fei chang shi qi wei chi zhi an jin ji ban fa', 'fang hai guo jia zong dong yuan cheng fa zan xing tiao li' 'cheng zhi tan wu tiao li', 'fang hai bing yi zhi zui tiao li', 'cheng zhi dao fei tiao li', 'zhan shi jiao tong she bei fang hu tiao li', 'wei hui she hui zhi an lin shi ban fa', 'hou fang gong chan dang chu zhi ban fa', 'kan luan shi ji wei hu guo jia jin ji zhi zui fa', 'jie yan fa', 'wei fan liang shi guan li zhi zui tiao li', 'cheng zi pan luan tiao li', and 'cheng zhi zou si tiao li'. *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ D. C. Clarke & J. V. Feinerman, *Antagonistic Contradictions: Criminal Law and Human Rights in China*, 141 CHINA QUARTERLY 135 (1995); Dai Yuzhong & Liu Mingxiang (戴玉忠 & 刘明祥), *He Xie She Hui Yu Jing Xia Xing Fa Ji Zhi De Xie Tiao* (和谐社会语境下刑法机制的协调), 46 THE PROCURATORATE PRESS OF CHINA 28 (2008).

¹⁶⁹ *Id.*

China (“PRC”) was founded on Marx’s contradiction and antagonism theories.¹⁷⁰ The contradiction and antagonism theories are an essential part of dialectical materialism (i.e. the official philosophy of socialist countries).¹⁷¹

Under dialectical materialism, contradiction is the unity of opposites, and it is universal and absolute. The interdependence of the contradictory aspects present in all things, and the struggle between these aspects determine the life of all things and push their development forward. Everything contains contradiction, and without contradiction, nothing would exist. For example, in mathematics, there is + and -; in mechanics, there is action and reaction; in physics, there is positive and negative electricity; and in chemistry, there is the combination and dissociation of atoms.¹⁷² Mao believed that the opposition and struggle between different ideas occurred constantly within the Communist Party. If there were no contradictions in the Party and no ideological struggles to resolve them, the Party would come to an end.¹⁷³

Antagonism and contradiction are by no means the same. Antagonism is one, but not the only, form of contradiction. When the contradiction between two opposites develops to a certain extent, it assumes the form of antagonism. For example, a bomb is a single entity in which opposites coexist within it without exploding. However, when ignited, the opposites turn into antagonistic contradictions, and the explosion occurs. As Mao explained, if contradictions between correct and incorrect thinking within the Party do not manifest themselves in an antagonistic form, and if those who have committed mistakes can correct them, the incorrect thinking and behaviors will not develop into antagonistic contradictions. Therefore, the Party must, on the one hand, wage a serious struggle against erroneous thinking and behaviors, and on the other hand, give wrongdoers ample opportunity to amend their ways. However, if the people who have committed wrongs persist in their behavior, non-antagonistic contradictions may develop into antagonistic contradictions.¹⁷⁴

In a socialist society, the masses (qun zhong, 群众)¹⁷⁵ and their enemies are the two opposites in an antagonistic contradiction. Mao

¹⁷⁰ *Id.*

¹⁷¹ Clarke & Feinerman, *supra* note 168; Dai Yuzhong & Liu Mingxiang, *supra* note 168.

¹⁷² Zedong Mao, *On Contradiction*, 1 SELECTED WORKS OF MAO ZEDONG 271 (1937).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ The masses are virtually synonymous with the people (ren min, 人民). In a socialist society, the masses form an important political concept.

asserted that the antagonistic contradiction between the bourgeois and proletarian class had almost been resolved through peaceful socialist revolution in 1956. The revolution was peaceful because only the reactionaries from the overthrown bourgeois class were punished, but the skills, talents, and cadres from the overthrown bourgeois class were re-educated, remolded, and utilized.¹⁷⁶ Then, he further elaborated the two principal social contradictions in the new era in his “On the Correct Handling of Contradictions among the People” in 1957. According to Mao, there were two types of contradictions facing China. One was the contradictions between the masses and their enemies, and the other was the contradictions within individuals. They were contradictions of a completely different nature. The contradictions between the masses and their enemies were antagonistic. Within the masses, contradictions among the proletariat were non-antagonistic. Thus, dictatorial methods should be used to resolve the contradictions between the masses and their enemies.¹⁷⁷

In a socialist society, Mao regarded criminals as enemies because Marx and Engels stated that crime was the struggle of the isolated individual against the predominant relations between state and power.¹⁷⁸ The dominant will of the state is reflected in its laws and is opposed to one’s own will. One’s own will and the state are considered powers that are mortal enemies, between whom eternal peace is impossible. Thus, the will of the criminal and the dominant will of the state are two opposites of an antagonistic contradiction. Therefore, to protect social order and the people’s interest, “dictatorship must be implemented for the larceners, the swindlers, the murders, the arsonists, the rogue groups, and others who seriously destroy social order.”¹⁷⁹

In Mao’s perspective, criminals represented the antithesis of the vast majority.¹⁸⁰ They should not be forgiven, and they deserved harsh

¹⁷⁶ Zedong Mao, *On The People’s Democratic Dictatorship*, 4 SELECTED WORKS OF MAO ZEDONG 376 (1949); Mao Zedong (毛泽东), *Guan Yu Zheng Que Chu Li Ren Min Nei Bu Mao Dun De Wen Ti* (关于正确处理人民内部矛盾的问题), MARXISTS (2016), <https://www.marxists.org/chinese/maozedong/marxist.org-chinese-mao-19570227.htm>.

¹⁷⁷ Zedong Mao, *On The People’s Democratic Dictatorship*, 4 SELECTED WORKS OF MAO ZEDONG 376 (1949); Mao Zedong (毛泽东), *Guan Yu Zheng Que Chu Li Ren Min Nei Bu Mao Dun De Wen Ti* (关于正确处理人民内部矛盾的问题), MARXISTS (2016), <https://www.marxists.org/chinese/maozedong/marxist.org-chinese-mao-19570227.htm>.

¹⁷⁸ KARL MARX, *THE GERMAN IDEOLOGY* 3 (Renmin Press 1932).

¹⁷⁹ Mao Zedong (毛泽东), *Guan Yu Zheng Que Chu Li Ren Min Nei Bu Mao Dun De Wen Ti* (关于正确处理人民内部矛盾的问题), MARXISTS (2016), <https://www.marxists.org/chinese/maozedong/marxist.org-chinese-mao-19570227.htm>.

¹⁸⁰ *Id.*

punishments. Accordingly, the masses would avoid further harm, and maintain a good existence. These socialist principles reinforced the need for harsh criminal penalties. The proportionality principle was no longer strictly observed, and criminals were mainly punished by reform through labor (*lao dong gao zao*, 劳动改造).

According to the Regulations on Reform Through Labor, one of the tools of the people's democratic dictatorship was the Reform Through Labor agencies. The Reform Through Labor agencies were in charge of punishing counterrevolutionaries and other criminals, and reforming them into members of the masses through forced labor.¹⁸¹ The forced labor was conducted both within and outside prison. In the Mao era, only criminals who perpetrated very serious crimes were put into prisons.¹⁸² The prisoners were kept under tight guard and were imprisoned individually. The majority of criminals were organized and supervised by Disciplining Teams (*lao dong gai zao guan jiao dui*, 劳动改造管教队) to do collective labor in production teams (*sheng chan dui*, 生产队),¹⁸³ but their freedoms were strictly restricted. In socialist orthodoxy, collective labor has a double meaning: on the one hand, it is meant to punish criminals, and on the other hand, it is meant to reform them. The reform process takes place through either collective labor or political and ideological education. Mao regarded labor, especially manual labor, as a matter of right and honor. This principle was written into China's Constitution.¹⁸⁴ Through collective manual labor, the masses could have an ethos of socialist revolution. As such, officials would not be influenced by bureaucracy, intellectuals would do away with petty, bourgeois individualism, and criminals would be accustomed to hard work and socialist ethical concepts.¹⁸⁵

2. Community Penalties in the Mao Era

Criminals who committed minor offenses were sentenced to either suspended sentences or public surveillance ("PS") (*guan zhi*, 管制), subject

¹⁸¹ *Lao Dong Gai Zao Tiao Li* (劳动改造条例) [Regulations for Reform Through Labor] arts. 1 & 2 (approved by the State Council, Aug. 26, 1954, effective Sept. 2, 1954) (China).

¹⁸² *Id.*

¹⁸³ Production teams are the production units which were divided by the disciplining teams of reform through labor.

¹⁸⁴ XIANFA art. 91 (1954) (China); *id.* at art. 27 (1975 version); *id.* at art. 48, (1978 version); *id.* at art. 42 (1982 version).

¹⁸⁵ Shang Qingfei & Zhang Ming (尚庆飞 & 张明), *Mao Zedong Lao Dong Guan De Li Shi Sheng Cheng Ji Qi Dang Dai Jia Zhi* (毛泽东劳动观的历史生成及其当代价值), GLOBALVIEW (2014), <http://www.globalview.cn/ReadNews.asp?NewsID=25794>.

to certain conditions.¹⁸⁶ In suspended sentence and PS cases, criminals could remain in their positions rather than work in the production teams.

Between 1949 and 1978, there was only one legal stipulation on suspended sentences. The Anti-Graft Regulation specified four circumstances under which embezzlers were given more lenient sentences, mitigated sentences, suspended sentences, or disciplinary sanctions instead of criminal penalties. The four circumstances were: (i) the embezzler confessed to crimes not yet discovered; (ii) the embezzler confessed and expressed sincere repentance; (iii) the embezzler provided information about other embezzlers; or (iv) the embezzler was young, repentant, and committed a minor offense.¹⁸⁷

Besides the Anti-Graft law, no other laws suspended sentences for other crimes. Explanations by the SPC and the MJ suggested that suspended sentences were applicable to crimes other than embezzlement, but these standards were vague.¹⁸⁸ As such, the conditions were circumstantial.¹⁸⁹ As a result, suspended sentences were rarely used in the Mao era.

Nevertheless, guided by the mass line (qun zhong lu xian, 群众路线), PS was introduced as a community penalty. As one of the CCP's most important functions was to forge close ties with the masses, the mass line was the CCP's fundamental political and organizational method to carry out this function.¹⁹⁰ The mass line requires the members of the CCP to rely

¹⁸⁶ *Id.*

¹⁸⁷ Chen Zhi Tan Wu Tiao Li (惩治贪污条例) [Anti-Graft Regulation] (issued by the SC, Apr. 21, 1952) (China).

¹⁸⁸ Guan Yu Jia Shi, Huan Xing, Chi Duo Gong Quan Deng Wen Ti De Jie Shi (关于假释、缓刑、褫夺公权等问题的解释) [The Explanations on Parole, Suspended Sentence, Disfranchisement and Other Problems] (issued by the MJ, May 20, 1950) (China); Dui Shang Hai Shi Ren Min Fa Yuan Guan Yu Cai Chan Xing Fa Shi Yong De Jian Cha Bao Gao De Hui Fu (对上海市人民法院关于财产刑罚使用问题的检查报告的批复) [The Reply to the Report of Shanghai Municipal People's court on the Application of Fines] (issued by the MJ, May 12, 1951) (China); Dui Hua Dong Fen Yuan Guan Yu Ruo Gan Wen Ti De Qing Shi Ji Yi Jian De Pi Fu (对华东分院“关于若干问题的请示及意见的批复”) [The Reply to Huadong Branch Court on Its Consultations and Suggestions of Several Problems] (issued by the SPC, July 28, 1953) (China).

¹⁸⁹ SUN XIAOLI (孙晓雳), *ZHONG GUO LAO DONG GAI ZAO ZHI DU DE LI LUN YU SHI JIAN: LI SHI YU XIAN SHI* (中国劳动改造制度的理论与实践: 历史与现实), (China's Univ. of Pol. Sci. and L. Press 1994).

