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**THE [CAPITAL] PUNISHMENT FITS THE CRIME: A
COMPARATIVE ANALYSIS OF THE DEATH PENALTY AND
PROPORTIONALITY IN THE UNITED STATES OF AMERICA
AND THE PEOPLE’S REPUBLIC OF CHINA**

Ryan Florio *

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SUMMARY

The governments of both the United States and China maintain the death penalty as a means of punishing its most dangerous criminals, but with an astounding 68 capital offenses, China perennially remains the world leader in executions. This article examines the theory of proportionality of criminal punishment and how it relates to the respective death penalty policies in the United States and China. A comparative analysis will reveal two extremely different societies with two different perspectives on proportionality: one that recognizes and protects fundamental freedoms and another that places emphasis on collective societal welfare over individual rights. The article will describe how constitutional and legislative provisions, specific historical periods, human rights, and the judicial system interact to shape the policies that the United States and China practice today.

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A. INTRODUCTION

Political activists have long cited religious intolerance, media censorship, and stringent birth control policies as indications of China's poor human rights reputation. In an effort to win its first-ever Olympics bid in 2001, Beijing assured the International Olympic Committee that China would improve its human rights record.¹ In 2004, China amended its constitution by inserting a stipulation governing human rights;² the amendment declares simply, "[t]he State respects and preserves human rights."³ As the 2008 Summer Olympics drew nearer, however, China faced pressure and criticism for failing to uphold its promise. Human rights organizations have reprimanded China for its failure to use its influence to halt the humanitarian crisis in Sudan, its religious and cultural oppression in Tibet, and its imprisonment of political dissidents.⁴

Seemingly lost amidst the mass of human rights outcries is the opposition to China's extensive and liberal use of the death penalty. Although the government does not officially release statistics, Amnesty International reported that China executed 1,010 people in 2006, representing almost two-thirds of the 1,591 put to death worldwide that year.⁵ While the figure significantly dropped from its total of 1,770 in 2005, some activists believe that because of state secrecy, the number of executions could be as high as 10,000 to 15,000 per year.⁶

¹ David Pierson, *China Gets Low Grade in Human Rights; Amnesty International, Citing Detentions, Finds Beijing Hasn't Lived up to Its Promises Ahead of the 2008 Olympics*, L.A. TIMES, May 1, 2007, at A3.

² ZOU KEYUAN, CHINA'S LEGAL REFORM: TOWARDS THE RULE OF LAW 3 (2006).

³ XIAN FA [Constitution] art. 33 (2004) (P.R.C.).

⁴ Evan Osnos, *Host Feels the Heat as Games Approach; Spielberg's Exit Is One More Hurdle for China*, CHICAGO TRIBUNE, Feb. 14, 2008, at C1.

⁵ The United States, by comparison, executed only 53 people in 2006. Amnesty International, *Facts and Figures on the Death Penalty (1 January 2007)*, Apr. 27, 2007, <http://archive.amnesty.org/library/index/ENGACT500022007>; John M. Glionna, *China Shows Caution on Executions; Facing Pressure Before the Olympics, Beijing's Policy Is to 'Kill Fewer, Kill Carefully.'* *Activists Urge More Legal Reforms*, L.A. TIMES, Jan. 6, 2008, at A6.

⁶ Glionna, *supra* note 5.

Under federal American law,⁷ there are only two crimes, other than murder and felonies that result in death, that are subject to capital punishment: espionage⁸ and treason.⁹ By stark contrast, sixty-eight offenses, including such non-violent crimes as tax fraud and counterfeiting currency, carry the death penalty in China.¹⁰ One man, in recent years, was sentenced to death for stealing a cellular phone,¹¹ and just last year, two prominent government officials were executed for taking bribes.¹² China's broad use of the death penalty, especially when compared to the United States and other nations, no doubt raises serious issues regarding theories of proportionality, that is, whether the punishment fits the crime. For instance, in China, a person convicted of manufacturing 100 grams of heroin may be subject to the death penalty.¹³ In the United States, a person found guilty of a similar offense may be sentenced to only five years in prison.¹⁴ Such a wide disparity in sentencing guidelines naturally leads one to contemplate the driving forces behind the Chinese penal system and the relationship between crime and punishment.

Facing mounting domestic and international criticism for what activists and legal scholars deemed "widespread and arbitrary use of the death penalty," China's legislature, the National People's Congress, adopted a new law in 2006 restoring power to its highest tribunal, the Supreme People's Court, to review all

⁷ Unlike the United States, which has federal and state laws, China's criminal codes are national laws that are uniformly applied and enforced throughout all of its provinces. Therefore, for purposes of this paper and the sake of comparison, only federal American crimes will be referenced.

⁸ 18 U.S.C. § 794 (2000).

⁹ 18 U.S.C. § 2381 (2000).

¹⁰ See generally Criminal Code of the People's Republic of China (promulgated by the People's Cong., Mar. 17, 1996), translated in WEI LUO, THE 1997 CRIMINAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA: WITH ENGLISH TRANSLATION AND INTRODUCTION (1998) [hereinafter Criminal Code].

¹¹ Glionna, *supra* note 5.

¹² Alexa Olesen, *China Orders New Limits on the Use of Death Penalty*, WASH. POST, Sep. 15, 2007, at A13.

¹³ Criminal Code *supra* note 10, art. 347, at 180-82.

¹⁴ 21 U.S.C. § 841(b)(1)(B) (2000).

death sentences handed down by lower courts.¹⁵ While some human rights groups welcomed what was believed to be “the most important reform of capital punishment in China in more than two decades,”¹⁶ others remained skeptical. Amnesty International, claiming there were inconsistencies in how the reform was implemented, counted 17 executions between January 1 and March 19, 2007, according to Chinese news reports; the Supreme People’s Court, however, reported only four during that same period.¹⁷ Others dismissed the government’s efforts as merely “stopgap” and questioned the integrity of the judicial system.¹⁸

The primary objective of this article is to explore proportionality of crime and punishment in China, surveying offenses and respective penalties in China while examining the theories, justifications, and historical bearings that drive them. A comparative analysis between the United States and China will be presented as well, portraying two extremely different societies with different historical and cultural influences. The United States exhibits an individualistic society that has traditionally recognized and protected fundamental rights, and its judicial system has generally adhered to a concept of proportionality under the Eighth

¹⁵ Decision of the Supreme People’s Court on the Exclusive Exercise of the Power to Review Death Penalty Cases, Dec. 28, 2006, *available at* <http://www.lawinfochina.com/law/display.asp?db=1&id=5741&keyword=organic%20law%20courts>; David Lague, *China Moves to Lessen the Broad Use of Death Sentences*, N.Y. TIMES, Nov. 1, 2006, at A3.

¹⁶ Lague, *supra* note 15.

¹⁷ Pierson, *supra* note 1.

¹⁸ See Maureen Fan, *Report Faults China on Rights Failures; Olympics an Excuse for Arrests, Amnesty Says*, WASH. POST, Apr. 30, 2007, at A10 (T. Kumar of Amnesty International commented, “It’s only about a year to go [until the Olympics] and we don’t see any genuine effort by the Chinese administration to improve human rights...[T]he public statement about extra review for the death penalty...[is] just enough to keep the criticism at bay.”); Glionna, *supra* note 5 (Sharon Hom, director of Human Rights in China, similarly expressed doubts about the reform: “So you have the return of an important piece of review...[b]ut you’re reviewing a system that is still politicized, that still does not welcome independent judges and where lawyers raising questions about abuse or torture are being harassed and beaten up.”).

Amendment of the Constitution. China, by contrast, is a collectivist nation that values societal welfare over individual rights. Its idea of proportionality is largely influenced by political leaders and governmental objectives. Both the United States and China demonstrate theories of punishment that draw upon utilitarian and retributive perspectives, but China appears to place more of an emphasis on the latter. Furthermore, legislative provisions, historical factors, and a unique judicial system each play a significant role in molding China into the world leader in executions it is today. Part B of the paper will describe the major theories of punishment and the doctrine of proportionality and how they relate. Part C examines constitutional and legislative provisions, including the notion of cruel and unusual punishment as established by the Eighth Amendment of the United States Constitution and interpreted by the United States Supreme Court. This section also explores whether and to what extent Chinese law observes an analogous concept. Part D will outline how specific eras in China's history have influenced its death penalty policy. Finally, Part E describes reactions from human rights organizations and Part F questions the future of judicial reform.

B. THEORIES OF PUNISHMENT AND THE DOCTRINE OF PROPORTIONALITY

In many cultures, when citizens commit crimes, they are charged, prosecuted, and punished by the government on society's behalf. Such punishment generally takes the form of inflicting pain or causing one to suffer some consequence that is ordinarily considered to be unpleasant. Citizens have a vested interest in their government operating in a fair and just manner, and because punishment involves pain or some deprivation of liberty or property, its intentional imposition by the state naturally requires justification.¹⁹ In order to properly determine the manner and degree of punishment, one must first establish the basis on which punishment is justified and the reasons punishment is sought. Without an understanding of why penalties are imposed and what

¹⁹ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 11-12 (4th ed. 2006).

they aim to achieve, one can hardly hope to gain a solid comprehension of the proportionality principle.²⁰

When the authorities have determined that a person is responsible for a criminal act and penal sanctions are deemed appropriate, legislators must decide how much punishment is necessary to achieve the desired goal of their judicial system. The idea that the punishment should fit the crime has been analyzed by commentators, institutions, and courts for years. In a general sense, as one scholar argues, a person is not justified in punishing another unless it is “proportional or reasonable in relation to the harm threatened or the interest to be furthered.”²¹ In the context of sentencing, the American Model Penal Code declares that one of its general purposes is to “safeguard offenders against excessive, disproportionate or arbitrary punishment.”²² This principle is echoed in constitutional law through United States Supreme Court opinions as well as the Eighth Amendment of the United States Constitution, which prohibits grossly disproportional punishment.²³

The following section describes the major theories of punishment, namely utilitarianism and retributivism, and their relationship with the proportionality doctrine. It will also intermittently speculate as to how the major theories interact with proportionality to influence death penalty policy in both the United States and China.

I. Utilitarianism and Proportionality

According to Jeremy Bentham, often referred to as the father of classical utilitarianism, the purpose of the law is to maximize the net happiness of society, and laws should therefore

²⁰ Mirko Bagaric, *Sentencing: The Road to Nowhere*, 21 SYDNEY L. REV. 597, 598 (1999).

