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CRIMINAL LAW

REFLECTIONS ON THE CRIMINAL PROCESS IN CHINA

JEROME ALAN COHEN*

I

Once a head is chopped off, history shows it can't be restored, nor can it grow again as chives do, after being cut. If you cut off a head by mistake, there is no way to rectify the mistake, even if you want to.

Mao Tse-tung

We Americans, who have always traveled widely and brought with us a missionary zeal to spread our own values, have never gladly suffered the exercise of foreign criminal jurisdiction over our nationals. We have also taken keen interest in how other countries treat their own nationals accused of crime. Americans have been concerned about the criminal process in China ever since our first ship—"The Empress of China"—entered the port of Canton in 1784. The captain of that American trading vessel joined French, Dutch and Danish counterparts in supporting the British East India Company's vain attempt to resist China's exercise of criminal jurisdiction over a sailor charged with homicide against a Chinese.¹ In 1821, the captain of an American merchantman proved equally unsuccessful in an effort to protect an Italian-born crew member against being tried by Chinese authorities on a similar charge.² In both cases the accused was found guilty and executed by strangulation.

Such incidents, although rare, fueled the increasing desire of the Western trading nations to exempt their nationals from China's administration of justice, which they did not

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† Mao Tse-tung, *Speech on the Ten Major Relationships* (April 25, 1956); reprinted in 20 PEKING REV. 10, 21 (No. 1, 1977).

¹ See, e.g., 1 H. MORSE, *THE INTERNATIONAL RELATIONS OF THE CHINESE EMPIRE* 102-03 (1910).

² *Id.* at 104-05.

hesitate to characterize as "barbarous,"³ even though Chinese officials sought to win their good will by only asserting jurisdiction when a Chinese had been killed and by swiftly and sternly punishing Chinese who committed offenses against Westerners.⁴ Following Britain's victory in the Opium War of 1839, a badly-weakened China concluded treaties with many states surrendering her right to exercise territorial jurisdiction over their nationals.⁵ By granting to foreigners the privileged status of "extraterritoriality" these "unequal treaties" introduced, and increasingly symbolized, what the Chinese Communists have called China's "century of humiliation."

Western complaints about Chinese justice were not primarily directed against the substantive criminal law's proscription of various kinds of conduct. Although the East India Company's Canton Select Committee charged in 1806 that "the Chinese . . . laws . . . are not only very arbitrary and corruptly administered, but founded on a system in many respects incompatible with European ideas of equity or justice,"⁶ the leading Western expert on Chinese law, Sir George Staunton, found much to praise in the Manchu Dynasty's criminal code, even while denouncing as "indefensible" some of the principles of its administration.⁷ More

³ *Id.* at 109.

⁴ Edwards, *Ch'ing Legal Jurisdiction Over Foreigners*, in *ESSAYS ON CHINA'S LEGAL TRADITION* (J. Cohen, F. Chen, and R. Edwards ed., publication forthcoming).

⁵ Many of the treaties are collected in 1 G. HERTSLET, *HERTSLET'S CHINA TREATIES* (3d ed., 1908). For the text of the 1844 treaty between the United States and China, see 6 C. BEVANS (ed.), *TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949* at 647 (1971).

⁶ 3 H. MORSE, *CHRONICLES OF THE EAST INDIA COMPANY TO CHINA, 1635-1834* at 40(1926).

⁷ See, G. STAUNTON & TA TSING LEU LEE: *BEING THE FUNDAMENTAL LAWS, AND A SELECTION FROM THE SUPPLEMENTARY STATUTES, OF THE PENAL CODE*

important than the differences between the code's homicide proscriptions and the comparable norms of Western countries was the fact that in practice Chinese magistrates sometimes applied the code in ways that seemed, to the Westerners, to ignore provisions that justified killing in lawful self-defense or that only required payment of a fine for killing by unavoidable accident.⁸ Many Westerners became convinced that it was impossible for foreign defendants to have an impartial trial. They bitterly complained that China had devised special, truncated procedures for the prosecution of foreigners, and they believed that, in cases where a Chinese had been killed by a foreigner, Chinese judges acted according to an "innate conviction that their countrymen, belonging to a civilized race, must be in the right as against those of rude and unlettered origin."⁹