¹⁹⁰ XIAOPING DENG, *GUAN YU JIAN GUO YI LAI DANG DE RUO GAN LI SHI WEN TI DE JUE YI* (关于建国以来党的若干历史问题的决议) [THE SELECTIONS ON THE DOCUMENTS OF PENALTY SESSIONS OF NATIONAL PARTY CONGRESS SINCE THE THIRD PLENARY SESSION OF THE 11TH CCP CENTRAL COMMITTEE] (Editorial Committee on Party Literature of the Central Committee ed. 1981); SHAOQI LIU, *LUN DANG*, IN *SELECTIONS FROM LIU SHAOQI* (Editorial Committee on Party Literature of the Central Committee ed. 1945).

on the masses of people in the struggle. For criminals who committed misdemeanors and other reclaimable enemies, Mao said that reforming criminals was more effective than imprisoning them.¹⁹¹ This penalty was innovative because criminals were not only supervised by the police but also by their communities.

Per government documents from the early 1950s, PS was primarily enforced against criminals who committed minor offenses. Under the “Decisions on Organizing Criminals Nationwide to Reform through Labor,” PS was an alternative to prison sentences up to one year. The conditions were that the victims and the masses should consent to the alternative, and that the criminal should do collective labor.¹⁹² Subsequently, the Anti-Graft Regulation stipulated that PS was imposed on criminals who committed economic crimes through which the illegal gain was relatively small¹⁹³. Then, the “Provisional Measures of Imposing PS on Counterrevolutionaries” prescribed that PS be enforced against members of the Nationalist Party and other malefactors who were counterrevolutionaries for less than three years. Everyone had the right to supervise convicts under PS¹⁹⁴.

Criminals under PS should report to the police regularly, but in their daily life, they were supervised by the communities in which they resided and worked.¹⁹⁵ The Public Security Committee (PSC, zhi an bao wei yuan hui, 治安保卫委员会)¹⁹⁶ played a vital role in implementing PS. The committee was based on different units such as companies, schools, streets, and villages. To lead the masses and assist the local government and police, the committee was obligated to monitor and supervise counterrevolutionary malefactors. Normally, the PS term was no more than three years, but could be prolonged.¹⁹⁷

As a community penalty, PS was meant to punish criminals, who committed minor offences, as well as other enemies capable of reform.

¹⁹¹ SUN XIAOLI, *supra* note 189.

¹⁹² Guan Yu Zu Zhi Quan Guo Fan Ren Lao Dong Gai Zao Wen Ti De Jue Yi (关于组织全国犯人劳动改造问题的决议) [Decisions on Organizing Criminals Nationwide to Reform through Labour] art. 2 (issued by the Central Committee of the CCP, May 22, 1951) (China).

¹⁹³ Anti-graft Regulation, *supra* note 187, at art. 4.

¹⁹⁴ Guan Zhi Fan Ge Ming Fen Zi Zan Xing Ban Fa (管制反革命分子暂行办法) [Imposing PS on Counterrevolutionaries] arts. 3 & 10 (issued by the MPS, 1952).

¹⁹⁵ *Id.*

¹⁹⁶ SUN XIAOLI, *supra* note 189.

¹⁹⁷ Cao Zidan (曹子丹), *Lun Wo Guo Guan Zhi Xing De Cun Zai Yi Ju* (试论我国管制刑存在的根据) [On the Basis for Existence of Our Criminal Control Penalty], 53 CHINA LEGAL SCI. 102 (1990); Yan Shaohua & Xiuchun Yang, *supra* note 13, at 23.

¹⁹⁸ Practically speaking, PS was a powerful political tool, as it was primarily imposed on political enemies rather than minor criminals after 1959. According to the “Provisional Measures of Imposing PS on Counterrevolutionaries,” PS was imposed on counterrevolutionaries had ever practiced iniquities before the founding of PRC and who showed no sign of repentance, but were not engaged in any active counter revolution.¹⁹⁹ Punishing individuals for their political beliefs was an unreasonable penalty. Later, in 1959, the National Political Working Conference encouraged an ambitious imposition of PS against class enemies, including “landlords, rich peasants, counter-revolutionaries, and malefactors” (di, fu, fan, huai fen zi, 地富反坏分子).²⁰⁰ In the Mao Era, society had two communities. One was the community of the masses, and the other was the community of enemies. Every citizen fell under one of the two categories. Counterrevolutionaries were required to show loyalty to the Communist Party, as well as sincere repentance for their previous affiliations, to join the categorical masses.

3. Administrative Punishments and RTL in the Mao Era

In addition to the criminal punishment system, administrative punishments and RTL were meant to control the non-antagonistic contradictions within individual people. Theoretically, criminals, who seriously endanger the social order, were considered an extremely small subset of the citizenry.²⁰¹ “In ordinary circumstances, contradictions among the people are not antagonistic. But if they are not handled properly, or if we relax our vigilance and lower our guard, antagonism may arise.”²⁰² To prevent contradictions that had the tendency to evolve into antagonistic ones, administrative punishments and RTL were applied to those who were not criminally liable yet remained politically untrustworthy.

¹⁹⁸ *Id.*

¹⁹⁹ Imposing PS on Counterrevolutionaries, *supra* note 194.

²⁰⁰ The “landlords, rich peasants, counter-revolutionaries, and malefactors,” also called “the four black categories” (hei si lei fen zi, 黑四类分子), were labels for different types of class enemies in various political movements during the Mao Era. They were denounced, and some were even physically tortured, especially during the Cultural Revolution Era. In fact, a significant number of them were simply either rich or political dissidents. Most of them were restored and redressed after 1979.

²⁰¹ Cao Zidan, *supra* note 197; Zhao Tingguang & Mo Hongxian, *Fan Zui De Ben Zhi Qi Yuan Yu Chan Sheng*, 47 CRIMINOLOGY FORUM 32 (Mu Wang ed. 2003).

²⁰² Mao Zedong (毛泽东), *Guan Yu Zheng Que Chu Li Ren Min Nei Bu Mao Dun de Wen Ti* (关于正确处理人民内部矛盾的问题), <https://www.marxists.org/chinese/maozedong/marxist.org-chinese-mao-19570227.htm>.

While most deviant behaviors are punishable in China, the vast majority are not crimes but rather public order violations.²⁰³ Accordingly, public order violations are much broader than crimes. Theft, for example, is a punishable crime, but most thieves are given administrative punishments.²⁰⁴ Only those who steal a large amount of property, repeatedly steal, steal from institutions like banks, or steal cultural relics are criminally sanctioned. In the “Regulation on Public Security Administration of Punishments,” issued by the Standing Committee of NPC on August 22, 1957, the three administrative punishments were warning, pecuniary penalty, and administrative detention for as little as half a day or up to 15 days. Those who were indolent and had repeatedly violated the “Regulation on Public Security Administration of Punishments” were punishable by RTL after administrative punishments were meted out. The state gathered them to work, and even paid them for their work. Thus, these individuals were not unemployed and did not burden society. The CCP’s Directive clearly limited the application of RTL to those people not convicted of a criminal offense because their offense was so minor that it did not warrant a criminal penalty.²⁰⁵ These offenders were wrongdoers, but were not regarded as criminals.²⁰⁶ Therefore, unlike RTL, wrongdoers in RTL institutions had a certain freedom of action. For example, they could return home during national festivals. Individual laborers could also receive a seventy percent reduced salary from the state.²⁰⁷ Following their release, they were not subsequently discriminated against in their communities.²⁰⁸

D. PS and RTL in the Post-Mao Era

1. PS in the Post-Mao Era

Since 1979, the Chinese government has made extensive progress in formulating a robust legal system.²⁰⁹ The principles of class struggle

²⁰³ Cao Zidan, *supra* note 197; Zhao Tingguang & Mo Hongxian, *supra* note 201.

²⁰⁴ *Id.*

²⁰⁵ Guan Yu Su Qing An Cang Fan Ge Ming Fen Zi De Zhi Shi (关于肃清暗藏反革命分子的指示) [Directive on Purging the Hidden Counterrevolutionaries] art. 6 (issued by the Central Committee of CCP, Aug. 25, 1955) (China).

²⁰⁶ *Id.*

²⁰⁷ Yong Cui, *Shou Chu Fen Ren Yuan Gong Zi*, LABOURNET.COM.CN (2013), <http://www.labournet.com.cn/xinchou/gzqd5.asp>.

²⁰⁸ Yu Song (于松), *Chen Zhonglin: Wei Fa Xing Wei Jiao Yu Jiao Zhi Fa Cao Gang Yi Da Zhi Wan Cheng* (陈忠林：“违法行为教育矫治法”草纲已大致完成(图)), ORIENTAL MORNING POST (2013), <http://news.163.com/13/1118/08/9DUSTJJ300014AED.html>.

²⁰⁹ ZHANG, *supra* note 60, at 175.

and legal nihilism have been rejected. In 1999, the Constitution was amended to expressly establish a socialist rule-of-law state. In 1979, PS became the most lenient criminal penalty in the Criminal Law. Under the Criminal Law, a public security agency, and not members of the community, was tasked with supervising criminals sentenced to PS.²¹⁰

Although the CCP still mobilized and relied on the masses for crime control, the role of the masses decreased.²¹¹ Between 1979 and the 1990s, crime prevention was still based on companies, schools, streets, and villages. However, supervisory responsibility fell on the leaders of these units rather than the individual members. At that time, nearly every business was still state-owned. Thus, local governments had the discretion to promote and increase the salary of leaders in local businesses.²¹² If they failed to prevent crime, they would likely not receive bonuses. If they failed to achieve the goals of crime prevention, they would likely not receive promotions or bonuses. This method was very effective as it was easier for the authorities to manage the tractable leaders than all the members of the masses. Nevertheless, when China converted to a market economy in the 1990s, this policy was impractical. Since then, the government has intervened less often in private businesses.²¹³ Thus, as the majority of businesses entered the private sector, the government no longer controlled promotions and pay raises. As such, the Party found it more challenging to motivate the general populace to engage in crime control. Likewise, following economic reform, social bonds within communities loosened.²¹⁴ People did not work and reside in the same street or village as before, and turnover was much higher than it was previously. Therefore, loosely-knit communities could no longer effectively self-regulate themselves. Ruan articulated that criminals in the Mao Era tended to regard PS as a harsher sanction than short-term imprisonment because they were treated like second-class citizens.²¹⁵ However, as the social bonds in the workplace and individual communities weakened, the punitive effects of PS became very remote, which further illustrated that PS was an unreasonable sanction. The number of PS sentences was extremely low. Sentencing statistics in China were released in 2002,²¹⁶ and shows that the proportion of PS sentences fluctuates between 0.65% and 1.85% from 2002 to 2013 (see Figure 1).

²¹⁰ PRC Criminal Law, *supra* note 3, at art. 33 (1979 version).

²¹¹ RUAN QILIN (阮齐林), *XING FA XUE* (刑法学), (China U. of Pol. Sci. and L. Press. 2011).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ The People's Court Daily publishes the latest number of criminals under

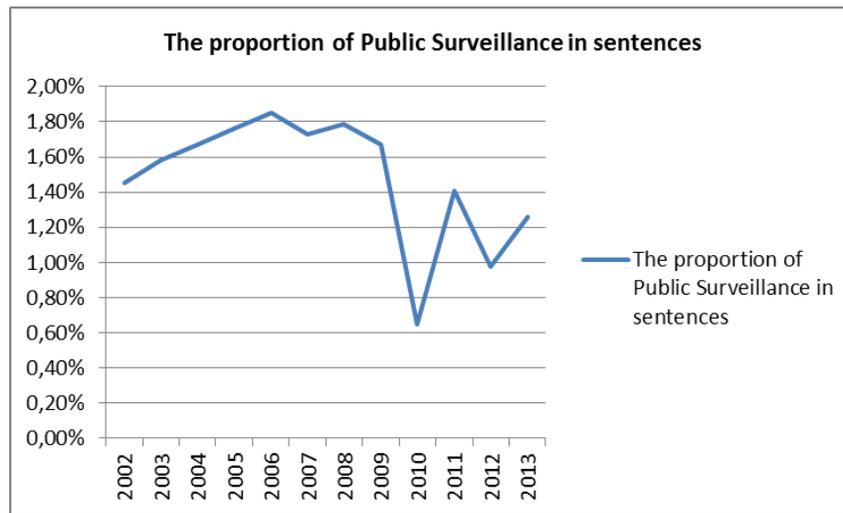


Figure 1: Proportion of criminals under PS from 2002 to 2013²¹⁷

2. Strike Hard Criminal Policy

Following widespread legal and economic reform, the vestiges of Mao's old regime began to fade away, and China experienced rapid changes fraught with uncertainty, insecurity and a steadily increasing crime rate.²¹⁸ Consequently, the CCP adopted a "Strike Hard" criminal

different penal sanctions in 2014 on 5 May 2015. 111 thousands of the convicts are sentenced to fixed-term imprisonment more than five years, life imprisonment or the death penalty, corresponding to 9.43% of the total criminal sentences; 500 thousands of the convicts are sentenced to fixed-term imprisonment less than five years, corresponding to 42.50% of the total criminal sentences; 549 thousands of the convicts are sentenced to criminal detention, suspended sentence, PS, independent fine or deprivation of criminal rights, corresponding to 46.38% of the total criminal sentences. However, the SPC's figures blur the most important data deliberately. The SPC's statistics do not tell us the prime concern of researchers, including the numbers and proportions of death penalties, life imprisonments, fixed-term imprisonment less than three years, criminal detention (the sentence of fixed-term imprisonment less than three years and criminal detention could be suspended), suspended sentence and independent fine or deprivation of political rights). PEOPLE'S COURT DAILY, http://rmfyb.chinacourt.org/paper/html/2017-11/13/node_2.htm (last visited Nov. 13, 2017).