²¹ 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 87 (1984).

²² MODEL PENAL CODE § 1.02(2)(c) (1962).

²³ See *infra* Part C (discussing cruel and unusual punishment).

be used to avoid all painful or unpleasant experiences.²⁴ Proponents of this theory believe that in deciding whether to punish, the authorities should engage in a cost-benefit analysis in which punishment should be inflicted only if the good that results from the punishment will outweigh the bad. In the same manner, a “person contemplating criminal [conduct] will balance the expected benefits” of the activity “against [the] risks...[and] severity of the likely punishment,” avoiding the conduct “if the perceived potential pain” or deprivation “outweighs the expected potential pleasure” derived from committing the crime.²⁵

Utilitarianism seeks to justify punishment by pointing to the useful purposes it serves. The most commonly cited and recognizable goal of utilitarianism is deterrence, of which there are two types: general and specific.²⁶ General deterrence is the basic knowledge that punishment will naturally follow the commission of a crime. Observing others who are punished for certain behavior creates a sense of association between the punishment and the conduct, which ostensibly constrains people from acting wrongfully. An individual’s punishment teaches society in general about what conduct is or is not permissible, and instills fear of punishment in potential violators of the law.²⁷ With specific deterrence, the actual imposition of punishment reminds the

²⁴ See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1879).

²⁵ DRESSLER, *supra* note 19, at 15.

²⁶ *Id.*; *cf. id.* at 15-16 (Other principal objectives of utilitarianism include incapacitation and rehabilitation. The former seeks to permanently or temporarily remove criminals from the general population and prevent them from acting upon their destructive tendencies, which often takes the form of incarceration. The latter seeks to reform the wrongdoer so that his wish to commit crimes will be curtailed. Common methods include psychiatric treatment, drug addiction therapy, and vocational training.); because these goals do not seek to justify capital punishment, they are therefore beyond the scope of this article.

²⁷ *Id.* at 15.

offender that if he repeats the act, he will be punished again.²⁸ For instance, if a person serves a five-year prison sentence for distributing illegal drugs, he will theoretically think twice before committing the same crime. The goal of deterrence is therefore a net reduction in crime, for if potential violators are aware of the risk and severity of punishment, they are less likely to engage in criminal conduct.

In order to comport with the proportionality doctrine, utilitarianism directs that punishment be inflicted consistent with the amount required, but no more than is required, to achieve its goals of crime prevention.²⁹ According to Bentham, there are certain rules designed to ensure that punishment is administered in a proportional fashion. First, the value of the punishment must not be less than what is sufficient to outweigh the profit of committing the crime.³⁰ If the punishment is inadequate, the crime will remain profitable to the actor and the threat of punishment will be ineffective. Second, Bentham directs legislators to grade punishments in a manner that will encourage a person to “choose always the least mischievous of two offences,” by ensuring that when any two offenses are in competition, “the punishment for the greater offence must be sufficient to induce a man to prefer the less.”³¹ Theft, for instance, should carry less punishment than murder in order to induce a criminal to commit the less harmful act. Although one may assume theft is universally considered a less harmful act than murder, China’s criminal code offers little guidance to potential criminals in this regard. Both the United States and China consider murder a capital offense. However, in the United States, theft of government money, for instance, carries a maximum sentence of 10 years imprisonment,³² whereas “stealing an extraordinarily large amount of money” from a

²⁸ Kent Greenawalt, *Punishment*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1287 (Joshua Dressler ed., 2d ed. 2002).

²⁹ DRESSLER, *supra* note 19, at 54.

³⁰ BENTHAM, *supra* note 24, at 179.

³¹ *Id.* at 181.

³² 18 U.S.C. § 641 (2000).

financial institution in China may warrant the death penalty.³³ How, then, can the potential criminal be expected to choose the “least mischievous” of the two offenses where the punishments are equally severe? Perhaps China’s criminal code and administration of punishment goes too far in inflicting more pain than what is required to achieve its goals. It remains to be seen, however, exactly what those goals entail.

II. Retributivism and Proportionality

The fundamental thrust behind the retributive theory of punishment is “just deserts” and moral culpability. Punishment of criminals is justified simply because they deserve it.³⁴ In contrast to utilitarianism, which looks to the future and to the potential societal benefits of punishment, the retributive theory looks to the past and justifies punishment solely on the basis of the voluntary commission of a crime. Therefore, because humans generally possess free will, they may be justly blamed and penalized when they choose to violate the law.³⁵

In contrast to utilitarian punishment, which is linked to predictions of future harm and the extent to which the undesired conduct can be deterred, retributivism seeks to compare punishment to the offense already committed, without consideration of future harm.³⁶ As discussed above, retributive punishment is justified by the criminal’s blameworthiness. In order to devise a system of proportional punishment based on retributive principles, one may simply declare that the degree of punishment should be proportional to the gravity of the crime. However, in the absence of an “eye for an eye” system of

³³ Criminal Code *supra* note 10, art. 264, at 147-48.

³⁴ Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY (Ferdinand Schoeman ed., 1987), 179-82.

³⁵ DRESSLER, *supra* note 19, at 17.

³⁶ *Id.* at 58-59.

punishment,³⁷ penalties can only roughly estimate the seriousness of the crime committed. Therefore, one must take the extra step of attempting to quantify the severity of the punishment and the crime while explaining how the two correspond to one another.

According to one scholar, when assessing the severity of a crime, one must take into account both the degree of harm caused and the actor's level of moral culpability.³⁸ For instance, murder is considered more serious than robbery because "the *harm* is greater and it is more serious than negligent homicide because the actor's *culpability* is greater."³⁹ Thus, a legislature seeking to develop a retributive system of proportional punishment will first examine the crime in question and determine what harm ordinarily results from the commission of such an offense. In the United States, for instance, people generally regard violent crimes (e.g. homicide and rape) as being more harmful and serious than non-violent offenses (e.g. bribery and fraud). Additionally, in evaluating the culpability component, the legislature will consider the criminal's state of mind and the circumstances surrounding the act. The intentional commission of a crime will presumably deserve harsher punishment than one committed recklessly or negligently.⁴⁰ However, this ultimately begs the question of whether, for instance, an intentional robbery deserves more or less punishment than a negligent homicide.

So how exactly do Chinese lawmakers evaluate the severity of a crime and the moral responsibility of a criminal? What is the rationale behind making the penalties for tax evasion and murder equally severe? Considering China's numerous capital offenses, including non-violent crimes, one must determine what roles the

³⁷ This is the archaic concept of doing to the offender, as punishment, exactly what the offender did to the victim. For instance, if the offender kills the victim, the offender must be killed as punishment. Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25, 26 (1992).

³⁸ Andrew von Hirsch, *Proportionality in the Philosophy of Punishment: From "Why Punish" to "How much?"*, 1 CRIM. L.F. 259, 266 (1990).

³⁹ *Id.* (emphasis added).

⁴⁰ DRESSLER, *supra* note 19, at 57-58.

factors of history, philosophy, and culture play in its criminal justice system.⁴¹

III. The Penalty Scale: How Much Punishment?

According to the doctrine of proportionality, people convicted of crimes of comparable gravity should receive punishments of comparable severity. But how exactly does one measure the gravity of the crime and the severity of the corresponding punishment? One cannot simply determine, for instance, that the serious crime of armed robbery deserves an “equally” serious punishment of, say, ten years in prison. In order to avoid such a dangerously arbitrary and subjective system, crimes and punishments cannot be perceived or analyzed in the abstract. Therefore, one scholar introduces the notion of cardinal proportionality, which aims to set “anchoring points” on a penalty scale.⁴² If the state has set the punishments for certain crimes, then it can fix the penalty for crime “X” by comparing the typical seriousness of the crime with the seriousness of other crimes.⁴³ The process, however, requires a starting point from which the state can gradually increase or decrease the punishment according to the severity of the crime. The propriety of a punishment therefore depends on how the scale has been anchored, what limits or bounds have been set, and what penalties have been fixed for other crimes.⁴⁴ An extremely harsh penalty scale, for example, might set a lower limit that imposes several years’ imprisonment for its least serious crimes, while its more serious crimes would carry even more severe penalties as they approach the upper limit. The objection to such a stringent formula depends on one’s moral assumptions. On the one hand, in a society that highly values fundamental rights, like the United States, a lengthy prison term involving a major deprivation of liberty for such a minor crime would likely violate the proportionality principle. On the other

⁴¹ See *infra* Part E.

⁴² Von Hirsch, *supra* note 38, at 282.

⁴³ *Id.*

⁴⁴ *Id.* at 283.

hand, in a society with a social ethic that minimizes the value of individual rights, like China, that same crime may indeed justify the seemingly disproportional punishment.⁴⁵

Assuming, *arguendo*, that China has devised a penalty scale, on its face, the fact that China has 68 capital offenses makes its judicial system appear grossly disproportional, as minor and mid-level crimes seem to pile up on the most serious punishment end of the penalty spectrum. Therefore, perhaps China sets a relatively high anchoring point, closing the gap between its lower and upper bounds. Assuming homicide and capital punishment stand alone at the upper limit of the United States' penalty scale, it is likely that China perceives many more crimes as equally severe and reprehensible, and they are therefore equally deserving of the upper limit punishment of death. The next section explores how the United States and China have dealt with the proportionality issue through constitutional interpretation and legislative enactments.

C. CONSTITUTIONAL AND LEGISLATIVE PROVISIONS IN THE UNITED STATES AND CHINA

I. The United States

a. The Constitution and Historical Interpretation

The Eighth Amendment of the United States Constitution prohibits the infliction of "cruel and unusual punishment" by government agents on persons convicted of crimes.⁴⁶ When the Framers of the Constitution drafted the Bill of Rights, their intent in enacting a ban on cruel and unusual punishment was twofold: to restrain legislative power to prescribe punishment for crimes, and to issue a warning to the courts not to abuse their discretion.⁴⁷

⁴⁵ *Id.* at 283-84.

⁴⁶ U.S. CONST. amend. VIII.

⁴⁷ Annaliese Flynn Fleming, *Louisiana's Newest Capital Crime: The Death Penalty for Child Rape*, 89 J. CRIM. L. & CRIMINOLOGY 717, 719-20 (1999). This idea of checks and balance that pervades throughout American constitutional law is not recognized in China's single-party system of government. See *infra* Part F.II.b.