But Western dissatisfaction derived from far more than China's perceived anti-foreign bias. It went to the very heart of the Chinese system for administering justice. Even in treating Chinese defendants that system seemed to presume that anyone unsavory enough to be accused of a crime must be guilty. It denied an accused the aid of counsel, a fair opportunity to rebut the charges and a privilege against self-incrimination; indeed, it generally insisted upon a confession as a prerequisite to conviction, and authorized the infliction of torture to assure that confession would be forthcoming. In these circumstances one can share the conclusion of earlier commentators that "the trial

was more for the purpose of publicly establishing the charge and determining the penalty, than of ascertaining the truth."¹⁰

Moreover, in their prosecution of foreigners, Chinese officials were so zealous in fulfilling the doctrine of responsibility that often required "a life for a life" that they did not even appear fastidious about whether the foreigner who was surrendered for trial was in fact the person whose act had resulted in the death in question. And, in order to make certain that someone would be turned over for punishment, the authorities did not hesitate to shut off all of a recalcitrant country's trade or to arrest and detain one or more representatives of the ship or trading company involved until the demand for an accused was met.¹¹ The Opium War and the system of extraterritorial jurisdiction imposed by the victors were at least in part the result of Western dissatisfaction with China's administration of justice.

The Chinese people came to detest the extraterritorial system, and part of the price of ending it was their adoption of formal Western-style legal institutions. Japan had succeeded in throwing off the yoke of extraterritoriality by modernizing its legal system at the end of the nineteenth century, and this inspired China to follow a similar path.¹² Beginning in 1902 the major Western powers provided China with a substantial incentive to undertake the vast effort "to reform its judicial system and to bring it into accord with that of Western nations;" in a series of bilateral treaties they promised that, if China did so, they "will also be prepared to relinquish extraterritorial rights when satisfied that the state of the Chinese laws, the arrangements for their administration and other considerations warrant it. . . ."¹³ During the last decade of imperial rule and then, after the Revolution of 1911, under the succeeding governments of the Republic of China, the country's leaders sought to "modernize" their law in the hope of not only putting an end to extrater-

OF CHINA xxiv (1810):

There are certainly many points upon which these laws are altogether indefensible. We shall look in vain, for instance, for those excellent principles of the English law, by which every man is presumed innocent until he is proved guilty; and no man required to incriminate himself. Such maxims the Chinese system neither does nor indeed could recognize. But it will scarcely escape observation, that there are other parts of the code which, in a considerable degree, compensate these and similar defects, are altogether of a different complexion, and are perhaps not unworthy of imitation, even among the fortunate and enlightened nations of the West.

⁸ I H. MORSE, *supra* note 1, at 110-11.

⁹ *Id.* at 112. See also, Edwards, *supra* note 4, for a discussion of the special procedures for exercising jurisdiction over foreigners, which China had originally designed in an effort to improve relations with them.

¹⁰ I H. MORSE, *supra* note 1 at 114, citing T. JERNIGAN, CHINA IN LAW AND COMMERCE 189 (1905).

¹¹ See I H. MORSE, *supra* note 1 at 99-109; Edwards, *supra* note 4. Both writers review the cases of China's assertion of criminal jurisdiction over Westerners.

¹² See I COHEN & CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW 11 (1974).

¹³ Treaty Respecting Commercial Relations, United States-China, Oct. 8, 1903, art. XV [1903] 33 Stat. 2208, T.S. No. 430. See also I G. HERTSLET, *supra* note 5, at 575.

ritoriality but also facilitating political and economic development. Among the vicissitudes of warlord struggles for power from 1916 to 1928 and Communist revolution and Japanese invasion after the Nationalists nominally unified the country in 1928, the Republican government managed to Westernize China's law codes and gradually do away with extraterritoriality, despite the fact that it made only limited progress in translating the new legislation into actual practice.