²¹⁷ The data between 2002 and 2012 are from the China Law Yearbook (The Editing Committee of the Law Yearbook of China, 2003, p. 1320; 2004, p. 1054; 2005 p. 1065; 2006, p. 988; 2007, p. 1065; 2008, p. 1106; 2009, p. 1000; 2010, p. 919; 2011, p. 1051; 2012, p. 1065; 2013, p. 1210) and the data in 2013 are from the SPC's website (SPC, 2014).

²¹⁸ Chen Yili (陈屹立), *Shou Ru Bu Ping Deng, Cheng Shi Hua Yu Zhong Guo De Fan Zui Bian Qian* (收入不平等、城市化与中国的犯罪率变迁), 78 CRIM. SCI. 89 (2010); ZHANG XIAOHU (张小虎), *DANG DAI ZHONG GUO SHE HUI JIE GOU YU FAN ZUI*

policy and executed extensive propaganda campaigns to curb the ascending crime rate.²¹⁹ The Strike Hard criminal policy was the dominant feature of the harsh punishment landscape in the post-Mao Era.²²⁰ Deng Xiaoping stated that the country required several anti-crime campaigns to punish criminals more harshly and more efficiently.²²¹ During the Strike Hard campaigns, although enforced punishments were within what was statutorily allowable, criminal cases were often treated harsher than usual.²²² Some local authorities even set minimum targets for Strike Hard campaigns. For example, some authorities required a certain proportion of sentences to be harsher than usual, and that the sentences on certain crimes were to be above the average of statutory sentences.²²³

The first round of Strike Hard campaigns was launched in 1983, and was followed by three additional rounds of nationwide campaigns in 1996, 2001, and 2010. At first, the campaigns seemed successful. For example, in the 1983 anti-crime campaigns, the national crime rate decreased by 44.7%.²²⁴ However, despite Deng's repeated calls to abide by the rule of law, expedient convictions meant that certain procedural protections were discarded.²²⁵ In actuality, the Strike Hard criminal policy did not decrease crime rates. On the contrary, it only deepened social conflicts.

3. RTL Under the Strike Hard Criminal Policy

The number of people subjected to RTL increased dramatically under the Strike Hard criminal policy.²²⁶ RTL was considered an effective instrument to achieve the policy's stated goal to punish crime swiftly and

(当代中国社会结构与犯罪) 65 (Qunzhong Press. 2009).

²¹⁹ *Id.*

²²⁰ Susan Trevaskes, *Political Ideology, the Party, and Politicking: Justice System Reform in China*, 37 MODERN CHINA 315 (2011).

²²¹ *Why Deng Decided to Initiate "Strike hard" Campaign in 1983?*, PEOPLE.COM.CN (2012), <http://book.people.com.cn/GB/69398/16958926.html>.

²²² *Id.*

²²³ Shanhe Jiang, et al., *Correlates Of Formal And Informal Social/Crime Control In China: An Exploratory Study*, 35 J. CRIM. JUST. 261 (2007).

²²⁴ Guan Yu Yan Li Da Ji Xing Shi Fan Zui Huo Dong Di Yi Zhan Yi Di Yi Zhang De Qing Kuang Tong Bao [The Report on the Situation of the First Fight of the First Round of Anti-crime Campaigns during the Strike Hard Campaigns] (issued by the MPS, 1983).

²²⁵ Liang Bin, *Severe Strike Campaign in Transitional China*, 33, J. CRIM. JUST. 387 (2005); Yan Li, *Yan Da Xing Shi Zheng Ce De Li Xing Shen Du*, J. SHANGHAI U. 215 (2004).

²²⁶ Liang Bing, *supra* note 225; Yan Li, *supra* note 225.

harshly.²²⁷ RTL regulations were issued by the police department. After the police investigated, they judged and enforced RTL cases.²²⁸ Undisputedly, the RTL system was much more efficient and less time consuming than criminal procedures.

The *China Law Yearbook* published the statistics on the number of prisoners in jail and the number of wrongdoers under RTL from 1988 to 1995. After 1995, the report on the data of RTL ceased. The data on the numbers of criminals under PS and suspended sentences and the number of criminals under different intervals of sentencing terms were not available until 2002 in the *China Law Yearbook*, but some data between 1999 and 2001 can be found on the MJ's research reports.²²⁹ There is no data on RTL and different punishments during the same period. The ratios of wrongdoers under RTL to prisoners in jail were ranged between 10.36% and 15.66% from 1998 to 1995. In light of the fact that the term of RTL ranges from one to four years, but the sentencing term of imprisonment ranges from half a month to life, it is likely that a large proportion of wrongdoers who committed minor offenses were punished by RTL rather than short-term imprisonment (see Figure 2 and Figure 3).

²²⁷ Liang Bing, *supra* note 225; Yan Li, *supra* note 225

²²⁸ Liang Bing, *supra* note 225; Yan Li, *supra* note 225

²²⁹ The Research Group on Community Correction of the Ministry of Justice, *Gai Ge He Wan Shan Wo Guo She Qu Jiao Zheng Zhi Du Zhi Yan Jiu [Research on Reform and Perfect Community Correction in China]*, 5 JUDICATURE TODAY 4 (2003).

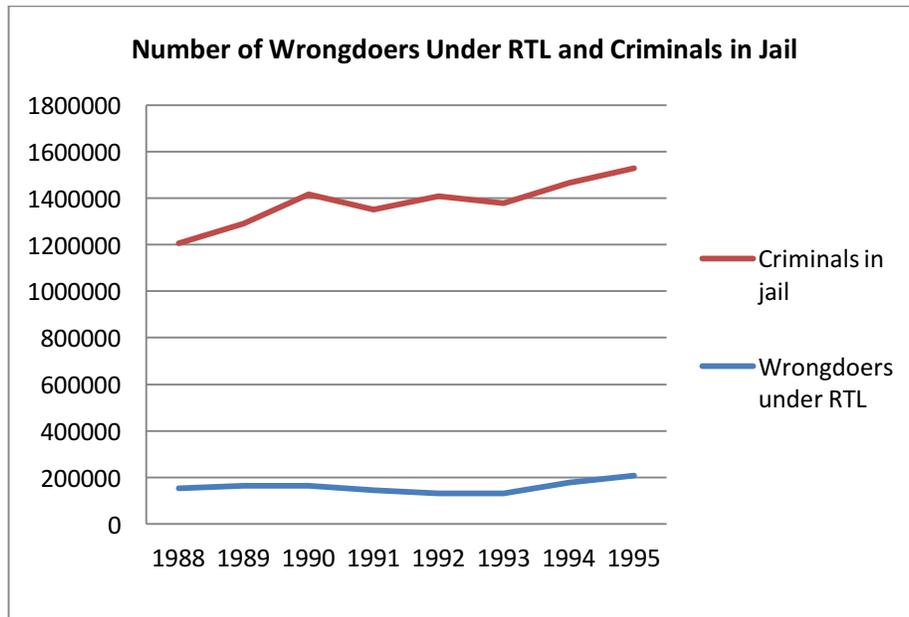


Figure 2: Number of wrongdoers under RTL and the number of criminals in jail from 1988 to 1995²³⁰



Figure 3 Ratio of wrongdoers under RTL to prisoners in jail from 1988 to 1995²³¹

²³⁰ The Law Yearbooks of China (The Editing Committee of the Law Yearbook of China, 1989, p. 768; 1990, p. 781; 1991, p. 798; 1992, p. 815; 1993, p. 831; 1994, p. 845; 1995, p. 858; 1996, p. 872).

²³¹ *Id.*

Despite its wide application, RTL did not have a solid legal basis as the NPC never promulgated any specific laws concerning RTL. Although several regulations that administered RTL were issued by the State Council (“SC”) and the MPS, they are not categorized as laws. The Supplementary Decision of the State Council for Re-education through Labor, issued by the SC, ostensibly tried to refine the system by confining the period during which people were subjected to RTL. The time period ran from one to three years, with a one-year extension when necessary. Prior to this decision, the time period was indefinite.²³² In fact, RTL contradicted the Legislative Law and the Constitution. Article 8 of the Legislative Law states that mandatory measures and penalties restricting a person’s freedom shall only be governed by law. Article 37 of the Constitution prohibits unlawful detention or deprivation or restriction of citizens’ freedom.

Because no law authorized RTL, there was an ongoing debate as to whether RTL was an administrative punishment or an administrative coercive measure.²³³ The Administrative Punishment Law was issued in 1996, and the Administrative Coercion Law was promulgated in 2011. Nonetheless, RTL was neither on the list of administrative punishments nor on the list of administrative coercive measures. Nevertheless, the SC tended to label RTL as an administrative punishment. The White Paper on China’s Human Rights Situation issued by the SC in 1991 referred to RTL as the administrative punishment, and the Notice on Further Strengthening the Management of Prison and RTL (Guan yu jin yi bu jia qiang jian yu guan li he lao dong jiao yang gong zuo de tong zhi) issued by the SC in 1995 also asserted that the institutions of RTL were executive agencies of administrative punishments.

RTL used to appear as a sanction in the abolished Regulation on Public Security Administration of Punishments, which was issued by the Standing Committee of NPC on August 22, 1957. The revised Regulation on Public Security Administration of Punishments was promulgated by the Standing Committee of the NPC and was issued on September 5, 1986. The regulation came into effect on January 1, 1987, and then it was replaced by the Law on Public Security Administration of Punishments on March 1, 2006. Under both regulations, RTL was not among the listed forms of administrative punishments.²³⁴ Pursuant to Articles 67, 68, 70,

²³² Guan Yu Lao Dong Jiao Yang De Bu Chong Gui Ding (关于劳动教养的补充规定) [Supplementary Provisions for Re-education through Labor] art. 3 (issued by the St. Council, Nov. 29, 1979) (China).

²³³ Liu Renwen, *supra* note 6; Williams, *supra* note 6.

²³⁴ Although the implementation of the Law on Public Security Administration of Punishments issued in 2006 meant that the previous Regulation on Public Security Administration of Punishments issued in 1986 was automatically repealed, the four-public security administrative punishments remained the same. They were warning, pecuniary penalty, administrative detention (one to fifteen days), and revocation of

and 76 of the Law on Public Security Administration of Punishments, “when a person commits prostitution, dissemination of pornography, and profitable gambling and refuses to make corrections despite repeated warnings, s/he may be subject to a mandatory educational measure.” RTL was intended as such a mandatory educational measure.