However, there is very little evidence regarding how the Framers intended to define the Cruel and Unusual Punishment Clause, so the United States Supreme Court assumed the task of interpreting its meaning in a number of landmark decisions. In 1878, the Court held that the Eighth Amendment prohibits torture and punishments of “unnecessary cruelty,”⁴⁸ but later clarified that the punishment of death itself is not cruel.⁴⁹ The first discussion of proportionality appeared two years later in *O’Neil v. Vermont*, where the dissent interpreted the Clause to prohibit “all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.”⁵⁰ In *Weems v. United States*, a majority of the Court finally articulated a proportionality guideline, ruling that “punishment for crime should be graduated and proportioned to [the] offense.”⁵¹ The Court reasoned that the Framers must have intended that the ban on cruel and unusual punishment included penalties disproportionate to the offense.⁵²

In addition, the Court further noted the Clause’s flexibility, stating that it “may acquire meaning as public opinion becomes enlightened by a humane justice.”⁵³ Several decades later, the Court echoed this sentiment in *Trop v. Dulles*, asserting that the “[Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁵⁴ The Court therefore began to base its standard on the morality of contemporary society.⁵⁵ As society’s attitude towards human rights and crimes changed, so did the meaning of the Clause. If people began to perceive a particular crime as especially harmful or reprehensible, the Clause would take on a more narrow

⁴⁸ *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (citations omitted).

⁴⁹ *In re Kemmler*, 136 U.S. 436, 447 (1890).

⁵⁰ 144 U.S. 323, 339-40 (1892) (Field, J., dissenting).

⁵¹ 217 U.S. 349, 366-67 (1910).

⁵² *Id.* at 372-73.

⁵³ *Id.* at 378 (citing *Ex parte Wilson*, 114 U.S. 417, 427 (1885); *Mackin v. United States*, 117 U.S. 348, 350 (1886)).

⁵⁴ 356 U.S. 86, 101 (1958).

⁵⁵ Sander Jacobowitz, *Rattling Chains and Smashing Rocks: Testing the Boundaries of the Eighth Amendment*, 28 RUTGERS L.J. 519, 525 (1997).

meaning. Conversely, if people increasingly perceived certain punishments as severe deprivations of liberty or violations of dignity, the Clause would ultimately cast a larger net. As discussed later, China does not value fundamental individual rights as highly as American society.⁵⁶ Therefore, its concept of cruel and unusual punishment, if there is one at all, will naturally have a much different meaning.

The *Weems* line of cases declared that the Cruel and Unusual Punishment Clause must be analyzed according to public perceptions of standards of decency. In *Gregg v. Georgia*, the Court found such scrutiny insufficient and went a step further, ruling that a penalty must also comport with basic concepts of human dignity, which essentially means that the punishment must not be “excessive.”⁵⁷ According to this heightened standard, a punishment “must not involve the unnecessary and wanton infliction of pain [and] must not be grossly out of proportion to the severity of the crime.”⁵⁸ As we shall see, Chinese law lacks a provision directly analogous to the Cruel and Unusual Punishment Clause, and it is unclear whether any standard of decency or human dignity is given any consideration or weight when administering death sentences.

b. *Coker* and Modern Interpretation

One year after *Gregg*, the Court’s struggle with the proportionality issue reached its peak in *Coker v. Georgia*, where it ruled that the death penalty for raping an adult woman constituted cruel and unusual punishment.⁵⁹ The Court asserted that capital punishment for the crime of rape is “grossly disproportionate and excessive” and “therefore forbidden by the Eighth Amendment.”⁶⁰ Consistent with *Weems* and *Trop*, the Court cited evidence of contemporary society’s attitude towards imposing the death

⁵⁶ See *infra* Part C.III.

⁵⁷ 428 U.S. 153, 173 (1976).

⁵⁸ *Id.* (citations omitted).

⁵⁹ 433 U.S. 584, 592 (1977) (plurality opinion).

⁶⁰ *Id.*

penalty for rape, noting that Georgia was one of only three states at the time that authorized such punishment.⁶¹ Evocative of Andrew von Hirsch's penalty scale and "anchoring points,"⁶² the Court went on to address the relative seriousness of rape, comparing its degree of harm and moral culpability to murder. The Court defined rape as an especially violent crime, which "short of homicide...is the 'ultimate violation of the self.'"⁶³ However, it stopped short of placing rape alongside murder at the "upper limit" of the penalty scale, concluding that rape, while exceptionally reprehensible, was not as serious as murder in terms of the criminal's blameworthiness and the resulting injury.⁶⁴ The Court further explained its rationale regarding the proportionality doctrine:

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life...rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist...does not...We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability," is an excessive penalty for the rapist who, as such, does not take human life.⁶⁵

While some of the passage's assertions are certainly debatable, the Court evidently drew a bright line between crimes that result in loss of life and those that do not, concluding that

⁶¹ *Id.* at 595-96 (emphasizing that Georgia was the only one of the three that authorized the death penalty for rape of an adult. Florida and Mississippi only imposed such punishment if the victim was a child).

⁶² *See supra* Part II.C.

⁶³ *Coker*, 433 U.S. at 597.

⁶⁴ *Id.*

⁶⁵ *Id.* at 598.

rapists do not take the lives of their victims and therefore do not deserve the death penalty.⁶⁶

Concerning the degree of harm caused by rape, the *Coker* Court observed that rape not only involves the obvious private injury to the victim, but because the crime “undermines the community’s sense of security,” there is a public injury as well.⁶⁷ The latter harm is perhaps what carries the most weight in the eyes of the Chinese criminal justice system. As discussed in the next section, in contrast to the United States, China discounts individual rights in favor of the collective social good. Thus, when a crime such as rape so severely disrupts society’s sense of security and well being, the government will likely regard the crime as warranting the harshest of punishments.

II. China

a. Constitution of the People’s Republic of China

The Preamble to the Constitution and its initial provisions acknowledge the leadership of the Communist Party and emphasizes the dominance of the socialist society over the individual.⁶⁸ However, the fourth and most recent version of the Constitution contains an extensive section on the fundamental rights of citizens.⁶⁹ Specifically, Article 35 guarantees standard civil and political rights similar to those included in the First Amendment of the United States Constitution: “freedom of speech, of the press, of assembly, of association, of procession and of demonstration.”⁷⁰ Article 37, comparable to the Fourth and Fifth Amendments of the United States Constitution, prohibits arrest without “approval or by decision of a people’s procuratorate or...court,” the “unlawful deprivation or restriction of citizens’

⁶⁶ Fleming, *supra* note 47, at 727.

⁶⁷ 433 U.S. at 598.

⁶⁸ See, e.g., XIAN FA art. 1, (1982) (P.R.C.) (“The socialist system is the basic system of the People’s Republic of China. Sabotage of the socialist system by any...individual is prohibited.”).

⁶⁹ See generally XIAN FA. art. 33-50 (1982) (P.R.C.).

⁷⁰ *Id.* at art. 35.

freedom of person by detention or other means,” and the “unlawful search of the person of citizens.”⁷¹

Despite numerous passages protecting individual liberties that mirror the American Bill of Rights, a thorough examination of China’s Constitution reveals no provision analogous to the Cruel and Unusual Punishment Clause of the Eighth Amendment,⁷² and thus no concept of proportionality. In fact, aside from Article 37, quoted above, the Constitution contains very little penal and procedural protections. Moreover, the same chapter that contains a large section on individual freedoms also includes a number of provisions that outline the fundamental duties of citizens.⁷³ One article in particular reiterates the importance of government and societal interests over individual rights: “The exercise by citizens...of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective.”⁷⁴ Thus, whereas American society highlights the significance of individual civil liberties, China emphasizes “order over freedom, duties over rights, and group interests over individual ones.”⁷⁵ This stark political contrast may explain, to some degree, why China lacks an excessive punishment provision, in addition to the more comprehensive list of individual rights that United States citizens enjoy.

b. Chinese Criminal Procedure Law

The two principal sources of criminal law in China are the 1996 Amended Criminal Procedure Law and the 1997 Criminal Code. The National People’s Congress passed the former in

⁷¹ *Id.* at art. 37.

⁷² Article 38 protects the inviolable “personal dignity” of citizens, but this section appears to be limited to libel and false charges.

⁷³ See generally XIAN FA, art. 51-56, (1982) (P.R.C.).

⁷⁴ *Id.* at art. 51.

⁷⁵ SHAO-CHUAN LENG & HUNGDAH CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA 171 (1985).

response to abuses by law enforcement officials, scrutiny of China's human rights record, and general calls for reform by legal scholars and professionals. Key changes included separation between administrative and judicial systems, enhancement of attorneys' involvement in criminal proceedings, and the establishment of a legal aid system for indigent criminal defendants.⁷⁶ The amendments also provided for Westernized procedural protections, such as the notion that criminals are "innocent until proven guilty," the right to a jury trial, and due process of law.⁷⁷ However, the general purposes of the revision, while affording several protections and rights, include no prohibition of excessive punishment.⁷⁸ Thus, while Chinese criminal defendants enjoy the right to defense counsel and the right to appeal, they are not necessarily or expressly shielded from "cruel and unusual" punishment.

c. Chinese Criminal Code

One year after the modification of the Criminal Procedure Law, the National People's Congress drafted a new Criminal Code, providing for, among other reforms, equal application of the law, parole improvements, and abolishment of the death penalty for people under the age of eighteen.⁷⁹ The modified Code also introduced a concept of proportionality: "The punishment shall be equivalent to the criminal acts committed by the offenders and the criminal responsibilities that the offenders shall bear."⁸⁰ According to Andrew von Hirsch's retributive theory of proportionality,⁸¹ when assessing the severity of a crime, one must take into account both the degree of harm caused and the actor's

⁷⁶ See generally WEI LUO, THE AMENDED CRIMINAL PROCEDURE LAW AND THE CRIMINAL COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA 5-20 (2000).

⁷⁷ AMENDED CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA [hereinafter CRIMINAL PROCEDURE] art. 12-14.

⁷⁸ *Id.* at art. 1-2.

⁷⁹ See generally WEI LUO, THE 1997 CRIMINAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA 9-13 (1998).

⁸⁰ CRIMINAL CODE art. 5.