When in 1943 the United States and the United Kingdom, the last of the powers to retain extraterritorial jurisdiction, finally surrendered their privileged position,¹⁴ they did so under the political pressures of sustaining a strained wartime alliance with Chiang Kai-shek's Republican government more than out of satisfaction with that government's administration of justice. Even to this day Americans continue to be concerned about the quality of criminal justice on the island of Taiwan, to which the Republican government was forced to flee in 1949 after its defeat in the Communist revolution, just as they are concerned about the administration of justice in many other countries with which the United States is allied. Because of this concern, not only United States diplomats, but also all members of the United States military Assistance Advisory Group stationed in Taiwan are exempt from the local jurisdiction by virtue of diplomatic immunity. Other U.S. military personnel in Taiwan and their dependents and civilian employees enjoyed this full immunity until 1966; since then, under the terms of a bilateral "status of forces" agreement similar to those the U.S. has negotiated with other allies, in most cases they have continued to be spared the exercise of Chinese criminal jurisdiction; and, when brought before a Chinese court, they are "guaranteed most of the procedural safeguards considered fundamental to American justice," safeguards that are denied to Chinese nationals who are tried by the same court.¹⁵ In order to avoid political friction, the Republic of China (ROC),

¹⁴ Treaty for the Relinquishment of Extraterritorial Rights in China and the Regulation of Related Matters, United States-Republic of China, Jan. 11, 1943, (1943) 57 Stat. 767, T.S. No. 984. See also, 6 C. BEVANS, *supra* note 5 at 739.

¹⁵ Lung-sheng Tao, *The Sino-American Status of Forces Agreement: Criminal Jurisdiction Over American Soldiers on Nationalist Chinese Territory*, 51 B.U.L. REV. 1, 29 (1971), summarizing the situation and providing further citations.

like many other countries, also has minimized its use of the criminal process against ordinary American citizens and has treated those whom it has prosecuted with considerable leniency.¹⁶ These measures have been rather successful in preventing a repetition of the series of diplomatic disputes generated by the exercise of Chinese criminal jurisdiction over aliens during the decades preceding the imposition of extraterritoriality. Yet, because of the treatment that the ROC, our longtime ally and recipient of American military aid, accords to its own nationals accused of crime, concern about the administration of justice on Taiwan continues to be voiced in the United States.¹⁷

The establishment in 1949 of the People's Republic of China (PRC) heightened the dissatisfaction of Americans and other Westerners with the administration of justice on the mainland. Almost immediately, the United States government expressed its "grave concern" over the "arbitrary" detention in Mukden of five American consular officials, who were subsequently found guilty at a "so-called trial"—apparently of assault upon a Chinese—and sentenced to further imprisonment which was commuted to deportation; and, soon after, a

¹⁶ See, F. Man-ling Li, *Recent Judicial Decisions Concerning Treatment of Aliens in the Republic of China* (unpublished essay on file in the East Asian Studies Library at the Harvard Law School).

¹⁷ See, e.g., *Security Assistance to Asia for FY '78*, HOUSE COMM. ON INTERNATIONAL RELATIONS, REPORT OF A SPECIAL STUDY MISSION TO ASIA, April 8-21, 1977, Comm. Print, 95th Cong., 1st Sess. (June 19, 1977) summarizing political dissidents' claims of arbitrary justice, torture, political control of the judiciary and detention of certain persons for 25 years. See also, N.Y. Times, Nov. 27, 1976, at 46 (the full page advertisement "Stop Secret Execution In Taiwan.") No execution subsequently took place, and "there have been no reports of execution of political prisoners [in Taiwan] for many years." U.S. DEPT OF STATE, HUMAN RIGHTS PRACTICES IN COUNTRIES RECEIVING U.S. SECURITY ASSISTANCE 6 (1977). But this State Department document notes that "there are still occasional reports that investigative agencies resort to torture or the beating of prisoners," that constitutionally prescribed rights "have been circumscribed for a 'temporary period,'" that the ROC does not permit independent verification of the number of political detainees held under emergency measures, and that under martial law, courts-martial have sentenced to death common civilian criminals in addition to trying political and military offenders. *Id.* at 5-6. For further discussion of the current situation in the ROC, see the text accompanying notes 138 to 152 *infra*, and see generally HUMAN RIGHTS IN TAIWAN, a monthly journal of the U.S.-based Formosan Association for Human Rights.