The implementation of RTL touched upon issues of individual civil liberties and rights. RTL was imposed on people whose acts were so minor that it did not constitute a criminal offense. RTL, however, was often much more severe than some criminal punishments, such as PS, criminal detention, and suspended sentences. RTL was up to four years, while criminal detention was three months to two years and PS was one to six months. Published by the Ministry of Public Security, the RTL administrative regulations specifically listed the ten categories of anti-social behaviors, which covered almost every type of common minor offense, that fell within the scope of RTL. As such, RTL violated Article 79 of the Legislative Law that states that the effect of laws shall be higher than that of administrative regulations, local regulations, and rules.

The broad application of RTL meant that minor, criminal penalties were rarely enforced. PS, fines, deprivation of political rights, and deportation, in the case of foreigners, were proportionally low. (See Figure 4). According to data released by the MJ, the SPC and the *China Law Yearbook*, criminal punishments are primarily imprisonment and suspended sentences, as the proportion of imprisonment is always above 65 percent (See Figure 4). Non-custodial sentences, or in other words punishments that do not involve criminal imprisonment, still only play a supplementary role in China.

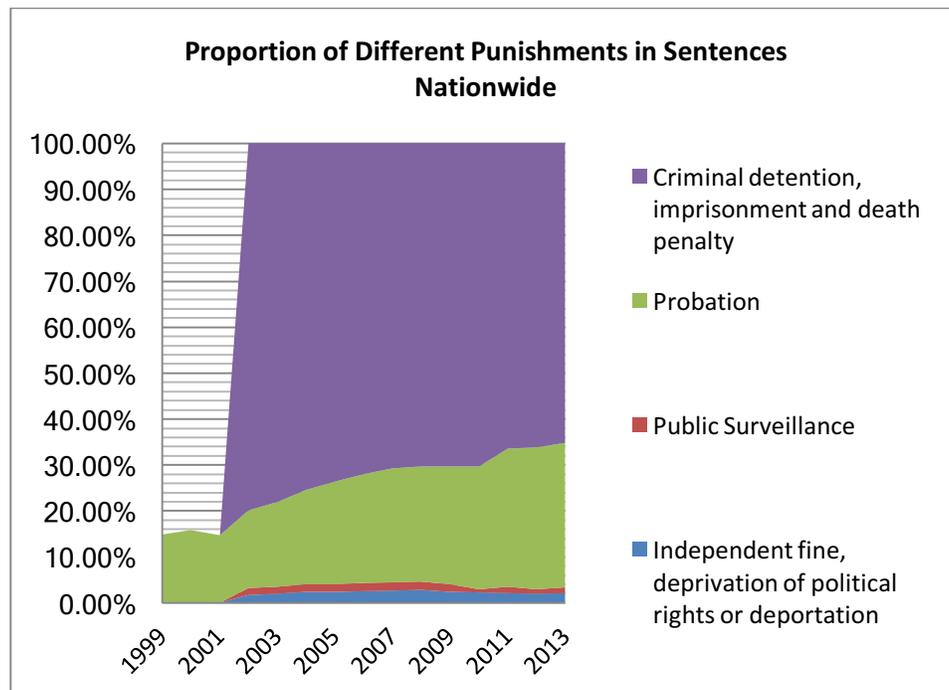


Figure 4: Proportion of different punishments in sentences nationwide (1999 to 2013)²³⁵

4. Balancing Severe Punishment and Leniency

In 2006, the CCP adopted a new concept of a harmonious society, balancing the severity and leniency of punishment in criminal policy.²³⁶ Accordingly, Strike Hard no longer seemed appropriate. The Resolution on the Major Issues Regarding the Building of a Harmonious Socialist Society (Guan yu gou jian she hui zhu yi he xie she hui ruo gan zhong da wen ti de jue ding), issued by the Central Committee of the CCP October 11, 2006, articulated imposing severe penalties to deter serious crimes, as well as establish positive community corrections.

Severe punishment under this criminal policy did not simply mean giving custodial sentences to criminals who perpetrate serious crimes, but denotes that the criminal policy of striking hard against serious crimes will continue. China's security and judicial institutions still crack down on

²³⁵ The data between 1999 and 2001 are from the MJ's research (The Research Group on Community Correction of the Ministry of Justice, 2003), the data between 2002 and 2012 are from the Law Yearbooks of China (The Editing Committee of the Law Yearbook of China, 2003, p. 1320; 2004, p. 1054; 2005 p. 1065; 2006, p. 988; 2007, p. 1065; 2008, p. 1106; 2009, p. 1000; 2010, p. 919; 2011, p. 1051; 2012, p. 1065; 2013, p. 1210) and the data in 2013 are from the SPC's website (SPC, 2014).

²³⁶ Guan Yu Gou Jian She Hui Zhu Yi He Xie She Hui Ruo Gan Zhong Da Wen Ti de Jue Ding (关于构建社会主义和谐社会若干重大问题的决定) [The Resolution on the Major Issues Regarding the Building of a Harmonious Socialist Society] (issued by the Central Committee of the CCP, Oct. 11, 2006).

crimes that endanger national security, organized crime, and serious violent crime, but are more lenient towards less violent crimes, minors, and first-time offenders.²³⁷ This was mirrored in the fourth round of the Strike Hard campaigns, which only targeted serious violent crime, gun and gang crime, telecom fraud, human trafficking, robbery, prostitution, gambling, and drug crimes, reflected this new policy.²³⁸ Most misdemeanors were excluded from the campaigns.²³⁹

5. The Residual Effect of the Heavy Penaltyism Under the Criminal Policy of Balancing Severe Punishment and Leniency

Some academics have compared this policy to the twin-track sentencing approach utilized in Western countries, which means reserving custody for people who commit serious crimes and punishing less serious offenders with non-custodial alternatives.²⁴⁰ The harmonious society policy has some similarities to the Western twin-track approach, but the differences are apparent.

Since the release of the Harmonious Society criminal policy, many scholars have advocated strict and certain punishments rather than harsh and swift punishments for serious crimes. Likewise, many scholars have advocated for relatively lenient punishments rather than normal punishments for minor offenses, especially in cases in which criminals turn themselves in, confess to their crimes, and assist in the prosecution of other criminals.²⁴¹ However, their opinions do not persuade policymakers and the general public. The general public is unsympathetic to what the leniency in the new criminal policy promises to achieve. Figure 3 illustrates that suspended sentences were the only non-custodial sentences that proportionally rose after the new criminal policy was announced. However, the vast majority of the general public in China still embraces heavy penaltyism.²⁴² If one feels that a sentencing is unfair, that person usually refers to a similar case in which the sentencing was harsher.²⁴³ For example, the public has complained about the high proportion of suspended sentences for dereliction of duty crime cases.²⁴⁴

²³⁷ Siyi Ni, et al., *China Rejects "Strike Hard" Anti-Crime Policy for more Balanced Approach*, XINHUANET (Mar. 14, 2007), http://news.xinhuanet.com/english/2007-03/14/content_5846317.htm.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Chen, *supra* note 16, at 523.

²⁴¹ Lan Zhiwei & Zheng Dong (兰志伟 & 郑东), *Zhi Wu Fan Zui Qing Xing Hua Wen Ti Yan Jiu* (职务犯罪轻刑化问题研究), 29 HEBEI L. SCI. 145 (2011).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ The authoritative statistics on the suspended sentence rate of duty crime is

The SPC frequently recommended that the proportion of suspended sentences for duty crimes should be as low as other crimes. The SPC rarely argued that the proportion of suspended sentence for all crimes should be as high as duty crimes.²⁴⁵ Even for juvenile delinquencies, a survey shows that 81.5% of the public question the punitive effect of suspended sentences.²⁴⁶ In socialist China, the mass line (qun zhong lu xian, 群众路线) is the CCP's fundamental political and organizational method. The mass line means, first of all, having faith in the masses. The Party members are trained to appreciate the criticism of the masses. In light of the mass line, the CCP urges that judicial decisions should not only consider its legal effects, but also its political and social effects.²⁴⁷ Public opinion is a vital part of the social effects. The judges have to pander to the public, but public sentiment believes that criminals deserve harsher punishments.

II. COMMUNITY CORRECTIONS IN CONTEMPORARY CHINA

A. *The Primary Target Group: PS and Suspended Sentence*

As discussed above, community corrections in contemporary China are public surveillance ("PS"), suspended sentences, parole, and temporary service of sentence outside of prison.

Pursuant to the Announcements on Developing Pilot Locations for Community Corrections Programs, which was issued by the Supreme People's Court ("SPC"), the Supreme People's Procuratorate ("SPP"), the Ministry of Public Security ("MPS") and the Ministry of Justice ("MJ") in 2003, the beneficiaries of the pilot programs are convicts who commit minor offenses and receive minimal punishment.

not available. Most articles on the suspended sentence rate of duty crime refer to an article of the Procuratorate Daily on August 19, 2007, which shows that 66.48% of convicts, who committed a duty crime and whose declared main sentence was fixed-term imprisonment less than three years, are put on suspended sentence in 2005. Among them, 95.6% of the convicts who committed misconduct are put on suspended sentence (J. Wang, 2007). An empirical study randomly selected 210 decisions in 24 provinces between July 1, 2013 and March 20, 2014. The study found that 74.03% of convicts, who committed a duty crime and whose declared main sentence is fixed-term imprisonment less than three years, are put on suspended sentence. Wang Xiaoguang & Li Qin (李琴 & 王小光), *Zhi wu fan zui liang xing qing huan hua de shi zheng fen xi* (职务犯罪量刑轻缓化的实证分析), *Criminal Science* (2014).

²⁴⁵ Lan Zhiwei & Zheng Dong, *supra* note 241.

²⁴⁶ Xuan Gang, *supra* note 163, at 142.

²⁴⁷ Huang Mingjian (黄明健), et al., *Jia Qiang Zhi Fa Gui Fan Hua Jian She Nu Li Shi Xian Fa Lu Xiao Guo, Zheng Zhi Xiao Guo Yu She Hui Xiao Guo De You Ji Tong Yi* (加强执法规范化建设努力实现法律效果、政治效果与社会效果的有机统一), *PEOPLE'S PUBLIC SECURITY* (Feb. 23, 2009).

Lenient penalties include fines, deprivation of political rights, PS, and suspended sentences. Fine and deprivation of political rights are rarely meted out in socialist China. From 2002 to 2013, the proportion of independent punishments, which include fines, deprivation of political rights, and deportation, fluctuated between 1.76% and 2.77%.²⁴⁸ PS and suspended sentences are more lenient forms of punishment. PS effectively means placing convicts into communities. Thus, convicts in PS are under scrutiny by supervisory agencies, as well as their communities. Suspended sentences denote the suspension of criminal detention or imprisonment of less than three years.

Before the pilot programs began, the predominant criminal punishment was imprisonment. From 2002 to 2013, imprisonment still accounted for 65.25% of sentencing nationwide. Non-custodial sentences were primarily suspended sentences, as it comprised 31.31% of punishments in 2013. Between 2007 and 2011, more than 72% of the convicts under community corrections programs were convicts under suspended sentences. PS only accounted for 1.26% of punishments in 2013, and approximately 3% of community corrections between 2007 and 2011 (See Figure 5 and Figure 6).

²⁴⁸ See Figure 4.