⁸¹ See *supra* Part B.II.

level of moral culpability. China appears to adopt a similar formula in that the Code plainly considers both the nature of the wrongful act and the criminal's blameworthiness in determining the appropriate punishment. More specifically, regarding the unlawful act itself, the Code provides that "a punishment shall be imposed based on the facts, nature and circumstances of the crime, the degree of harm done to society and the relevant provisions of this Law."⁸² Furthermore, when assessing the defendant's moral responsibility, the Code considers aggravating and mitigating factors such as intent, negligence, unforeseeable circumstances, age, mental and physical disabilities, and self-defense.⁸³ Although the legislature finally adopted a concept of proportionality in its Criminal Code, like the Criminal Procedure Law, the Code lacks any sort of protection against excessive punishment.

III. Comparing American and Chinese Principles

The United States Supreme Court's opinion in *Coker v. Georgia* provides an accurate depiction of how the American criminal justice system perceives and ensures proportional punishments. The Court focuses on the nature and severity of the crime as well as circumstances surrounding the unlawful act including the defendant's moral culpability. Likewise, the Chinese Criminal Code considers the degree of the harm caused and the criminal's level of blameworthiness in measuring the amount of punishment to be imposed. Both penal systems, therefore, adopt what appears to be the same retributive theory of proportionality. Why, then, does China retain an inordinate amount of capital offenses and continue to execute criminals at an astonishing pace?

Perhaps China's understanding of proportionality is not as deeply rooted in history and tradition as it is in the United States. The Eighth Amendment of the United States Constitution was ratified in 1791, and the judiciary has since strived to preserve its legacy and enforce its objectives through case law and guidelines,

⁸² CRIMINAL CODE art. 61.

⁸³ *Id.* at art. 14-21.

as it continues to do so to this day.⁸⁴ China's principle of proportional punishment (at least its *recorded* notion), on the other hand, was introduced a mere decade ago in the revised Criminal Code. Perhaps the legislature and courts have yet to seriously undertake the issue of defining precisely what it means to administer punishment "equivalent to the criminal acts committed by the offenders and the criminal responsibilities that the offenders shall bear."⁸⁵ Similarly, it took the United States Supreme Court 75 years after the Eighth Amendment's ratification to finally address the Cruel and Unusual Punishment Clause.⁸⁶

Western nations like the United States maintain individualistic societies whereas Eastern nations like China adopt collectivist ideals. Thus, it is no surprise that while the United States goes to great lengths to protect fundamental rights, China discounts the value of individual liberties in favor of government stability and societal interests. Accordingly, "whenever the social order is perceived by the Chinese elites as threatened, legal niceties are usually set aside;"⁸⁷ the ultimate result manifests itself in massive crime prevention campaigns and harsher punishments. The next section outlines and examines Chinese political and legal history and the major sources of law that continue to play a significant role in sustaining the collectivist society that China is today.

D. HISTORY AND SOURCES OF CHINESE LAW

The features of law in a given society and at a particular historical stage are shaped not only by the prevailing environment of that time, but also by the cultural heritage of that society, though the

⁸⁴ See, e.g., *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007) (holding that a judge may consider the disparity between the Federal Sentencing Guidelines' treatment of crack and powder cocaine offenses when imposing a punishment "greater than necessary" to serve the objectives of sentencing).

⁸⁵ CRIMINAL CODE art. 5.

⁸⁶ *Fleming*, *supra* note 47, at 720; see *Pervear v. Massachusetts*, 72 U.S. 475 (1866).

⁸⁷ LENG & CHIU, *supra* note 75, at 171.

*role of culture and tradition in shaping the law may be muted, implicit and even unconscious. Thus a study of current Chinese law requires some basic understanding of legal traditions in China.*⁸⁸

As in any developing nation, the laws of China have been influenced by history, culture, and contemporary ideas. This section will examine competing philosophical principles, outline the major periods of Chinese legal history, and explore how each influenced the government's death penalty policy.

I. Philosophical Influences

The Chinese criminal justice system is rooted in the ancient philosophical theories of Legalism and Confucianism. The former school of thought regarded law as the “conscious creation and fiat of the lawgiver” while the latter held that law was “a reflection of moral righteousness and justice.”⁸⁹

[T]he Legalists laid all their emphasis on positive law (*Fa*) which was to be the pure will of the lawgiver irrespective of what the generally accepted *mores* or morality might be, and be capable of running quite contrary to it if the welfare of the state should so require...[T]he Confucians (*Ju chia*) adhered to the body of ancient custom...which unnumbered generations of Chinese people had instinctively felt to be right – this was *li*, and we may equate it with natural law.⁹⁰

For most of China's history, Confucianism prevailed and the government generally adhered to its principles.⁹¹

⁸⁸ JIANFU CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT 3 (1999).

⁸⁹ Foreign Law Guide: China (People's Republic of China) 1, <http://foreignlawguide.com/ip/flg/China%20Introduction.htm>.

⁹⁰ *Id.* at 11 n.1.

⁹¹ *Id.* at 1.

Confucianism introduced the concept of the importance of society over the individual.⁹² Confucians believed that the goal of government was to preserve social harmony, and societal well being always trumped individual rights.⁹³ Along with this collectivist notion came the historical deference to ancestors, heads of state, and members of the elite class; the application of the law was generally left to the discretion of the individual leader at the time. Under what was called the “rule of the person” system, each authority figure could base decisions on prevailing beliefs, convenience and practicality, and the status of the person to be punished.⁹⁴ Lasting through Mao Zedong’s tenure,⁹⁵ this concept resulted in a wide array of vastly different punishments for what were often similar offenses.⁹⁶ It therefore seems that Confucian ideals offered no concept of proportionality, but instead looked to government leaders for guidance on how to administer appropriate punishments, a pattern that would persist throughout Chinese history.

II. Imperial China

During the Chinese imperial era, people believed that strong leadership was necessary for the maintenance of a stable environment and the preservation of social harmony, and the law of the imperial codes was used to reinforce that leadership.⁹⁷ Consistent with Confucian ideals, Chinese imperial codes were generally “less concerned with the defendant’s individual rights than with imperial interests, such as maintaining social stability

⁹² Pamela A. Seay, *Law, Crime, and Punishment in the People’s Republic of China: A Comparative Introduction to the Criminal Justice and Legal System of the People’s Republic of China*, 9 IND. INT’L & COMP. L. REV. 143, 143 (1998).

⁹³ Jeremy T. Monthly, *Internal Perspectives on Chinese Human Rights Reform: The Death Penalty in the PRC*, 33 TEX. INT’L L.J. 189, 194 (1998).

⁹⁴ Seay, *supra* note 92, at 143.

⁹⁵ See *infra* Part D.IV.

⁹⁶ Seay, *supra* note 92, at 143.

⁹⁷ Meaghan Sunderland, *Criminal Law Reform in the People’s Republic of China: Any Hope for Those Facing the Death Penalty?*, 8 APPEAL 18, 20 (2002).

and enhancing the power of the ruling class and ideology.”⁹⁸ As early as the Tang Code of 653 A.D., capital punishment was codified, and each imperial code thereafter included more than one hundred capital offenses.⁹⁹ Various imperial codes sanctioned the death penalty for many crimes, and included elaborate formulas to calculate mitigating and aggravating circumstances, premised on the notion that “punishment should correspond to the seriousness of the offense, as determined by its repercussions on universal harmony.”¹⁰⁰ Despite the perceived harshness of the criminal justice system, imperial China remained committed to promoting the interests of the state via the enforcement of its codes. The government viewed individual rights as a secondary matter. While imperial China appeared to be generally concerned with proportional punishment, it focused specifically on the death penalty, determining which method of execution was appropriate for a given crime. For instance, codes established the means of execution (decapitation, strangulation, or “slicing”) not only with reference to the amount of pain the criminal would suffer, but primarily to its impact on the criminal’s “soul” after death.¹⁰¹ Early imperial codes therefore reflected retributive ideals of proportional punishment.

During the Qing Dynasty (1644-1911), the last imperial period, capital punishment was authorized for the commission of “heinous” crimes. Like its predecessors, the Qing Code was not concerned with the disputes of private individuals or the notion of rights, but rather focused on directing local authorities to impose punishment for crimes that the state perceived to be legally significant.¹⁰² The state implemented laws to ensure that its

⁹⁸ Stephen B. Davis, *The Death Penalty and Legal Reform in the PRC*, 1 J. CHINESE L. 303, 307 (1987).

⁹⁹ Sunderland, *supra* note 97, at 19.

¹⁰⁰ Davis, *supra* note 98, at 306.

¹⁰¹ *Id.* at 307.

¹⁰² William C. Jones, *Trying to Understand the Current Chinese Legal System*, in UNDERSTANDING CHINA’S LEGAL SYSTEM 7, 11-15 (C. Stephen Hsu ed., 2003).

interests were advanced, and as this was done, the interests of private individuals were often protected as an indirect result.¹⁰³ Of greatest concern to lawmakers were matters that threatened the security of the state and the preservation of social order,¹⁰⁴ and the harshest penalties in the Code were reserved for crimes that were regarded as a threat to the continued existence of the state.¹⁰⁵ The original Qing Code contained a total of 275 capital offenses, but by the end of the era, the number swelled to an astounding 840 crimes punishable by death.¹⁰⁶ Despite the perceived harshness of the criminal justice system, imperial China remained committed to promoting the interests of the state via the enforcement of its codes. Again, individual rights were viewed as a secondary matter.

III. Nationalism and the pre-PRC Communists (1911-1949)

During the last years of the Qing Dynasty, reformers began efforts to draft new codes that reflected a western influence, and Chinese leaders began traveling abroad to study western law.¹⁰⁷ When the Qing Dynasty fell in 1911 and China became a republic, the Nationalist Party assumed power and continued efforts to establish a western style legal system. Following Japan's lead in emulating European criminal justice systems, the new government created new legal codes, including the Criminal Code and Code of Criminal Procedure,¹⁰⁸ and drastically reduced the number of capital offenses to approximately twenty.¹⁰⁹ The reforms, however, were relatively short-lived and never fully realized. During the 1940s, the Nationalists were engaged in civil war with

¹⁰³ *Id.* at 15-16.

¹⁰⁴ Sunderland, *supra* note 97, at 20.

¹⁰⁵ Monthly, *supra* note 93, at 201.

¹⁰⁶ DAVID T. JOHNSON & FRANKLIN E. ZIMRING, THE NEXT FRONTIER: NATIONAL DEVELOPMENT, POLITICAL CHANGE AND THE DEATH PENALTY IN ASIA (forthcoming Jan. 2009) (manuscript at 38-39, on file with the University of Miami International & Comparative Law Review).