Mukden "people's court" heard charges against an "American spy ring" and sentenced all non-Chinese members of the U.S. Consulate General to deportation, without having named them at the "trial."¹⁸ During the Korean War, the PRC's espionage convictions of a number of Americans and other foreigners gave rise to further misgivings. In 1954, in the best known case of this genre—the sentencing to life imprisonment and twenty years, respectively, of CIA agents John Downey and Richard Fecteau—the U.S. branded the convictions "a most flagrant violation of justice" based upon "trumped-up charges,"¹⁹ a claim that President Richard Nixon implicitly repudiated in 1973.²⁰

However well-founded the PRC's accusations may have been in certain cases, many observers were disturbed by the breadth of new China's few criminal statutes, especially the dragnet legislation for the punishment of counterrevolution, which had provided the basis for the espionage prosecutions and which embraces even acts that occurred prior to its promulgation and acts analogous to those that it proscribes.²¹ Furthermore, the procedures employed against both foreign and Chinese accused, resulting in years of preconviction detention in many cases, multiple pressures to confess and lack of a meaningful opportunity to make a defense, drew widespread criticism abroad.²² And, in dealing with its own nation-

als, the PRC's frequent resort to extra-judicial sanctioning processes administered by police, military officials, Communist Party members or the masses, provide much grist for anti-Communist propaganda mills. Contemporary China's characteristic kangaroo court—the "mass trial" before throngs of spectators—attained notoriety.

The advent of Sino-American détente in the early 1970's led to the release of Downey, Fecteau and the few other American prisoners remaining as vestiges of the era of bad feeling and radically altered popular perception of revolutionary China in the United States. Indeed, in the new era—one in which many American visitors to China came home suffering from Marcopoloitis—interest in the costs of Chairman Mao's society declined sharply while attention focussed on the benefits it conferred. It became almost a matter of poor taste to point out the continuing existence in China of severe criminal sanctions, and a vivid autobiographical account of seven years in PRC prison and labor camps,²³ which might have been a best-seller in the 1950's, went virtually unnoticed by the same Americans who were shocked by Solzhenitzyn's *Gulag Archipelago*.²⁴ Although visitors were occasionally permitted to view a Chinese prison and, more rarely, a criminal trial, I know of only one instance in over two decades when a labor camp was included on a visiting delegation's itinerary (the Chinese, plainly sensitive to comparisons with the USSR, insisted that it was not a "camp" but a "farm").²⁵ Many returning travelers received the impression that "crime just isn't a problem in China today."²⁶

Yet, precisely because of the enhanced contacts between the PRC and the rest of the world that have flowed from détente, it is important to strive for an accurate understanding of the state of criminal justice in contemporary China. For example, if cultural and other exchanges expand beyond the present modest levels, more and more Americans will

¹⁸ For the details of these related incidents, see Briggs, *American Consular Rights in Communist China*, 44 AM. J. INT'L L. 243 (1950).

¹⁹ 31 DEP'T STATE BULL. 856-57 (1954). For discussion of the case, see J. Cohen, *Chinese Attitudes Toward International Law—and Our Own*, in CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES 282, 289-90 (J. Cohen ed. 1970).

²⁰ See COHEN & CHIU, *supra* note 12, at 641.

²¹ Act of the PRC for Punishment of Counterrevolution, promulgated Feb. 21, 1951, in 1 CHUNG-HUA JEN-MIN CHENG-FU FA-LING HUI-PIEN (Collection of Laws and Decrees of the Chinese People's Government) 3-5 [hereinafter cited as COLLECTION]; English translation in J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963* at 299-302 (1968).

²² See, e.g., A. BONNICHON, *LAW IN COMMUNIST CHINA* 24, 26-32 (1956); H. RIGNEY, *FOUR YEARS IN A RED HELL* 29 (1956). For an account of the Chinese criminal process that is as detached as it is illuminating, by two Americans convicted of espionage after several years of pre-trial detention, see A. RICKETT & A. RICKETT, *PRISONERS OF LIBERATION* (1957). For a discussion of the experiences of various foreigners in the PRC, see Cohen, *The Personal Security of Businessmen and Trade Representatives*, in *LAW AND POLITICS IN CHINA'S FOREIGN TRADE* 287-98 (V. Li ed., 1977).

²³ BAO RUO-WANG (J. Pasqualini) & R. CHELMINSKI, *PRISONER OF MAO* (1973).

²⁴ A. SOLZHENITSYN, *THE GULAG ARCHIPELAGO, 1918-1956: AN EXPERIMENT IN LITERARY INVESTIGATION*. (T. Whitney, trans 1974).

²⁵ Interview with a member of an American lawyers' delegation that visited a labor camp in the spring of 1977.