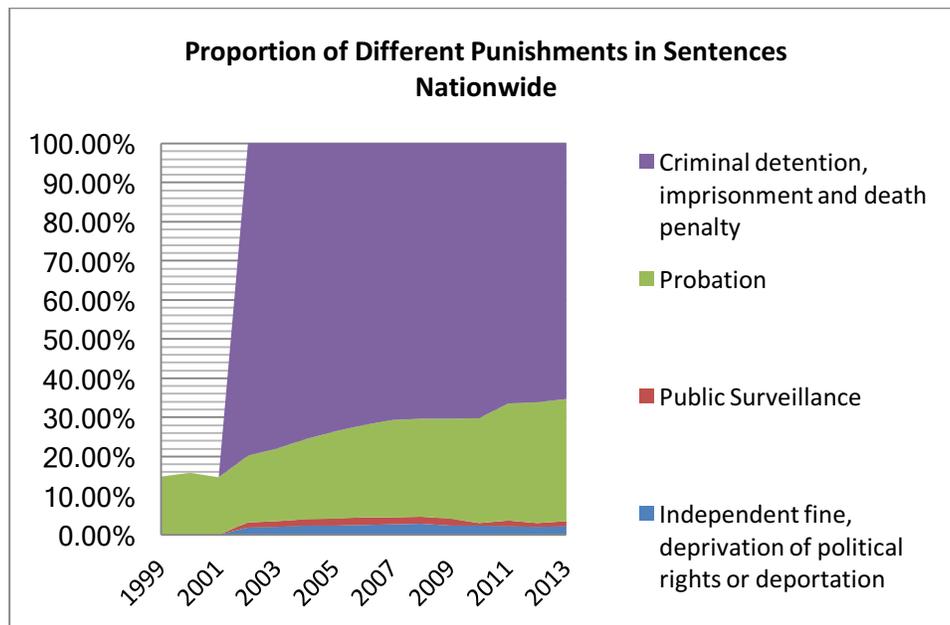


Figure 5: Proportion of different punishments in sentences nationwide (1999 to 2013)²⁴⁹

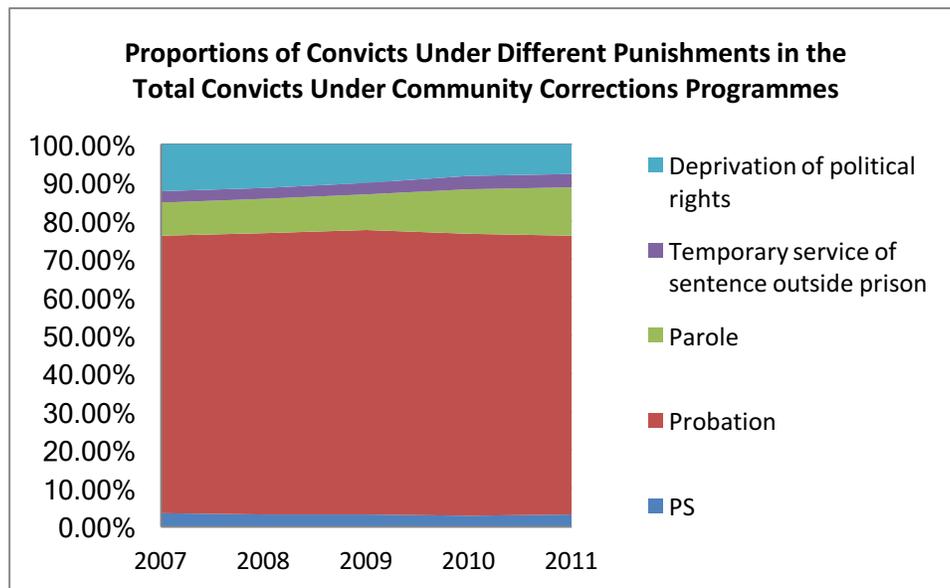


Figure 6: Proportion of the convicts under different punishments in the total convicts under community corrections programs from 2007 to 2011²⁵⁰

²⁴⁹ The data between 1999 and 2001 are from the MJ's research (The Research Group on Community Correction of the Ministry of Justice, 2003), the data between 2002 and 2012 are from the Law Yearbooks of China (The Editing Committee of the Law Yearbook of China, 2003, p. 1320; 2004, p. 1054; 2005 p. 1065; 2006, p. 988; 2007, p. 1065; 2008, p. 1106; 2009, p. 1000; 2010, p. 919; 2011, p. 1051; 2012, p. 1065; 2013, p. 1210) and the data in 2013 are from the SPC's website (SPC, 2014).

The provisions on PS with those on suspended sentences²⁵¹ have many similarities.²⁵² Both convicts under PS and convicts under suspended sentences must conform with the following obligations: observe laws, administrative rules and regulations, and submit to supervision; report on his own activities as required by the observing organ; observe the regulations for receiving visitors stipulated by the observing organ; and report to obtain approval from the observing organ for any departure from the city or county he lives in or for any change in residence. Under the Amendment VIII of the Criminal Law, both the convicts under PS and the convicts under suspended sentence shall be subject to community corrections programs, and may also be prohibited from engaging in certain activities, entering certain areas or places or contacting certain persons during suspended sentence. The terms of PS and suspended sentence are also comparable. The term of public surveillance shall be not less than three months but not more than two years, while the suspended sentence period shall be not less than two months but not more than five years.

Meanwhile, there are three differences with regard to the convict's rights and obligations under the Criminal Law:

1. A convict under PS exercises no right of freedom of speech, press, assembly, association, procession or demonstration without the approval of the organ; in contrast, the rights of a convict under a suspended sentence are not restricted, unless she/he was simultaneously sentenced to supplementary deprivation of rights.
2. A convict under PS receives equal pay for their labor; in comparison, the Criminal Law does not provide any requirements on the payment of convicts under suspended sentence.
3. If a convict under PS commits a new crime or a crime was discovered for which she/he is not sentenced, another judgment shall be rendered in accordance with the articles on the combined punishment for several crimes;²⁵³ contrarily, during the suspended sentence period, if a convict commits a new crime or an additional

²⁵⁰ The deprivation of political rights has been excluded from the community corrections programs since the Amendment VIII of the PRC Criminal Law began to be implemented on May 1, 2011. The Application and Execution of Community Corrections Programs (Z. Wu, Cai, & Peng, 2012). The book states that the data is collected from MJ's documents, but it does not mention how the data was collected.

²⁵¹ PRC Criminal Law, *supra* note 3, at arts. 38, 39, 40, 41, 72, 73, 74, 75, 76, & 77 (1997 version).

²⁵² See Figure 5.

²⁵³ PRC Criminal Law, *supra* note 3, at arts. 69, 70, & 71 (1997 version).

crime is discovered for which she/he is not sentenced, the suspension shall be revoked and another judgment shall be rendered for the newly committed or discovered crime. Furthermore, the punishment to be executed shall be decided on the basis of the punishments for both the preexisting crime and the new crime.

The Criminal Law does not stipulate how to deal with the violation of administrative regulations relating to the supervision on the convicts under PS. If a convict under suspended sentence violates the administrative regulations and if the circumstances are serious, the suspension shall also be revoked and the original punishment shall be executed.

Despite the fact that the Criminal Law does not provide a provision on the discriminated payment for the convicts under suspended sentence,²⁵⁴ most scholars and practitioners still insist there are no excuses to reduce the salaries of the convicts under suspended sentence, and that most convicts under a suspended sentence are treated equally.²⁵⁵

Thus, compared with the convicts under PS, the rights of the convicts under suspended sentence are *less restricted*. However, if the convicts under a suspended sentence commit new crime or seriously violate administrative regulations, the suspended sentence shall be revoked. Judges prefer suspended sentences rather than PS due in order to promote individual deterrence.

1. Parole and Temporary Service of Sentence Outside Prison

Under the Criminal Law issued in 1997, parole can be handed down to a convict who is sentenced to fixed-term imprisonment and who has served more than half their original sentence or to life imprisonment and has served not less than 10 years of the term. If she/he conscientiously observes prison regulations, accepts education, reforms through labor, shows true repentance and poses no threat to society. No parole shall be granted to convicts who are sentenced to more than 10 years of

²⁵⁴ Employed convicts under community penalties should receive equal pay for equal work. PS scholarly articles from the Mao Era were redacted for political content. In the Mao Era, the emphasis on equal pay for equal work in PS cases was to primarily distinguish it from reform through labor. As mentioned above, due to the authoritative control in the Mao Era, community self-regulation was as strict as supervision under RTL disciplinary teams. However, PS was still regarded as a more lenient punishment because convicts under PS could receive the same salary as ordinary workers. Convicts under RTL, however, could only receive a much smaller salary than ordinary workers.

²⁵⁵ Z Zheng, *Fu Xing Qi Gong Zuo Ye Neng Tong Gong Tong Chou, Ping Deng Xing Dai Rang Shi Zu Shao Nian Zhao Hui Le Zi Xin* (服刑期工作也能“同工同酬”平等相待让失足少年找回了自信), MODERN GOLDEN PAPER (Sept. 20, 2013, 12:52 AM), <http://news.163.com/13/0920/00/9966I8UB00014Q4P.html?f=jsearch>.

imprisonment or life imprisonment for crimes of violence such as homicide, explosion, robbery, rape or kidnapping.²⁵⁶ Similar to the revisions on probation, the Amendment VIII of the Criminal Law issued in 2011 deletes the requirement of ‘posing no threat to society’, and adds two new considerations: 1) that “the criminal has no risk of recidivism;” and 2) that “the impact of parole on the community where the criminal lives shall be considered when a parole decision is made.” The Amendment also enumerates a list of the crimes which a suspended sentence shall not be applied. These crimes include murder, rape, robbery, abduction, arson, explosion, dissemination of hazardous substances or organized violent crime. In addition, a convict who is sentenced to life imprisonment, the minimum term of imprisonment was amended from 10 years to 13 years.²⁵⁷ Several considerations for parole, including “showing repentance,” “posing no threat to society” and “considering the impact on the community where the criminal lives” are akin to those for suspended sentence.

Temporary service of sentence outside prison in China is similar to compassionate release or medical parole in some Western countries. Temporary service may be permitted for a convict who is seriously ill, pregnant or breast-feeding her own baby, unable to take care of him/herself or poses no threat to society. It may also be permitted for a convict who is sentenced to life imprisonment when the convict is pregnant or breast-feeding her own baby. The supporting documents of serious illness shall be prepared by the hospital designated by a people's government at the provincial level. If a convict poses a threat to the community or him/herself, he may not be released. If the execution of imprisonment has not commenced, service of sentence outside prison is decided by the court if; the execution of imprisonment has already commenced, it is suggested by the prison or the house of detention and approved by the administrative authority of prison at the provincial level or the public security organ at municipal level.²⁵⁸

The term of temporary service of sentence outside prison is included in the term of imprisonment. In order to shorten the imprisonment term, the convicts and their relatives typically try to obtain temporary service of sentence outside prison. Some convicts who are not eligible for temporary service of sentence outside prison may attempt to get the permission by illegal means. Moreover, the final decision on temporarily service of sentence can be made by the court, the

²⁵⁶ PRC Criminal Law, *supra* note 3, at art. 81 (1997 version).

²⁵⁷ *Id.* Revised by Amendment VIII of the Criminal Law.

²⁵⁸ Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [PRC Criminal Procedure Law] art. 254 (promulgated by the Nat'l People's Cong., July 1, 1979, effective as amended Jan. 1, 2013) (China).

administrative authority of prison as well as the public security organ, but their standards may have subtle differences. The prison or the house of detention may not agree with the imprisonment sentence meted out by the court, but can recommend the administrative authority of prison or public security organ to approve the temporary service of sentence outside the prison. This may result in the executive power meddle in the judicial power, and the lack of dimensional homogeneity may bring in more chances of corruption. The temporary service of sentence outside prison system has been criticized for these reasons.²⁵⁹ In response to the criticisms, the Regulations on Temporary Service of Sentence Outside Prison stresses that the examination and approval shall be stricter for the criminals who are more likely to pay bribe for temporary service of sentence outside prison, including the criminals who commits crimes related to corruption, disrupting the order of financial administration, financial fraud and organized crime,²⁶⁰ but the Regulations do not explain what ‘stricter’ means.

B. *Missions of the Programs: Correction, Supervision, and Assistance*

The Announcements declare that the goals of the pilot community corrections programs are to perfect the socialist punishment system, to mobilize the general populace in the reformation of criminals, and to improve the cost effectiveness of penal corrections.²⁶¹

The pilot programs aimed to increase the number of rehabilitated convicts, and to deter them from committing future crimes.²⁶² Successful implementation of the pilot programs would result in an increase in community corrections programs.