¹⁰⁷ Jones, *supra* note 102, at 19.

¹⁰⁸ Davis, *supra* note 98, at 308.

¹⁰⁹ CHEN, *supra* note 88, at 194.

the Communists, and efforts to strengthen its legal system were put on hold. Led by future party chairman Mao Zedong, the Communists defeated the Nationalists in 1949, and one of the first acts of the new government was to repeal all the laws of the old Nationalist government.¹¹⁰ The western concept of law, one based on individual rights and administered by an impartial judiciary separated from other branches of government was explicitly rejected by the Communists¹¹¹ in favor of an oppressive regime marked by a massive increase in executions.

IV. Mao Zedong and the People's Republic of China (1949-1976)

After the Communists won the civil war, Mao Zedong assumed power and declared the People's Republic of China. Whereas the Nationalists modeled their legal ideas on western systems, the Communists borrowed heavily from the Soviet Union, adopting a "revolutionary judicial system characterized by informal mediation, mass trials, retributive justice, and frequent summary executions."¹¹² As Mao and the Communists worked to bring about "rapid political, economic and social transformation," they simultaneously implemented policies designed to eliminate counterrevolutionaries, ultimately resulting in mass executions; they did this all without enacting comprehensive codes of substantive and procedural criminal law to replace the ones they abolished from the Nationalist government.¹¹³ Under Mao, China's form of law was characterized as an informal "societal" model, focusing on "socially approved norms and values, inculcated by political socialization and enforced by extrajudicial apparatuses consisting of administrative agencies and social organizations."¹¹⁴ After the initial years of what some scholars called a "legal vacuum," the People's Republic of China adopted its first Constitution in 1954 and began drafting major codes,

¹¹⁰ Jones, *supra* note 102, at 20-21.

¹¹¹ *Id.* at 22.

¹¹² Davis, *supra* note 98 at 309.

¹¹³ *Id.* at 309-310.

¹¹⁴ LENG & CHIU, *supra* note 75, at 7.

individual laws, and regulations.¹¹⁵ However, political leaders began to criticize the development of comprehensive codes, arguing that institutions and rules should not be fixed, but dynamic and flexible.¹¹⁶ Meanwhile, Mao continued his goal of eliminating all sources of political opposition and ridding society of anti-social elements that threatened public order.¹¹⁷ Mao used capital punishment to control political and social life and harsh criminal sanctions were often justified to “frighten the enemy and support the class struggle of the masses.”¹¹⁸ The Maoist regime culminated in the chaotic Cultural Revolution of 1966-1976, when the government launched a massive purge of all those who opposed Mao, resulting in mass trials, execution quotas, and the persecution of tens of thousands of Chinese.¹¹⁹

Mao wielded the death penalty primarily as a political tool to eliminate opponents and promote the establishment of a socialist government. In the absence of a formal criminal justice system, no comprehensive legal codes or theories of punishment existed, and hence no concept of proportionality. After a period of revolutionary violence, Mao interestingly once expressed concern about the death penalty and advocated its cautious application. In his famous speech, “The Ten Major Relationships,” delivered in 1956, Mao stated: “Once a head is chopped off, history shows it cannot be restored, nor can it grow again as chives do, after being cut.”¹²⁰ Mao effectively acknowledged the permanent and irrevocable nature of capital punishment and implied that it should be employed reservedly. Nevertheless, the Maoist regime carried out thousands of executions in an era that was devoid of any concept of proportionality or procedural safeguards for criminal defendants.

¹¹⁵ CHEN, *supra* note 88, at 39.

¹¹⁶ *Id.*

¹¹⁷ JOHNSON & ZIMRING, *supra* note 106, at 57.

¹¹⁸ Davis, *supra* note 98, at 312.

¹¹⁹ Sunderland, *supra* note 97, at 22.

¹²⁰ Davis, *supra* note 98, at 310 n.40.

V. Deng Xiaoping and the Anti-Crime Campaigns of the 1980s

After Mao died in 1976, a faction led by Deng Xiaoping prevailed in the vying for power in the upper levels of the Communist Party that followed.¹²¹ The anarchic Cultural Revolution had severely damaged the legal system and left people searching for a more regularized society. Therefore, the Deng administration deemed legal modernization to be of utmost importance, and some of the first pieces of legislation enacted under Deng's leadership were the Criminal Law and Criminal Procedure Law of 1979,¹²² precursors to the most recent versions discussed earlier. The former was the first comprehensive law of its kind to define punishable acts and appropriate sanctions. Its use of highly moralistic words such as "heinous" and "monstrous" to describe the elements of select crimes reflected and emphasized the retributive nature of China's criminal justice system.¹²³ Both acts significantly enhanced the predictability and fairness of the Chinese legal system, providing for such things as appellate review, regularized proceedings for capital crimes, and limited procedural protections to safeguard the rights of the defendant.¹²⁴

Probably the most significant provision of the new laws was the codification of the suspended death sentence. Under this "two-year reprieve," a capital offender could receive a stay of execution during which he performed hard labor.¹²⁵ If the prisoner demonstrated evidence of reform over the two years, the court could commute the sentence to life or fixed-term imprisonment.¹²⁶ Yet another safeguard included in the Criminal Procedure Law provided for automatic review and approval by the Supreme People's Court of death sentences imposed by lower courts, which

¹²¹ Jones, *supra* note 102, at 39.

¹²² Sunderland, *supra* note 97, at 22.

¹²³ LENG & CHIU, *supra* note 75, at 123.

¹²⁴ Davis, *supra* note 98, at 312-13.

¹²⁵ *Id.* at 314.

¹²⁶ *Id.* A similar provision is now codified in the 1997 Criminal Code; See CRIMINAL CODE art. 48-51.

protected against erroneous and unfair judgments.¹²⁷ Together, the new laws “prescribe[d] appropriate legal standards to guide judicial work and the framework for ‘due process’ to protect the individual.”¹²⁸ Even so, the anti-crime campaigns of the 1980s would unfortunately overshadow the positives that emanated from these new laws.

According to one source, Deng had a “golden opportunity” to change Chinese death penalty policy after he came to power, and he chose not to.¹²⁹ The year Deng came to power marked a crucial stage in Chinese legal history as the nation began experiencing a massive surge in crime. Not long after the enactment of the new criminal codes, as a move to restore public order and security, Chinese authorities initiated a number of campaigns to combat crime, and many of the newly legislated procedural safeguards were stripped away.¹³⁰ In 1981, the Standing Committee of the National People’s Congress suspended the Supreme People’s Court’s mandatory review of capital cases, which predictably “increased the frequency and velocity” of death sentences.¹³¹ The early 1980s marked the first of China’s so-called “Strike Hard” campaigns, as the Standing Committee passed resolutions designed to “strike timely and heavy blows at offenders” who committed the most heinous crimes.¹³²

The most comprehensive, harsh, and enduring crusade began in August of 1983, when the government instituted a nationwide crackdown on crime and ordered security forces to round up 50,000 people considered to be criminals or “antisocial.”¹³³ Diplomats estimated that thousands of criminals were executed within the first few months of the campaign.

¹²⁷ See Davis, *supra* note 98, at 316.

¹²⁸ LENG & CHIU, *supra* note 75, at 86.

¹²⁹ JOHNSON & ZIMRING, *supra* note 106, at 67.

¹³⁰ See Sunderland, *supra* note 97, at 22.

¹³¹ Monthy, *supra* note 93, at 194.

¹³² LENG & CHIU, *supra* note 75, at 134.

¹³³ See Colin Campbell, *China Suddenly Taking a Tougher Line on Crime*, N.Y. TIMES, Sep. 13, 1983, at A2.

Consistent with the collectivist and retributive philosophy of Chinese society, radio commentators referred to the “dregs of society” that received severe punishment because they had “seriously disrupted the social order.”¹³⁴ The government also began to employ overtly deterrent tactics by hanging billboards that displayed the pictures and sentences of dozens of criminals who had recently been executed, sending a stern message to the public that criminals would be dealt with mercilessly.¹³⁵ Further, the Standing Committee enacted a number of provisions that significantly increased the number of crimes punishable by death. As the rising number of capital crimes and executions suggests, the anti-crime campaigns, as well as the accompanying changes in law and procedure, severely limited the effect of legal reform incorporated in the Criminal Law and Criminal Procedure Law.¹³⁶ Nevertheless, Chinese authorities praised the campaigns as necessary courses to stamp out crime and reported nearly a 60% drop in the national crime rate over two months.¹³⁷ China inevitably faced mounting criticism from human rights groups, but the Chinese public did not share outsiders’ perception of a major problem. One commentator responded, “[a]nyone without bias who is really concerned with the welfare of the people in this part of the world will feel pleased that China is cracking down on crime.”¹³⁸ In contrast, non-domestic sources recognized the glaring disparity in proportionality, as those executed included “people who would have drawn moderate prison terms in Western countries.”¹³⁹

During the Deng era, it appears that China evinced no concept of proportionality at all. Preoccupied with what some scholars argue was a distorted and unfounded perception of a

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Davis, *supra* note 98, at 319.

¹³⁷ Christopher Wren, *Crime and Capital Punishment in China*, N.Y. TIMES, Nov. 20, 1983, at E9.

¹³⁸ *Id.*

¹³⁹ *Id.*

drastic increase in crime,¹⁴⁰ the government made no effort to match the appropriate punishment to the offense. Instead, authorities used the anti-crime campaigns as a political response to social change. According to Deng, economic modernization and reform were principal objectives of legal reform, and crime was perceived as a major threat to such development.¹⁴¹ Therefore, it is no surprise that in 1982, the Standing Committee drafted a resolution on “Severely Punishing Criminals Who Do Great Damage to the Economy,” which broadened the death penalty to cover offenses such as smuggling, selling drugs, bribery, and embezzlement.¹⁴² The adoption of this resolution presents two proportionality arguments. On the one hand, perhaps the government perceived some crimes, both violent and non-violent alike, as equally disruptive to the socioeconomic order and therefore equally deserving of the most severe punishment. On the other hand, the authorities may have aimed to send a deterrent message that any person who undermined the welfare of society in any manner, regardless of the degree of relative harm, would be dealt with severely. Indeed, the Chinese media acknowledged the deterrent value of capital punishment, arguing that it constituted a “serious warning to the criminals who...frenziedly sabotag[ed] [the] socialist economy.”¹⁴³ In any case, the resolution certainly demonstrates that “whenever the socialist system is perceived to be threatened, [the government] will not hesitate to use harsh measures and revise its laws to meet the challenge.”¹⁴⁴

V. Contemporary Chinese Law

Crime is essentially a symptom of a defective society. When the society is completely revolutionized, it will disappear. In the meantime, the behavior which we call criminal is eliminated by eliminating the person guilty of it, or by getting him to see that his behavior is harmful to

¹⁴⁰ JOHNSON & ZIMRING, *supra* note 106, at 67.