²⁶ The quotation is from *People's Justice: Judge George W. Crockett, Jr., Looks at China's Legal System*, 2 NEW CHINA 27. (No. 1, 1976).

want to know about the risk of arbitrary imprisonment that they run by journeying to China and residing there.²⁷ If Sino-American relations continue to develop favorably, the United States may wish to negotiate a bilateral consular agreement that would include some provisions guaranteeing official access and assistance to Americans who have run afoul of the criminal process in China; this plainly will require knowledge of the existing system and the extent to which it currently provides such opportunities.²⁸ As debate waxes over whether the United States should withdraw diplomatic recognition from the ROC and confer it upon the PRC, the extent to which the administration of justice by the competing governments should be characterized as tyrannical has become a topic of discussion.²⁹ And if the United States considers extending military assistance to the PRC, both the Executive Branch and the Congress will have to assess the relevance of China's criminal process in determining whether legislation prohibiting military aid to governments that systematically repress their own nationals applies to China.³⁰

The world community's belated acceptance of China as a full participant has also increased the importance of understanding its system for administering criminal justice. Given the Chinese system and the values underlying it, is the PRC likely to adhere to existing multilateral agreements prescribing minimum universal standards for governments to observe regarding human rights? Will Peking's domestic standards be reflected in its attitude toward current efforts to revise the Geneva Conventions for the protection of prisoners of war and civilians

²⁷ I, myself, was courteously questioned at some length, but not detained, by Chinese border police in August 1972, after informing customs officials that I was re-entering the PRC with Chinese currency obtained on a previous visit. See COHEN & COHEN, *Up Against the Great Wall*, 27 HARV. L. SCH. BULL. 28,32 (1976).

²⁸ For the PRC position regarding consular access in the absence of agreement, see COHEN & CHIU, note 12 *supra*, at 647-56. For examples of bilateral consular agreements with the PRC, see *id.* at 1059-67. See also the text accompanying note 206 *infra*.

²⁹ See, e.g., Goldwater, *A Travesty of Law*, 61 A.B.A.J. 674 (1975), Commenting on R. Brown, Jr., *Present-Day Law in the People's Republic of China*, 61 A.B.A.J. 474-79, (1975).

³⁰ For an excellent discussion of such legislation, see Salzberg & Young, *The Parliamentary Role in Implementing International Human Rights: A U.S. Example*, 12 TEX. INT. L.J. 251 (1977).

detained in wartime? To what extent will China be acting hypocritically if it joins in United Nations General Assembly denunciations of other governments for violations of human rights relating to the criminal process?

The Chinese experience is relevant in many contexts. Private international bodies such as Amnesty International and the International Commission of Jurists eagerly seek more data on PRC practice. As the Patricia Hearst case illustrated, actors in the criminal process in this country and elsewhere need to know more about "thought reform" and its implications. And scholars as well as diplomats and lawyers will have to assimilate the experience of one-quarter of humanity in order to determine whether it is realistic to expect certain minimum standards of criminal justice to be accepted in practice as well as theory by all nations regardless of history, culture, race, religion, socioeconomic organization, ideology and other factors.

This is a good time to take another look at the criminal process in China. As part of the increasing interest in the promotion of human rights, there is ferment over similar problems not only in the United States but also elsewhere in the world. Moreover, now that the period of détente-inspired euphoria is fading in this country, it should become easier to adopt a balanced view of the Chinese, one that is not predisposed to categorize them as either saints or sinners. It is time to do away with the double standard toward the two major Communist societies that many have applied in recent years as they have castigated the Soviet Union for injustices in its sanctioning processes while averting a critical eye from the PRC. Perhaps the following reflections will also help American scholars of criminal justice to overcome their apparent reluctance to take account of the Chinese experience even in studies that purport to compare legal systems or to analyze the relation between ideology and criminal procedure.

II

Almost ten years ago I published a 639-page introduction to this subject, that dealt with the years 1949-63.³¹ Plainly it will not do to repeat what has been printed there and elsewhere.³²

³¹ See J. COHEN, note 21 *supra*.

³² Many studies relating to aspects of criminal justice in the PRC have appeared. See e.g., SHAO-

In the light of what we have been able to learn during the past decade, however, I can discuss some of the abiding and salient characteristics of the Chinese criminal process as it has developed over the years 1949-77, a period twice as long as that originally studied.