Furthermore, The Announcements on Developing Pilot Locations for Community Corrections Programs, and the subsequent Provisional Measures on Implementing Community Corrections Programs, issued by the MJ in 2004, The Announcements on Expanding Pilot Locations for Community Corrections Programs, issued by the SPC, the SPP, the MPS, and the MJ in 2005, The Opinions on Implementing Community

²⁵⁹ Cai Guoqin & Zhao Zengtian (蔡国芹 & 赵增田), *Zan Yu Jian Wai Zhi Xing Zhi Du De Xian Shi Kun Jing Yu Chu Lu* (暂予监外执行制度的现实困境及其出路), 26 THE RULE OF LAW FORUM, n.130 (2011); Fan Chongyi & Liu Wenhua (樊崇义 & 刘文化), *Jia Qiang ‘Jian Bao Shi’ Cheng Xu Jian Du*, *Chong Su Si Fa Gong Xin Yu Quan Wei* (加强“减假保”程序监督重塑司法公信与权威), People’s Procuratorial SemiMonthly (2014).

²⁶⁰ *Zan Yu Jian Wai Zhi Xing Gui Ding* (暂予监外执行规定) [Regulation on Temporary Service of Sentence Outside Prison] art. 6 (issued by the SPC, SPP, MPS, MJ and National Health and Family Planning Commission, 2016) (China).

²⁶¹ Announcement on the Development of Pilot Locations for Community Corrections, *supra* note 4, at art. 1.

²⁶² *Id.* at art. 2.

Corrections Programs Nationwide, issued by the SPC, the SPP, the MPS, and the MJ in 2009, The Implementing Measures of Community Corrections Programs, issued by the SPC, the SPP, the MPS, and the MJ in 2012, and The Draft Law on Community Corrections, drafted by the MJ in 2013, all state the three missions of rectification education. The missions are correction, supervision, and assistance.²⁶³ The detailed requirements of the three missions are summarized below.

1. Correction

The goal of correction is to encourage offenders to repent and re-establish social bonds.²⁶⁴ The community corrections institutions provide educational activities related to public morality, legal knowledge, and current affairs to improve offenders' moral character and legal understanding.²⁶⁵ Additionally, convicts, who are able to work, participate in community service to cultivate a sense of social responsibility and discipline by working for the common good.²⁶⁶ In total, convicts in community corrections take part in no less than eight hours of educational study as well as no less than eight hours of community service each month.²⁶⁷ Community corrections institutions devise individualized corrections plans for each convict under their supervision based on a comprehensive evaluation of the offense, display of remorse, personality traits, and daily life environment. Corrections plans are adjusted over time to achieve optimal results.²⁶⁸

²⁶³ In the 2003 document, supervision was prioritized over correction. Since 2009, the order of the three missions has been prioritized as correction, supervision, and assistance. Fan Chongyi & Liu Wenhua, *supra* note 259.

²⁶⁴ Announcement on the Development of Pilot Locations for Community Corrections, *supra* note 4, at art. 2.2.1; She Qu Jiao Zheng Zan Xing Ban Fa (社区矫正暂行办法) [Provisional Implementing Measures of Community Corrections] (issued by the MJ, 2004) (China); Guan Yu Zai Quan Guo Shi Xing She Qu Jiao Zheng Gong Zuo De Yi Jian (关于在全国试行社区矫正工作的意见) [Suggestions on Enforcing the Pilot Community Corrections Nationwide] art. 3.1 (issued by the SPC, SPP, MPC, and MJ, 2009) (China); She Ju Jiao Zheng Shi Shi Ban Fa (社区矫正实施办法) [Implementing Measures of Community Corrections] art. 15 (issued by the SPC, SPP, MPC, and MJ, 2012) (China).

²⁶⁵ Provisional Implementing Measures of Community Corrections, *supra* note 264, at art. 30; Implementing Measures of Community Corrections, *supra* note 264, at art. 17.

²⁶⁶ Suggestions on Enforcing the Pilot Community Corrections Nationwide, *supra* note 264, at art. 3.1; Implementing Measures of Community Corrections, *supra* note 264, at art. 16.

²⁶⁷ Implementing Measures of Community Corrections, *supra* note 264, at art. 16.

²⁶⁸ Provisional Implementing Measures of Community Corrections, *supra* note 264, at arts. 23, 29; Suggestions on Enforcing the Pilot Community Corrections Nationwide, *supra* note 264, at art. 3.1.

2. Supervision

Officials from community corrections institutions periodically visit convicts at their homes, workplaces, schools, and communities, record their observations,²⁶⁹ and evaluate their behavior. If a convict has violated a regulation, or even escaped supervision, that convict's case is promptly investigated. For more effective supervision, community correction institutions manage individuals differently based on the classification system,²⁷⁰ and technologies like electronic monitoring are utilized to track and monitor convicts.

3. Assistance

The primary goal of the assistance mission is to teach convicts how to support themselves following their non-custodial sentences.²⁷¹ Community corrections institutions coordinate with relevant departments and NGOs to provide vocational training and employment guidance according to the needs of the convicts.²⁷² Corrections institutions also help urban convicts apply for subsistence allowances, and help rural convicts contract for land. Convicts under community correction supervision are not supposed to experience educational, employment, or social welfare discrimination.²⁷³

²⁶⁹ Convicts in community corrections periodically report to a parole officer at an appointed time. Additionally, they are required to report changes in residence or employment, major, unforeseen family events, or encounters with persons that are considered a harmful influence on their rehabilitation. PRC Criminal Law, *supra* note 3, at arts. 81-86.

²⁷⁰ Criminals in community corrections programs are classified into A, B and C groups concerning their danger to society and re-socialization level. Dan Weili (但未丽), *She Qu Jiao Zheng De Beijing Mo Shi Yu Shanghai Mo Shi Bi Jiao Fen Xi (社区矫正的“北京模式”与“上海模式”比较分析)* [A comparative study on community corrections of the “Beijing Model” and “Shanghai Model”], 142 J. CHINESE PEOPLE'S PUB. SECURITY U. (Social Science Edition) 151 (2011).

²⁷¹ Provisional Implementing Measures of Community Corrections, *supra* note 264, at art. 33; Suggestions on Enforcing the Pilot Community Corrections Nationwide, *supra* note 264, at art. 3.3; Implementing Measures of Community Corrections, *supra* note 264, at art. 18.

²⁷² Provisional Implementing Measures of Community Corrections, *supra* note 264, at art. 33; Implementing Measures of Community Corrections, *supra* note 264, at art. 17; Suggestions on Enforcing the Pilot Community Corrections Nationwide, *supra* note 264, at art. 3.3; Implementing Measures of Community Corrections, *supra* note 264, at art. 18.

²⁷³ Provisional Implementing Measures of Community Corrections, *supra* note 264, at art. 33; Suggestions on Enforcing the Pilot Community Corrections Nationwide, *supra* note 264, at art. 3.1; Implementing Measures of Community Corrections, *supra* note 264, at art. 18.

C. *The Two Prototype Trial Models: Beijing and Shanghai*

To lay the groundwork for national implementation, pilot programs were first established in six relatively developed provinces or municipalities.²⁷⁴ Beijing and Shanghai are the most developed cities in China and were the first to put community corrections into practice on a trial basis. Among the trial models, the achievements of Beijing and Shanghai are the most influential.

1. The Beijing Model

In Beijing, the community corrections program was administrated by the prisoner re-education liaison. The liaison is a member of the Municipal Bureau of Justice. Since 2003, a leading committee, comprised of members from the Municipal Bureau of Justice, the Municipal People's Court, the Municipal People's Procuratorate, the Municipal Bureau of Public Security, the Municipal Bureau of Civil Affairs, the Municipal Bureau of Labor and Social Security, and the Municipal Office of the Comprehensive Treatment of Social Security, was established.²⁷⁵ The committee is based in the Municipal Bureau of Justice. Hence, the Municipal Bureau of Justice plays a leading role in implementing the programs. In addition to the officers of the Bureau of Justice, prison police officers and social workers are recruited as members of the professional teams to run the community corrections programs. Also, to encourage community participation, several "yangguang" (阳光), or community corrections service centers were built, and volunteers can work with the professional teams.²⁷⁶ The Beijing Model was also called the "3+N" Model. In this model, "3" refers to the professional teams, including the officers of the Bureau of Justice, prison police officers, and social workers, and "N" refers to volunteers.²⁷⁷

The program puts an emphasis on strengthening the supervision of convicts. The goals of the Beijing Model are that every convict is supervised, no convict escapes supervision, no convict commits a subsequent crime, and no convict jeopardizes the social order.²⁷⁸

²⁷⁴ Announcement on the Development of Pilot Locations for Community Corrections, *supra* note 4, at art. 3.

²⁷⁵ Suggestions on Enforcing the Pilot Community Corrections Nationwide, *supra* note 264, at art. 3.1.

²⁷⁶ Dan Weili, *supra* note 270.

²⁷⁷ Jiang et al., *supra* note 15; The Research Department of the Ministry of Justice, *Beijing Shi She Qu Jiao Zheng Shi Dian Gong Zuo Diao Cha Bao Gao* (北京市社区矫正试点工作调查报告) [*Survey Report On the Pilot Work of Community Corrections in Beijing*], 1 JUST. OF CHINA 70 (2008).

²⁷⁸ Jiang et al., *supra* note 15; The Research Department of the Ministry of Justice, *supra* note 277.

Moreover, an auxiliary goal of the program is that the need for social workers generates more local employment.²⁷⁹ Social workers are primarily recruited from unemployed workers in their 40s to 50s, who have been out of work for more than one year.²⁸⁰ After passing the recruitment examination and completing a two-week training course, social workers can sign an employment contract with the Bureau of Justice. These workers can receive a wage of approximately 1,700 yuan per month.²⁸¹ The social workers on the professional team are full-time employees, but their duties are more administrative in nature. Every social worker is responsible for supervising five criminals and fifteen ex-convicts recently released from prison.²⁸² Their work involves taking part in developing a corrections plan, filling out documents, regularly visiting the families of convicts, and keeping the Bureau of Justice informed about the convicts. The frequency of visits and reporting are dependent on the criminal's classification.

Criminals in community corrections are classified in a three-tiered system. Convicts are placed into the A, B, or C group, with A as the highest tier, based on their danger to society and re-socialization level.²⁸³ Their tier corresponds with intensive supervision, normal supervision, and minimum supervision. Social workers play a prominent role in intensifying the supervision.

²⁷⁹ Guan Yu Zhao Pin She Qu Jiao Zheng Xie Guan Yuan Gong Zuo De Yi Jian (关于招聘社区矫正协管员工作的意见) [The Suggestions on Recruiting Assistants to Community Corrections Officers] (issued by the Beijing Bureau of Justice and Beijing Bureau of Labor and Social Security, 2007) (China).

²⁸⁰ 2016 Nian Beijing Shi Huairou Qu Yangguang She Qu Jiao Zheng Fu Wu Zhong Xin Zhao Ping She Qu Jiao Zheng Xie Guan Yuan Gong Gao (2016年北京市怀柔区阳光社区矫正服务中心招聘社区矫正协管员公告) [The Notice on Recruiting Assistants to Community Corrections in Yangguang Community Corrections Service Centre in Huairou District of Beijing Municipality in 2016], YANGGUANG COMMUNITY CORRECTIONS SERVICE CENTRE OF HUIROU DISTRICT (2016) <http://www.bjsgwy.org/2016/0712/6109.html>.

²⁸¹ Zhang Jing, *supra* note 18, at 8.

²⁸² Lin Zhongshu (林仲书), *Beijing Shi She Qu Jiao Zheng Shi Dian Gong Zuo Qing Kuang* (北京市社区矫正试点工作情况) [The Pilot Programs of Community Corrections in Beijing], 1 J. SHANGHAI U. POL. SCI. & L. 14 (2007).

²⁸³ She Qu Fu Xing Ren Yuan Dong Tai Fen Xi Gong Zuo Zan Xing Gui Ding (社区服刑人员动态分析工作暂行规定) [The Provisional Regulations on the Dynamic Analysis of the Offenders under Community Corrections] (issued by the Office of Community Corrections in Beijing, 2005) (China); She Qu Fu Xing Ren Yuan Zong He Zhuang Tai Ping Gu Zhi Biao Ti Xi (社区服刑人员综合状态评估指标体系) [The System on the Analysis of the Comprehensive Situations of the Offenders under Community Corrections] (issued by the Office of Community Corrections in Beijing, 2005) (China).