¹⁴¹ Davis, *supra* note 98, at 321.

¹⁴² LENG & CHIU, *supra* note 75, at 138.

¹⁴³ Davis, *supra* note 98, at 324.

¹⁴⁴ LENG & CHIU, *supra* note 75, at 138.

*society, and thus to himself, since he exists as an aspect of the total society.*¹⁴⁵

The anti-crime campaigns and resulting suspensions of procedural safeguards lasted into the 1990s. Facing pressure and condemnation from foreign investors and the international community at large, the National People's Congress finally amended the Criminal Procedure Law and Criminal Law in 1996 and 1997.¹⁴⁶ Although the revised codes added procedural protections for criminal defendants, it actually expanded the number of capital offenses, apparently to carry on the legacy of Deng's crime prevention campaigns.¹⁴⁷ Regardless of whether the new capital crimes directly produced more executions, "the proliferation of new death penalties since 1983 certainly signaled to prosecutors and judges in the provinces that capital punishment was a policy in favor in Beijing."¹⁴⁸ Reflecting the sentiment in the passage quoted above and the recurring theme of collective rights over individual rights, China continues to view offenses threatening public security as the most dangerous form of crime.¹⁴⁹ It is therefore no surprise that the new Criminal Code broadened the application of capital punishment to include more socially harmful crimes.¹⁵⁰ Some commentators have expressed concern that the amendments are too sweeping and that the overly broad definition for "endangering state security," for instance, will result in the condemnation of a wide variety of activities.¹⁵¹ Others have lamented that the revision resembles a "death penalty code."¹⁵² Chinese officials, by contrast, describe these changes as a "major step forward" in the improvement of the legal system.¹⁵³ Few

¹⁴⁵ Jones, *supra* note 102, at 25.

¹⁴⁶ Sunderland, *supra* note 97, at 23.

¹⁴⁷ *Id.* at 30; *See generally* CRIMINAL CODE.

¹⁴⁸ JOHNSON & ZIMRING, *supra* note 106, at 76.

¹⁴⁹ CHEN, *supra* note 88, at 187.

¹⁵⁰ *See generally* CRIMINAL CODE art. 114-39.

¹⁵¹ Sunderland, *supra* note 97, at 26.

¹⁵² CHEN, *supra* note 88, at 195.

¹⁵³ Sunderland, *supra* note 97, at 18.

Chinese scholars advocate the abolition of the death penalty. Instead, the majority argues purely for restrictions and restraint in its use, citing China's reputation and international trends as principal considerations.¹⁵⁴ Nevertheless, China remains notorious for maintaining the highest death penalty rate in the world and continues to endure criticism for deviating from international standards.¹⁵⁵

E. HUMAN RIGHTS

*The main objective of the Chinese criminal justice system is to protect, first of all, the socialist order and next, the people's personal rights.*¹⁵⁶

As the above quote indicates, China has historically valued social order over individual rights. This collectivist philosophy has no doubt played a significant role in many of China's practices and policies that generate human rights controversy today, specifically its widespread use of the death penalty. Indeed, China has used capital punishment as a means of preserving stability within its society for over 5,000 years and continues to do so despite international pressure and criticism.¹⁵⁷ In an effort to uphold its promise to improve its human rights record, the Chinese government drafted an amendment to the Constitution in 2004 that stated simply, "[t]he state respects and preserves human rights."¹⁵⁸ According to one scholar, however, although China has incorporated "human rights" into its Constitution, there is still a long way to go before such privileges can be firmly safeguarded,¹⁵⁹

¹⁵⁴ CHEN, *supra* note 88, at 195.

¹⁵⁵ Sunderland, *supra* note 97, at 18.

¹⁵⁶ LENG & CHIU, *supra* note 75, at 123-24.

¹⁵⁷ Liam P. Deeney, *The Abolition of the Death Penalty in International Law*, 23 SUFFOLK TRANSNAT'L L. REV. 803, 813-14 (1999).

¹⁵⁸ XIAN FA art. 33 (2004) (P.R.C.).

¹⁵⁹ KEYUAN, *supra* note 2, at 4.

as Chinese policy deviates from universally accepted international standards.¹⁶⁰

I. United Nations

In 1948, the United Nations General Assembly (UNGA) adopted the Universal Declaration of Human Rights (UDHR).¹⁶¹ Evocative of the Eighth Amendment of the United States Constitution, the UDHR establishes an individual's right of protection from deprivation of life and declares that no person shall be made to suffer degrading or cruel punishment.¹⁶² The UNGA believes capital punishment violates both fundamental rights.¹⁶³ Although China adopted the UDHR,¹⁶⁴ the treaty is not binding.¹⁶⁵ Both China and the United States are major offenders as retentionist nations, but much of the criticism is directed towards China, perhaps due in part to its long list of capital crimes and exceptionally high number of annual executions and to some extent because of the attention surrounding the 2008 Summer Olympics. This year, however, the Chinese government has an opportunity to make good on its promise. In 1966, the UNGA adopted Article 6 of the International Covenant on Civil and Political Rights (ICCPR), which promotes the goals of the UDHR by restricting the use of capital punishment, ensuring against its arbitrary use, and seeking the ultimate abolition of the death penalty.¹⁶⁶ Unlike the UDHR, the ICCPR binds all signatory countries.¹⁶⁷ In March of this year, Chinese Premier Wen Jiabao announced that China will ratify the ICCPR "at an early date,"

¹⁶⁰ *Id.* at 23.

¹⁶¹ John Paul Truskett, *The Death Penalty, International Law, and Human Rights*, 11 TULSA J. COMP. & INT'L L. 557, 561 (2003).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Universal Declaration of Human Rights, Office of the High Commissioner for Human Rights, <http://www.unhchr.ch/udhr/miscinfo/carta.htm> (last visited Apr. 15, 2008).

¹⁶⁵ Deeney, *supra* note 157, at 803.

¹⁶⁶ *Id.* at 804.

¹⁶⁷ *Id.*

citing efforts to “make domestic laws consistent with international laws.”¹⁶⁸ It is unclear, however, exactly what “binding” effect China’s ratification will have on its human rights endeavors, particularly regarding capital punishment. The United States ratified the Covenant but made a reservation on Article 6, the portion that deals with death penalty restrictions.¹⁶⁹ It remains to be seen whether China will similarly circumvent the issue, although it has already taken a major step by restoring mandatory review of death sentences to the Supreme People’s Court.¹⁷⁰ However, the government has yet to revise its Criminal Code to restrict the number of capital crimes or seriously entertain the possibility of abolishing the death penalty entirely.

II. Amnesty International

For decades, Amnesty International has criticized China’s widespread and largely unchecked administration of the death penalty. During the anti-crime campaign of 1983, the global human rights organization sent a letter to Chinese President Li Xiannian, urging the government to halt the wave of executions.¹⁷¹ The government rejected the appeal and “described the executions as normal measure and routine work in maintaining public order.”¹⁷² When the National People’s Congress passed the new Criminal Procedure Law and Criminal Code in 1996 and 1997, respectively, the Chinese government hailed the revisions as major achievements in judicial reform. Amnesty International, however, took exception and claimed the revised laws still fell far short of international human rights standards.¹⁷³ Today, the organization

¹⁶⁸ *China to Ratify UN Covenant on Rights*, CHINA DAILY, Mar. 18, 2008, available at http://www.chinadaily.com.cn/china/2008npc/2008-03/18/content_6546058.htm.

¹⁶⁹ Deeney, *supra* note 157, at 814.

¹⁷⁰ *Id.*; Lague, *supra* note 15.

¹⁷¹ LENG & CHIU, *supra* note 75, at 137.

¹⁷² *Id.*

¹⁷³ Amnesty International, *People’s Republic of China: Law Reform and Human Rights*, Mar. 1, 1997 (ASA 17/014/1997), <http://asiapacific.amnesty.org/>

laments the fact that the “revised” Criminal Code includes an astounding 68 capital offenses while the government continues to execute people at a rapid pace even for non-violent crimes.¹⁷⁴ During a two-week period in 2007, Chinese courts handed down 47 death sentences and carried out 14 executions for drug-related offenses.¹⁷⁵ Amnesty International responded by alleging that the government imposed capital punishment in an unfair and arbitrary manner.¹⁷⁶ The organization also raised a proportionality objection, maintaining that courts should impose death sentences only for the “most serious crimes” and that the legislature should eliminate capital punishment for non-violent crimes such as economic and drug-related offenses.¹⁷⁷

Criticism by organizations like Amnesty International has not gone uncontested. In March of this year, when the organization issued one of its several reports assailing China’s death penalty policy, Chinese human rights spokespersons fired back, claiming that western nations have been blinded by the past and are unwilling to see the government’s rapid developments.¹⁷⁸ According to one researcher, for instance, since the Supreme People’s Court reassumed power to review all death sentences in 2007, the number of capital punishments has dropped, with half of the cases changed to a two-year reprieve in the end.¹⁷⁹ Amnesty International acknowledges that there has likely been a significant

library/Index/ENGASA170141997?open&of=ENG-CHN (last visited Apr. 17, 2008).

¹⁷⁴ Amnesty International, *People’s Republic of China: The Olympics Countdown – One Year Left to Fulfill Human Rights Promises*, Aug. 7, 2007 (ASA 17/024/2007), <http://asiapacific.amnesty.org/library/Index/ENGASA170242007?open&of=ENG-CHN> (last visited Apr. 17, 2008).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Amnesty International Report Refuted*, CHINA DAILY, Apr. 9, 2008, available at http://www.chinadaily.com.cn/china/2008-04/09/content_6601478.htm (last visited Apr. 17, 2008).