To safeguard the security of the Olympic Games, the first corrections service center was built in the Chaoyang District, a month before the Olympic Games began.²⁸⁴ Similarly, several months before the Olympics, electronic monitoring was first employed to supervise criminals in community corrections.²⁸⁵ The service center in Chaoyang was built for convicts in community corrections, as well as those recently released from prison.²⁸⁶ The Bureau of Justice regularly organizes moral education and legal education seminars, and arranges for volunteers to periodically offer them one-on-one help. The volunteers are mainly pensioners, who are retired civil servants, retired professionals and retired teachers, civil servants, neighborhood committee and village committee members, college students, and families of convicts and the ex-convicts.²⁸⁷ The Bureau also funds the service centers and engages companies to provide psychological counseling and vocational training.²⁸⁸ For those who are homeless, unemployed, and separated from their relatives, the Bureau of Justice also provides accommodations. The corrections service center in Chaoyang is considered to have achieved remarkable results because none of the people from this service center committed crimes in the two years following the Olympic Games.²⁸⁹

2. The Shanghai Model

A similar committee was formed in Shanghai as well. However, unlike other pilot locations, Shanghai set up an agency called the Community Corrections Office to administer the community program.²⁹⁰ The agency supported a NGO named “xinhang” (新航) that established community corrections service centers. Employee training was all conducted by xinhang. The government only purchases its community corrections services and has control over its operation.²⁹¹

²⁸⁴ Dan Weili, *supra* note 270.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ Wang Hongyu (王宏玉), *Beijing Shi She Qu Jiao Zheng Diao Cha* (北京市社区矫正调查) [*The Survey on Beijing Community Corrections Programs*], 128 J. CHINESE PEOPLE'S PUB. SECURITY U. (Social Science Edition) 112 (2007).

²⁸⁸ *Id.*

²⁸⁹ Li Song & Huang Jie (李松 & 黄洁), *Beijing Yang Guang Jiao Zheng Zhong Xin: 471 Ming Jiao Zheng Ren Yuan Wu Yi Chong Fan* (北京阳光矫正中心:471名矫正人员无一重犯), LEGAL DAILY (2010), http://www.moj.gov.cn/sqjzbgs/content/2010-06/10/content_2167530.htm?node=24072.

²⁹⁰ See *Community Corrects Service Center*, XINHANG (last visited 1/9/2018), available at <http://www.xhang.com/index.asp>.

²⁹¹ Dan Weili, *supra* note 270.

The xinhang community corrections service centers undertake the correction, assistance, and supervision of criminals.²⁹² They are required to provide collective education, psychological counseling, and reintegration assistance, and they must conduct the routine monitoring and organize community services. The ratio of civil servant employees to employees recruited by xinhang is 1:50. The civil servants from the police office, the court, the procuratorate, and the Bureau of Justice are obliged to guide the social workers employed by xinhang. Twenty-five percent of the civil servants working in the service centers leave every year. Every residential district has a xinhang workstation with two or three social workers.²⁹³ Each social worker employed by xinhang undergoes an intensive training program before beginning work. The training is a total of 120 hours and is taught by professors specialized in either social work or law. The social workers also must engage in a minimum of forty-eight hours of training annually.²⁹⁴

Community volunteer work is also administrated by a NGO: the Association of Volunteers for Helping and Educating Ex-convicts and Convicts under Community Corrections (she hui bang jiao zhi yuan zhi xie hui, 社会帮教志愿者协会).²⁹⁵ This NGO fundraises for volunteer work, recruits employees and volunteers (both citizens and legal persons), trains the volunteers, and supervises their work. Although the Shanghai Bureau of Justice heads the association, the Bureau gives the association a free-hand to operate according to its constitution.

The Bureau of Justice's comprehensive review of xinhang is based on correction schemes, interviews on convictions, financial standing, and recordkeeping system, rather than on the basis of crime prevention as in the Beijing Model.²⁹⁶ Nonetheless, the rate of the reoccurrence of crime²⁹⁷

²⁹² *Id.*

²⁹³ Chen He (陈海), *Lun She Qu Jiao Zheng Zhi Shang Hai Mo Shi (论社区矫正之“上海模式”)* [On “Shanghai Model” Community Correction], 174 J. JIANGXI PUB. SECURITY C. 78 (2014).

²⁹⁴ Wang Lina (王李娜), *Shanghai She Qu Jiao Zheng De Shi Jian Yu Si Kao (上海社区矫正的实践与思考)* [The Practice and Consideration on Shanghai Model Community Corrections], 5 J. HUBEI U. ECON. (Humanities and Social Sciences) 37 (2008).

²⁹⁵ See SHANGHAISHI SHEHUI BANGJIAO ZHIYUANZHE XIEHUI, <http://www.shbangjiao.com/index.asp> (last visited Jan. 11, 2018).

²⁹⁶ Wang Lina, *supra* note 294.

²⁹⁷ The statistical computations on recidivism rate were performed by the MJ and the local Bureaus of Justice. The official statistics on recidivism rate are always extremely low in China. According to the China Law Yearbook, the recidivism rate of previous criminals and previous wrongdoers once under RTL is 0.02% in 2008, 0.02% in 2009, 0.01% in 2010, 0.01% in 2011 and 0.47% in 2012. The MJ never explains how the statistics are collected. If these statistics tell the true story, the recidivism rate of previous

is the highest among all the trial locations. Thus, the Shanghai Model, which focuses on rehabilitation rather than crime prevention, is inevitably questioned.²⁹⁸

D. *The Combination of the Features of Formal Punishments and Informal Punishments*

Based on the framework of community corrections programs, the programs are completely different from informal punishments, but in practice, they have some similarities.

1. Features of Formal Punishments

The design of community corrections programs seemingly bears little resemblance to informal punishments. Community corrections has its basis in criminal law and criminal procedure. The community corrections programs were introduced into Amendment VIII of the Criminal Law and the revised Criminal Procedure Law.²⁹⁹ Although the detailed measures on program implementation are stipulated by the announcements and opinions issued by the SPC, the SPP, the MPS, and the MJ, rather than the Criminal Law and the Criminal Procedure Law, these announcements and opinions do not place any additional burden on the convicts beyond the scope of the law. Moreover, the correction and assistance measures are in the convicts' best interests, and are fully justified in its goals of social mobilization.

Furthermore, enforcement authority is vested in the Bureaus of Justice rather than any unofficial individuals or groups.³⁰⁰ The community corrections institutions have a supervisory function and provide facilities for correction and assistance measures. While social workers and

criminals and previous wrongdoers is much lower than the crime rate of the general populace. The data of the latest population census show that the population in China is 1,370,536,875, while the official statistics of the MPS prove that there are 5,969,892 filed criminal cases in 2010. Approximately, China has a crime rate of 435.6 cases per 100,000 population. *The Law Yearbook of China 2008-2012* (Beijing: Law Press).

²⁹⁸ Zhang Wei (张文举), *She Qu Jiao Zheng Zhi Du Shang Hai Mo Shi Xian Zhuang Fen Xi* (社区矫正制度“上海模式”现状分析) [*The Current Situation of “Shanghai Model” Community Corrections*], 35 J. CHIFENG U. 113 (2014).

²⁹⁹ PRC Criminal Law, *supra* note 3, at arts. 38, 40, 76, 77, 85, & 86 (1997 version); PRC Criminal Procedure Law, *supra* note 258, at art. 258.

³⁰⁰ Provisional Implementing Measures of Community Corrections, *supra* note 264; Implementing Measures of Community Corrections, *supra* note 264; Jin Yi Bu Jia Qiang She Qu Jiao Zheng Gong Zuo Xian Jie Pei He Guan Li De Yi Jian (进一步加强社区矫正工作衔接配合管理的意见) [Suggestions on Further Strengthening Connections and Cooperation in Community Corrections], (issued by the SPC, SPP, MPC and MJ, Sept. 21, 2016).

volunteers are encouraged to assist community corrections programs, they are only engaged in correction and assistance.³⁰¹

By virtue of the success of the pilot programs, the central government has made remarkable headway in expanding community corrections. Before the RTL system was terminated, the development of community corrections programs was more effective, and rendered informal punishments irrelevant. Although community corrections programs deal with more serious criminals than RTL, community corrections programs treat wrongdoers more fairly and humanely than RTL. To prevent crime and enforce social control, the RTL system deprived the liberty of wrongdoers who did not even commit a criminal act. However, to reform and rehabilitate criminals, community corrections programs allow criminals to serve their sentences in their community and provide correction and assistance measures for them.

2. Features of Informal Punishments

However, the execution of the pilot programs, to some degree, deviates from its designed supervision, correction, and assistance measures. Pursuant to the Criminal Law, only enforcement officials should supervise criminals in community corrections. In practice, the masses are not only mobilized to correct and assist the convicts, but they are also mobilized to supervise them. The general populace seems to play a larger role in supervision than in correction and assistance.

Since the widespread reforms following the Mao Era, Chinese authorities gradually moved away from involving the masses in law enforcement. The Criminal Law, which was promulgated in 1979, stipulated that criminals under PS were supervised by the masses. Additionally, criminals under suspended sentences are supervised at the grassroots level. In 1997, this stipulation was altered. Pursuant to the Criminal Law, only the police can examine and supervise criminals.³⁰² Subsequently, to curb excessive police power, the authority to supervise and examine was transferred from “the police” to “enforcement authorities” in Amendment VIII of the Criminal Law.³⁰³ Amendment VIII of the Criminal Law does not define “enforcement authorities.” In community corrections programs, the Bureaus of Justice are responsible for the supervision and examination of convicts. In the event of supervisory violations, the police are obligated to investigate the case.³⁰⁴

³⁰¹ Provisional Implementing Measures of Community Corrections, *supra* note 264; Implementing Measures of Community Corrections, *supra* note 264; Suggestions on Further Strengthening Connections and Cooperation in Community Corrections, *supra* note 300.

³⁰² PRC Criminal Law, *supra* note 3, at arts. 39, 75 (1997 version).

³⁰³ *Id.*

³⁰⁴ *Id.* at arts. 71, 79.

Regardless, the authorities still mobilize the general public and encourage volunteers to participate in the programs.³⁰⁵ However, unlike before, the volunteers are predominantly pensioners, civil servants, workers in neighborhood and village committees, and college students. They are easily managed by the Bureaus of Justice, and can commit themselves to work for relatively long periods of time. In the Beijing Model, the Bureau of Justice assigns volunteers to specific convicts. The Shanghai Model takes a step further in recruiting volunteers. Any citizen or legal organization interested in volunteering can submit an application to the Association of Volunteers for Helping and Educating the Ex-convicts and the Convicts under Community Corrections. With association approval, the citizen or legal organization is selected as a volunteer. Despite that, the volunteers in Shanghai are also mainly pensioners, civil servants, workers in neighborhood and village committees, and college students. Per association data, 54% of volunteers are neighborhood and village committee workers, 9.1% are pensioners, 7.9% are civil servants, and 4.4% are college students.³⁰⁶ However, there is a shortage of volunteers, and when the association lacks volunteers, the Bureau of Justice guides the association to make pensioners, civil servants, neighborhood and village committee workers, and college students do volunteer work.³⁰⁷

Although social workers and volunteers are supposed to only help with correcting and assisting convicts, they still take part in the supervision of the convicts in both the Beijing Model and the Shanghai Model. This makes community corrections programs a combination of formal and informal punishments. In the Beijing Model, a large number of social workers are uneducated and unemployed, and their professional training is insufficient. However, they are largely involved in administrative work in the Bureau of Justice. In the Shanghai Model, social workers are relatively well-educated and well-trained, but this does not necessarily mean that they handle the administrative work of the Bureau of Justice. They are qualified to do so, but lack the authority to assist with administrative duties. Indeed, mobilizing the masses in community corrections programs is an acceptable strategy, but presents an issue of which sectors of the populace are mobilized.

³⁰⁵ Provisional Implementing Measures of Community Corrections, *supra* note 264; Implementing Measures of Community Corrections, *supra* note 264; Suggestions on Further Strengthening Connections and Cooperation in Community Corrections, *supra* note 300.