¹⁷⁹ *Id.*

decrease in executions since the government restored review to the high court.¹⁸⁰ However, it still expresses doubts as the actual number of executions remains a state secret and asserts that the only way to verify any improvement is to make death penalty statistics publicly available.¹⁸¹

III. Human Rights Outlook

Regardless of whether the number of capital punishments has decreased, China remains the world leader in executions, and its 68 capital crimes continue to raise proportionality concerns and draw criticism from human rights groups. As evidence of its reform efforts, China cites mandatory review, cautious application of law, and overall reductions in executions.¹⁸² Although the SPC reviews all death sentences, it evidently persists in applying the substantive provisions of the Criminal Code, as criminals are continually executed for non-violent crimes today.¹⁸³

In 2002, Taiwan's legislature eliminated a long-standing law that imposed the death penalty for certain violent offenses like robbery and kidnapping.¹⁸⁴ Additionally, Taiwan's President Chen Shui-bian vowed in 2005 to abolish the death penalty so that his country may one day become "a nation founded on the basis of human rights."¹⁸⁵ Although Taiwan still retains the death penalty today, it has certainly taken steps towards human rights reform by minimizing its list of capital crimes. China, by contrast, has broadened the reach of the death penalty while claiming an overall reduction in the amount of executions, even though the actual

¹⁸⁰ Amnesty International, *Human Rights in China and the Beijing Olympics: Stop Executions*, <http://www.amnesty.org/en/human-rights-china-beijing-olympics/issues/death-penalty> (last visited Apr. 17, 2008).

¹⁸¹ *Id.*

¹⁸² *Amnesty International Report Refuted*, *supra* note 177.

¹⁸³ *People's Republic of China: The Olympics Countdown – One Year Left to Fulfill Human Rights Promises*, *supra* note 187.

¹⁸⁴ Truskett, *supra* note 161, at 591.

¹⁸⁵ Death Penalty Information Center, *International News and Developments: 2005*, <http://www.deathpenaltyinfo.org/article.php?did=2117> (last visited Apr. 15, 2008).

number is virtually unknown due to state secrecy. Of course, human rights organizations like Amnesty International will presumably never halt their criticism of China and other retentionist nations, including the United States, until they abolish capital punishment entirely. But if China holds its place atop the world leaders in executions, insists on maintaining its current criminal code with 68 capital crimes, and continues to put individuals to death for a number of non-violent offenses, it will likely remain the focal point of human rights criticism and controversy.

F. LEGAL REFORM

I. The New Criminal Code

In 1998, one year after the National People's Congress revised the Criminal Code, Jeremy T. Monthy, a Chinese law researcher, commented on the state of the criminal justice system in his article on the death penalty in China:

[China]'s new capital punishment scheme is as or more Confucian . . . as the system in place at the close of the dynastic era. . . . [Its] social or Confucian reliance on executions as public and moral forms of justice is as strong now as it has been throughout China's "5,000 years of history," and the arbitrariness and politicization of the judicial process leading up to the execution is even stronger than it was at the turn of the century. While they are an earnest start, it is doubtful that even the new Criminal Law provisions can cure these ills.¹⁸⁶

Monthy further asserts that the Chinese legal system has taken several steps backward, as its death penalty policy and purportedly revised criminal law resemble the practices of the imperial era.¹⁸⁷ When the Chinese legislature drafted the new law,

¹⁸⁶ Monthy, *supra* note 93, at 191.

¹⁸⁷ *Id.* at 212.

it attempted to cure the arbitrary administration of death sentences by eliminating the overtly political and excessively broad category of “counterrevolutionary” crimes.¹⁸⁸ However, it also expanded the courts’ discretion and authorization to impose capital punishment by introducing a host of new death-eligible crimes including non-violent offenses.¹⁸⁹ The expansion of the death penalty is hardly a surprise, as the criminal law revisions came in the wake of the anti-crime campaigns, and the government aimed to send a message that any person who threatened the existence of the state would be dealt with severely.¹⁹⁰ Despite the supposedly progressive utilitarian effort, some scholars argue that the goals of the state are no more modern than those of the most barbaric rulers of the Qing Dynasty. Still others denounce the new criminal law as one of the most violent codes since the imperial era and still prone to arbitrary enforcement.¹⁹¹ For instance, anyone involved in the smuggling of counterfeited currency can be put to death “if the circumstances are exceptionally serious.”¹⁹² With such ambiguous language, especially for a non-violent crime, arbitrary administration of the death penalty is inevitable.¹⁹³ Hence, reflecting Monthy’s assertion quoted above, the 1997 revision of the Criminal Code has been a “major disappointment,” and perhaps it is time for the government to consider revising the law once again.¹⁹⁴

II. The Role of the Judiciary

According to the Chinese Constitution, “[t]he people’s courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative

¹⁸⁸ *Id.* at 204.

¹⁸⁹ *Id.* at 204. The 1979 Criminal Code prescribed twenty-eight capital offenses while the revision contains sixty-eight. CHEN, *supra* note 88, at 194; *See generally* CRIMINAL CODE.

¹⁹⁰ Monthy, *supra* note 93, at 204.

¹⁹¹ *Id.* at 210-11.

¹⁹² CRIMINAL CODE art. 151.

¹⁹³ *See infra* Part F.II.a.

¹⁹⁴ CHEN, *supra* note 88, at 196.

organs, public organizations or individuals.”¹⁹⁵ Despite this provision, Chinese courts have remained highly susceptible to political influence on broad policy matters and high profile cases.¹⁹⁶ Historically, the judiciary has not been as autonomous as the Constitution envisioned, and the subsequent adverse effects on death penalty policy persist today.

a. The *Li Fuyong* Case

One of the first cases published in the Gazette of the Supreme People’s Court provides an example of how political influences affect the judiciary, as well as a demonstration of the inherent proportionality problem in the Criminal Code. In 1985, Chinese authorities arrested a man named Li Fuyong for cutting and stealing electrical transmission wires from several villages, causing massive power failures across a large region of the country.¹⁹⁷ A lower provincial court convicted Li of violating Article 110 of the 1979 Criminal Law, which provides in relevant part that, “[w]hoever sabotages means of . . . electric power or gas equipment . . . causing serious consequence, is to be sentenced to not less than ten years of fixed-term imprisonment, life imprisonment, or death.”¹⁹⁸ After reviewing the case, an intermediate court found that Li’s actions had caused “grave harm to public security and serious damage to the production” of the affected villages and sentenced him to death “[i]n order to maintain the security and order of society”¹⁹⁹ The Supreme People’s Court agreed to review the case and issued a brief opinion, simply holding that all lower courts were “absolutely correct” and that the offense of sabotaging power facilities, “being currently a serious

¹⁹⁵ XIAN FA art. 126 (1982) (P.R.C.).

¹⁹⁶ Monthly, *supra* note 93, at 205.

¹⁹⁷ NANPING LIU, OPINIONS OF THE SUPREME PEOPLE’S COURT: JUDICIAL INTERPRETATION IN CHINA 250-251 (1997).

¹⁹⁸ *Id.* at 162, n.171 (quoting CRIMINAL CODE art. 110). The current Criminal Code includes a virtually identical provision, including the very same sentencing guidelines. *See* CRIMINAL CODE art. 119.

¹⁹⁹ *Id.* at 251.

crime, causing harm to the security of the society and to the construction of the socialist modernization, shall be given speedy and severe punishment.”²⁰⁰

In his book on judicial interpretation, Nanping Liu, a law professor at the University of Hong Kong, criticizes the Court in the Li case for its use of mere political – rather than legal – reasoning.²⁰¹ The Court’s main function, according to Liu, is to engage in legal reasoning by indicating what statute or precedent applies to each case.²⁰² In the Li case, however, the Court ignored its primary duty and based its decision upon current political and government policy.²⁰³ According to the Criminal Code, because the Court found that Li’s conduct caused “serious consequences,” it had three different sentences from which to choose: not less than ten years imprisonment, life imprisonment, or death.²⁰⁴ Not only is the Code silent on exactly how serious a consequence must be to render a crime punishable by death, but the Court failed to provide any guidance on how to administer the proper sentence, finding only that the punishment was “absolutely correct” because the crime harmed the “security of society and...the construction of socialist modernization.”²⁰⁵ Instead of basing its decision on legal considerations, the Court revealed its susceptibility to political influence as well as its intent to coordinate the ruling with Deng Xiaoping’s anti-crime campaigns.²⁰⁶ Before the Li case, the Court had never imposed the death penalty for such an offense.²⁰⁷ In fact, before the decision was published, a man who committed the same crime was sentenced to only 12 years imprisonment.²⁰⁸ It is therefore highly unlikely that the Court’s decision was informed by any legal principle of proportionality. Rather, the Li Fuyong case

²⁰⁰ *Id.* at 253.

²⁰¹ *Id.* at 161.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 162, n.171 (quoting CRIMINAL CODE art. 110).

²⁰⁵ *Id.* at 253.

²⁰⁶ *Id.* at 164.

²⁰⁷ *Id.* at 163.

²⁰⁸ *Id.* at 164.

was a direct response to the government's objective of maintaining an anti-crime movement and protecting the socialist cause.²⁰⁹

b. Achieving Judicial Independence

As the case of Li Fuyong indicates, the Chinese government exerts an extraordinary amount of pressure and influence on the courts, thereby undermining the constitutional mandate of judicial autonomy and freedom from interference by other bodies of government. This notion of "separation of powers," which is deeply rooted in American history, has yet to be fully realized in China because it is difficult for the courts to ward off influence by the single-party government.²¹⁰ For instance, because the courts depend on local governments for financial support, judges tend to obey the instructions of political leaders.²¹¹ Furthermore, the Communist Party regards supervision of judicial functions as a necessary measure to curb corruption and improve justice,²¹² although the government at times oversteps what few bounds actually exist. In practice, courts answer to legal committees run by the Communist Party, and decisions in cases that involve delicate issues are often decided by ranking party officials instead of judges.²¹³ In a 2007 speech, Luo Gan, a member of the Politburo Standing Committee, asserted that the Communist Party must maintain its dominance over the courts and reiterated the intrinsic bond between the government and the judiciary: "There is no question about where legal departments should stand. The correct political stand is where the party stands."²¹⁴ Today, government policy continues to guide the work

²⁰⁹ *Id.*

²¹⁰ KEYUAN, *supra* note 2, at 151.

²¹¹ *Id.*

²¹² *Id.* at 165.

²¹³ *Id.* at 170.