³⁰⁶ Nai Chen (陈楠), *Shanghai She Qu Jiao Zheng Zhong De Wen Ti Yu Dui Ce* (上海社区矫正中的问题与对策) *Master*, EAST CHINA U. POL. SCI. & L. SHANGHAI 27 (2011).

³⁰⁷ *Id.*

E. *Issues Facing the Implementation of the Programs Nationwide: The Correction Measures and Assistance Measures Become Impractical*

After the pilot programs ran for six years, the Chinese government decided to implement community corrections nationwide. To date, the national program has been in effect for another six years, and some areas have experienced new difficulties not seen in the pilot programs.

First, in some provinces or municipalities, the Bureau of Justice and its affiliates do not have enough personnel. Prior to their involvement, the affiliates' missions were guiding legal education, legal consultation, mediation participation, dispute resolution on behalf of the township government, community security management, cooperation with the police station and local court to maintain public order and prevent crime, and the implementation of other legal services delegated by the Bureau of Justice. Although it seems like a great deal of responsibility, in actuality, other departments simply consult the affiliates for their law-related work.³⁰⁸ In some small towns and villages, the affiliates only have three staff members.³⁰⁹ Additionally, the staff members are sometimes required to work in other departments, as well.³¹⁰ In undeveloped provinces in Western China, many villages are in isolated areas. Liangshan, a prefecture containing numerous ethnic communities, has approximately one hundred staff members in its affiliates of the Bureau of Justice.³¹¹ The one hundred staff members must administer and oversee approximately six hundred towns and villages. Thus, it is highly impracticable to operate community corrections service centers like those in Beijing and Shanghai.³¹²

³⁰⁸ Research Department of the Ministry of Justice, *Guan Yu Shi Qu Jiao Zheng Dui Wu Jian She De Tiao Yan Bao Gao* (关于社区矫正队伍建设的调研报告), MOJ.GOV.CN (2012), available at http://www.moj.gov.cn/yjs/content/2012-10/18/content_2787355.htm?node=30053.

³⁰⁹ Jiang et al., *supra* note 15; Hebei Sheng She Qu Jiao Zheng Gong Zuo Ji Zhi Yu Gui Fan Yun Xing Yan Jiu Ke Ti Zu (河北省社区矫正工作机制与规范运行研究课题组) [Research Group of Working Mechanism and Standard Operation of Community Correction in Hebei], *Hebei Sheng She Qu Jiao Zheng Gong Zuo Ji Zhi Yu Gui Fan Yun Xing Yan Jiu* (河北省社区矫正工作机制与规范运行研究) [Research on Working Mechanism and Standard Operation of Community Correction in Hebei], 28 HEBEI L. SCI. 182 (2010).

³¹⁰ Research Group of Working Mechanism and Standard Operation of Community Correction in Hebei, *supra* note 309, at 192-94.

³¹¹ Tang Wei (唐文娟), *Yi Zu Ju Ju Qu Tui Xing She Qu Jiao Zheng De Kun Jing Yu Chu Lu – Ji Yu Liang Shan Yi Zu She Qu Jiao Zheng De Shi Dian Fen Xi* (彝族聚居区推行社区矫正的困境与出路—基于凉山彝族社区矫正的试点分析) [The Problems and Solutions of Promoting Community Correction in Yi Nationality Inhabitation Communities—Analysis Based on Pilot Location of Yi Nationality Inhabitation Communities in Liangshan], 35 GUIZHOU ETHNIC STUD. 31 (2014).

³¹² *Id.*

Second, a lack of finances is an obstacle in many areas. In the “Implementing Measures of Community Corrections,” community corrections are a required part of the budget plan. However, the Bureaus of Justice in many municipalities receive only the initial budget for community corrections, but are subsequently and regularly underfunded.³¹³ The financial problem is especially grim in villages in Western China.³¹⁴ The community corrections service centers in other provinces cannot run as effectively as the ones in Beijing and Shanghai, largely due to a lack of funding.

Third, due to the lack of personnel and funding, some community corrections measures, especially those aimed at correcting and assisting convicts, are difficult to implement. A number of community corrections measures, for example, like comprehensive evaluations, individual corrections plans, educational studies, vocational training, employment guidance, and psychological counseling, lack sufficient funding and staff to get off the ground. Several local Bureaus of Justice have to simply cut specific measures. For example, community service should overlap with vocational training, but without enough resources to devote to vocational training, community services are restricted to activities like cleaning that require unskilled labor.³¹⁵ Moreover, a significant number of citizens complain about issuing subsistence allowances and unemployment benefits to convicts because law-abiding citizens are currently suffering from economic hardships.³¹⁶

Lastly, the overwhelming emphasis on crime prevention has resulted in stricter supervision of convicts in community corrections. The criteria that determine program success are skewed toward crime prevention.³¹⁷ MJ statistics reveal that the reoccurrence of crime

³¹³ Kong Cai, *Quan Mian Shi Xing She Qu Jiao Zheng Gong Zuo Cun Zai De Zhu Yao Wen Ti Ji Dui Ce* [Main Problems and Countermeasures of Policing Community Correction in an All Around Way], 4 JUST. OF CHINA 7 (2010); Research Group of Working Mechanism and Standard Operation of Community Correction in Hebei, *supra* note 309.

³¹⁴ Kong Cai, *supra* note 313, at 71; Tang Wei, *supra* note 311, at 103-14.

³¹⁵ Jiang et al., *supra* note 15, at 75-96; Xing Tian, *She Qu Jiao Zheng Dui Xiang Kai Zhan Gong Yi Lao Dong* (社区矫正对象开展公益劳动), KUNMING DAILY (2014), <http://news.163.com/14/0603/02/9TPHOP0A00014AED.html>.

³¹⁶ Li Guangyong (李光勇), *She Qu Jiao Zheng Ren Yu Bang Fu Xian Zhuang, Kun Jing Yu Dui Ce Diao Cha Yan Jiu* (社区矫正人员帮扶现状、困境与对策调查研究) [The Research on the Situation, Problems and Countermeasures of Helping Convicts Under Community Correction], 4 CRIM. SCI. 80 (2013); Tang Wei, *supra* note 311, at 35-39.

³¹⁷ Lu Lei (鲁兰), *Lun Tui Jin She Qu Jiao Zheng Shi Dian Zhi Zhi Yue Yin Su* (论推进社区矫正试点之制约因素) [On The Restrictions Of Community Correction Pilot Programs], 146 L. REV. 42 (2007).

committed by convicts in community corrections remains under 0.2%,³¹⁸ and the Bureau of Justice in Shanxi Province even reported that the crime reoccurrence rate was just 0.015%.³¹⁹ Despite the fact that no minimum targets were established, most local bureaus set individual goals of achieving rates under 1% to avoid lagging behind other municipalities.³²⁰ Although a number of correction and assistance measures are impractical, the local Bureaus of Justice must achieve this goal.³²¹ Therefore, while convicts in community corrections are those not likely to commit future crimes, supervision of these criminals has intensified.³²² Due to the lack of personnel, enforcement authorities rely heavily on community involvement.³²³ Unfortunately, this development may have a detrimental effect on the successful expansion of community corrections programs.

CONCLUDING REMARKS

In China, formal and informal punishments traditionally coexist. Although Chinese rulers generally justified informal punishments from a moral Confucian perspective, they, in fact, appreciated its utilitarian value more so than anything else. Specifically, imperial rulers valued the immediate deterrence provided by informal punishments. “In any political system, the difference between principled reform and reform for narrow utilitarian reasons is inevitably muddled, and this is especially the case in China's political culture.”³²⁴ Nonetheless, the effectiveness and efficiency of informal punishments were prioritized, often at the expense of individual civil rights and civil liberties. Without a sound, legal basis, informal punishments were regularly harsher than criminal penalties at the low end of spectrum. Furthermore, wrongdoers penalized informally were not subject to the rule of law, and were not granted the individual rights and freedoms guaranteed in criminal and procedural laws. As such, offenders could not legally challenge the imposed informal punishments.

Severe informal punishments shifted the entire punishment system towards heavy penaltyism. The majority of minor offenses were punished

³¹⁸ Xin Wu (辛闻), *Si Fa Bu: She Qu Jiao Zheng Shi Dian Xiao Guo Hao, Zai Fan Lv Kong Zhi Zai 0.2% Yi Xia* (司法部:社区矫正试点效果好再犯率在0.2%以下), [translation], BOSIDENG (Nov. 5, 2014, 10:36 AM), http://news.china.com.cn/2014-11/05/content_33973119.htm.

³¹⁹ Zhe Wang, *Shan Xi Shang Ban Nian She Qu Jiao Zheng Chong Xin Fan Zui Lv Wei 0.015%* (山西上半年社区矫正重新犯罪率为0.015%) (Sept.16, 2014), available at <http://epaper.legaldaily.com.cn/fzrb/content/20140916/Article02008GN.htm>.

³²⁰ Lu Lei, *supra* note 317.

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ Trevaskes, *supra* note 220.

informally, and the general public, therefore, inevitably considered formal punishments a harsh remedy. In China, historical, political, and social trends led to the development of harsh penaltyism. Although competing schools of thought in imperial China had different perspectives on the role of formal punishment in crime prevention, these ideologies regarded deterrence as the predominant rationale for punishment. Therefore, effective deterrence justified the use of severe punishment on criminals, which overrode classic, Confucian principles of proportionality. In socialist ideology, the punishment system was perceived as an instrument of class struggle, in which enemies were targeted and punished.

When the CCP abolished RTL, scholars at home and abroad debated whether this marked the end of informal punishments in China. Community corrections programs, however, represent a combination of formal and informal punishments. Rhetorically, the legitimate goals of the programs no longer focus only on crime prevention, but also heavily emphasize the rehabilitation and societal reintegration of criminals. However, in practice, the implementation of community corrections programs was unavoidably tinged by utilitarian motives. Essentially, while rehabilitation was the primary goal, deterrence is the ultimate goal. The administration of community corrections programs is not just for the welfare of criminals. If community corrections programs facilitate more effective crime prevention, then these programs could play a more prominent role. The reoccurrence of crime is standard by which success is measured. The local Bureau of Justice tries to show the effectiveness of the community corrections programs with low crime rates. However, these low rates are not achieved by engaging in corrective and assistive measures, but more so by focusing on intensified supervision and narrowing the list of criminals who can receive community penalties. As E. Li exhorts, “in China, community corrections is a penal and policing approach that primarily represents an actuarial form of justice.”³²⁵ The actuarial justice is driven by cost-effectiveness and techniques for identifying, classifying, and managing offenders, rather than rehabilitating them. This creates financial obstacles to secure proper implementation of rehabilitation programs. Moreover, although the Bureau of Justice is responsible for supervisory measures, in practice, a large part of criminal supervision is handled by social workers. These practices deviate from the original program, and shares features of informal punishments.

The prevention of the reoccurrence of crime is the predominant standard of assessment, and therefore, local authorities place a greater emphasis on supervisory measures, and heavily rely on age-old patterns of public surveillance pattern. Corrective and assistive measures and assistance measures are clearly linked with desistance, but they can only

³²⁵ Enshen Li, *China's Community Corrections: An Actuarial Model of Punishment*, 64 CRIME L. SOC. CHANGE 1, 2-3 (2015).

demonstrate their effects on crime prevention in the course of time, while the supervision measures could be effective immediately. As such, the corrective and assistive measures and assistance measures are difficult to measure as opposed to supervisory measures. However, the eventual criminogenic effect of people holding the criminal justice system in contempt may outweigh the immediate deterrent effect.³²⁶ The failure of Strike Hard campaigns has already proven this. As Confucianism teaches, “benevolent rulers always insist on their long-range planning and are never anxious to see the instant benefit.”³²⁷

³²⁶ Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L. J. 949 (2002).

³²⁷ Z. Dong, *Chun Qiu Fan Lu* (春秋繁露), ZHONG GUO ZHE XUE SHU DIAN ZI HUA JI HUA, available at <http://ctext.org/chun-qiu-fan-lu/dui-jiao-xi-wang-yue-da/zhs> (last visited Nov. 20, 2017).