²¹⁴ Joseph Kahn, *Chinese Official Warns Against Independence of Courts*, N.Y. TIMES, Feb. 3, 2007, at A5.

of the courts, while the Communist Party—not the law—reigns supreme.²¹⁵

The relationship between the government and the judiciary is no doubt a dangerous one. History demonstrates that the political sentiment of the time can significantly influence both the seriousness of a crime and the severity of the corresponding punishment.²¹⁶ While all eyes are on China during the Summer Olympics, the penal system will likely keep a low profile. Still, China may be just one crime wave away from experiencing another spike in death sentences and executions.

c. The Five-Year Plan and SPC Review

In October 2005, the Supreme People's Court issued a Five-Year Plan to increase judicial reform, setting out specific goals to improve the court system.²¹⁷ In order to remedy the effects of government interference and protect against the arbitrary enforcement of rules, the Court set out to ensure the "uniform application of the law."²¹⁸ One key development in addressing this issue is the greater use of precedent in deciding cases. In the past, the doctrine of *stare decisis*, so prevalent in the American judicial system, had not existed in China. When the Court began publishing its opinions in the SPC Gazette in the 1980s, judges did not view cases as authoritative law that carried the force of precedent.²¹⁹ Instead, courts looked to past cases merely for guidance, and did not feel that they were bound to earlier decisions.²²⁰ Today, the trend has reversed, and courts are now beginning to examine precedent more closely when undertaking a complex legal matter.²²¹ Consideration of precedent is indeed a

²¹⁵ KEYUAN, *supra* note 2, at 168-69.

²¹⁶ See generally *supra* Part D.V.

²¹⁷ Susan Finder, *Reforming the People's Courts*, CHINA LAW & PRAC., June 2006, at 36.

²¹⁸ See *Id.*

²¹⁹ See LIU, *supra* note 197, at 145.

²²⁰ *Id.*

²²¹ Finder, *supra* note 217, at 36.

crucial development, as courts will ideally seek to avoid inconsistent decisions like *Li Fuyong*, and compensate for the ambiguous language in the Criminal Code. However, if the courts continue to operate under the constraints of the Communist Party, the Plan's objectives may never be fully realized.

Perhaps the most important and most obvious legal reform instituted in recent years is the reinstatement of mandatory review of all death sentences to the Supreme People's Court.²²² The new law requires a panel of three judges to review each death sentence by checking facts, laws, criminal procedure, and precedent.²²³ According to Xiao Yang, the SPC's chief judge, since the new law took effect in early 2007, "capital punishment has been 'strictly, cautiously and fairly' meted out to the tiny number of serious criminal offenders in China."²²⁴ Commenting on proportionality, Xiao added that the SPC is working to ensure that the death penalty only applies to individuals who commit "extremely serious, atrocious crimes that lead to grave social consequences."²²⁵ Another SPC judge stated that the Court has rejected about fifteen percent of the death penalties it has reviewed since January 2007.²²⁶ Furthermore, according to Chinese officials, the number of death sentences handed down with a two-year reprieve currently outnumbered immediate executions.²²⁷ When asked about the future of the death penalty in China, Xiao responds that it is "too early and unrealistic" to abolish it now

²²² See *supra* note 15.

²²³ Xinhua.net, *Chinese Courts Convict Over 759,230 People Last Year*, CHINACOURT, Jan. 8, 2007, http://en.chinacourt.org/public/detail.php?id=4127&k_title=death.

²²⁴ Xinhua.net, *Top Judge: Death Sentences Meted Out Only to "Tiny Number of Felons" in China*, CHINACOURT, Mar. 10, 2008, http://en.chinacourt.org/public/detail.php?id=4281&k_title=death.

²²⁵ *Id.*

²²⁶ Xie Chuanjiao & Xu Chunzi, *A Visionary's March Toward the Rule of Law*, CHINA DAILY, Mar. 11, 2008, http://www.chinadaily.com.cn/china/2008npc/2008-03/11/content_6525380.htm.

²²⁷ *Id.*

because of the nation's long history of capital punishment.²²⁸ Evoking both utilitarian principles and China's deeply rooted pattern of collectivist retributivism, Xiao insists that China must retain the death penalty as "an effective deterrent," and adds that even non-violent criminals, including those involved in financial offenses, "deserve death if their actions are extremely harmful to society."²²⁹ Nevertheless, Xiao maintains that the SPC must utilize its restored power efficiently, and advises judges to exercise extreme caution and consider human rights when handing down death sentences.²³⁰

Although China has demonstrated noteworthy efforts to reform its death penalty policy, its insistence on adhering to the current Criminal Code fails to properly address the proportionality problem. As long as the government continues to execute non-violent criminals, China will remain among the world leaders in capital punishment and the firestorm of human rights outcries will never cease. Indeed, China may not perceive the situation as a problem, citing the overall reduction in executions as a major improvement. However, if China aims to conform to international human rights standards, perhaps it is time to reevaluate what it means to commit an "extremely serious, atrocious crime."

G. CONCLUSION

In 2003, a Louisiana court convicted 43-year-old Patrick Kennedy of raping his 8-year-old stepdaughter and sentenced him to death.²³¹ Under Louisiana's aggravated rape statute, if the victim is under the age of thirteen, the state may seek the death penalty.²³² Even though the courts had never before imposed the death penalty under this particular statute, the Louisiana Supreme Court affirmed Kennedy's sentence and held that because of the "heinous nature of the crime and the severity of the injuries

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *State v. Kennedy*, 957 So.2d 757, 760 (La. 2007).

²³² LA. REV. STAT. ANN. § 14:42(D)(2)(a)(2008).

sustained by the victim,” the death penalty “is not disproportionate under the Eighth Amendment.”²³³ Last January, the United States Supreme Court granted certiorari to hear the case.²³⁴ During oral arguments, the Court focused on whether “evolving standards of decency” in the United States prohibits capital punishment for any felony but murder under the Cruel and Unusual Punishment Clause.²³⁵ Unlike Chinese courts, which have historically allowed the government and Communist Party to dictate the severity of crimes and corresponding punishments, the United States Supreme Court has generally based its capital punishment decisions on the morality of contemporary society, evaluating how the general public perceives a particular offense.²³⁶ In the past decade, for instance, the Court has used the “evolving standards” criterion to prohibit the death penalty for mentally retarded defendants²³⁷ and juvenile offenders under the age of eighteen.²³⁸ Thirty years ago, the Court held that the death penalty for the rape of an adult woman constituted cruel and unusual punishment,²³⁹ and since then, no person has ever been executed for rape not involving the victim’s death. An affirming opinion by the Court and the ultimate implementation of Kennedy’s sentence would mark the first execution for the crime of rape in 44 years.²⁴⁰

On June 25, 2008, the Supreme Court reversed the Louisiana state courts, holding that the Eighth Amendment

²³³ Kennedy, 957 So.2d at 793.

²³⁴ Kennedy v. Louisiana, 128 S. Ct. 829 (2008); Robert Barnes, *Justices Uphold Lethal Injection Procedure; Split Reasoning Opens Door to New Challenges*, WASH. POST, Apr. 17, 2008, at A1.

²³⁵ Bill Mears, *High Court Split Over Execution of Child Rapists*, CNN.com, Apr. 16, 2008, <http://www.cnn.com/2008/CRIME/04/16/scotus.execution/index.html?iref=newssearch>.

²³⁶ Trop v. Dulles, 356 U.S. 88, 101 (1958).

²³⁷ See Atkins v. Virginia, 536 U.S. 304 (2002).

²³⁸ See Roper v. Simmons, 543 U.S. 551 (2005).

²³⁹ Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion).

²⁴⁰ Mears, *supra* note 235.

prohibits the death penalty for the rape of a child where the crime did not result in the victim's death:

Consistent with evolving standards of decency and the teachings of our precedents we conclude that, in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but "in terms of moral depravity and of the injury to the person and to the public," they cannot be compared to murder in their "severity and irrevocability."²⁴¹

Drawing upon the posture and sentiment of contemporary society, the Court concluded that there was a "national consensus against capital punishment for the crime of child rape."²⁴² The Court also cautioned, "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."²⁴³

One cannot overlook China's distinctive features that place its criminal justice system on an entirely different level: a collectivist society that devalues individual rights, 68 capital crimes, executions of non-violent offenders, and egregious political interference with the judiciary. The United States, by contrast, recognizes fundamental liberties, derives influence from contemporary societal morality, and adheres to a principle of proportionality deeply rooted in history and tradition under the Eighth Amendment. The Chinese criminal justice system is historically opportunistic. It has generally disregarded the principle of proportionality and administered punishment in a manner that is best suited to meet the needs of its socialist society

²⁴¹ Kennedy v. Louisiana, --- S.Ct. ----, 2008 WL 2511282 (U.S.) (citing *Coker*, 433 U.S. at 598).

²⁴² *Id.* at *18.

²⁴³ *Id.* at *9.

and the political goals of its leaders. Both Mao and Deng viewed the law as an instrument of governmental policy. Under Mao, the government endorsed severe sanctions for individuals who disrupted the social order or thwarted the interests of the revolution. Similarly, because crime directly threatened Deng's ultimate goal of economic modernization, the government launched massive campaigns to eradicate offenders and subsequently broadened the use of capital punishment. Death penalty policy was guided not by any principle of proportional punishment or individual rights, but distorted primarily by the welfare and security of the socialist system.

Only recently has China formally recognized and adopted a concept of proportionality,²⁴⁴ albeit one that appears to belie the multitude of capital crimes listed in the Criminal Code. The authority and responsibility to draft a revised Code belongs to the National People's Congress, but an analysis of the legislature lies beyond the scope of this article. In the meantime, though, the Chinese judicial system must reevaluate the severity of its crimes and punishments, perhaps drawing upon "evolving standards of decency" in lieu of allowing governmental and political policy to direct its decisions. Both the United States and China are world superpowers, and both nations retain the death penalty as a means to punish its most serious criminal offenders. As long as they refuse to abolish capital punishment, both will continue enduring criticism from human rights groups. The difference, of course, is the obvious disparity in capital offenses and executions that makes China's death penalty policy so salient. China, like the United States, is recognized as a world leader, but until its government carries out substantial improvements to its judicial system and seriously considers revising the Criminal Code, the international community will continue to label China as the world leader in human rights violations.

²⁴⁴ See CRIMINAL CODE art. 5.