The first point to emphasize is that crime is an important problem in China, no matter what some wide-eyed travelers may report they have been told. For example, any tourist who uses his eyes can see that Chinese are careful to lock their bicycles. It is not unusual for ground-floor windows to have bars, and even chests of drawers in model homes toured by visitors tend to display padlocks. Chinese are as human as the rest of humanity, live in meager circumstances and are subject to inevitable temptations. Except for periods of upheaval such as the Cultural Revolution of 1966-69, foreigners generally need not worry about theft or personal violence while in China, but they must guard against extrapolating from their own experience. The areas to which they are admitted and the places where they are accommodated are often not typical of the society as a whole, and, as in the nineteenth century, the commission of an offense against a foreigner ordinarily brings with it especially swift and heavy punishment because of the embarrassment this causes the nation's honor.³³

CHUAN LENG, *JUSTICE IN COMMUNIST CHINA* (1967); V. LI, *LAW WITHOUT LAWYERS* (1977); Li, *The Role of Law in Communist China*, 1970 CHINA Q. 66 (No. 44); Lubman, *Form and Function in the Chinese Criminal Process*, 69 COL. L. REV. 535 (1969); Pfeiffer, *Crime and Punishment: China and the United States*, in Cohen (ed.), *supra* note 19, at 261; Tao, *Politics and Law Enforcement in China: 1949-1970*, 22 AM. J. COMP. L. 713 (1974); W. Jones, *A Possible Model for the Criminal Trial in the People's Republic of China*, 24 AM. J. COMP. L. 229 (1976); Hungdah Chiu, *The Judicial System Under the New PRC Constitution*, in *THE NEW CONSTITUTION, OF COMMUNIST CHINA* 63-121 (M. Lindsay ed. 1976); Hungdah Chiu, *The Judiciary in Post-Cultural Revolution China*, in *PROCEEDINGS OF THE FIFTH SINO-AMERICAN CONFERENCE ON MAINLAND CHINA* 99-121 (1976); Edwards, note 39 *infra*; Cohen, *The Chinese Communist Party and 'Judicial Independence': 1949-1959*, 82 HARV. L. REV. 967 (1969) and the other essays cited therein.

³³ See, e.g., *Chinese Court Pronounces Death Sentence on Counterrevolutionary Criminal*, New China News Agency-English, (Peking) June 13, 1966, reprinted in U.S. Consulate, Hong Kong, *SURVEY OF CHINA MAINLAND PRESS*, [S.C.M.P.] 1-3 (No. 3720, 1966) in which the Supreme People's Court demonstrated a determination to deter physical assaults upon foreign diplomats and other aliens.

It may well be that the PRC's vast improvement of social conditions during the past generation has brought about a corresponding diminution of antisocial conduct but, because the PRC issues no meaningful crime statistics, we have to take such assertions on faith. Whatever the relative degree of progress in reducing the crime rate, the Chinese media themselves leave no doubt that crime persists in an absolute and still important sense. The press continues to issue warnings about the menace of counterrevolutionaries who commit sabotage and other criminal acts, and no less an authority than Chairman Hua Kuo-feng, recently promoted from the post of Minister of Public Security, has acknowledged "new-born counterrevolutionaries" and bad elements "who are engaged in beating, smashing and looting, steal state property and endanger the peace and order of society."³⁴ Provincial radio broadcasts call for the suppression of "embezzlers, swindlers, murderers, arsonists, criminal gangs and bad elements."³⁵ And formerly discreet Chinese officials in Peking have recently begun to inform foreign correspondents about bloody armed conflict in several areas that has led to factories being blown up, raids on military arsenals and robberies of banks, grain stores and shops.³⁶

PRC officials are fond of stating that only approximately five percent of their populace consists of "class enemies" who are basically hostile to the government³⁷ and must be forced to build socialism. It is difficult to be certain what such statements mean. They do not seem to refer to those who are merely politically discontented. Given the continuing effort of the Taiwan regime to stir up opposition, the political, social and economic upheavals generated by the initial Communist seizure of power,

³⁴ Hua Kuo-feng, *Speech at the Second National Conference on Learning from Tachai in Agriculture*, (Dec. 25, 1976), English translation in 20 PEKING REV. 31, 36 (No. 1, 1977).

³⁵ Radio broadcast entitled *Chekiang Committee Holds Enlarged Meeting* (Dec. 13, 1976). Printed in 1 FOREIGN BROADCAST INFORMATION SERVICE, PEOPLE'S REPUBLIC OF CHINA G1-G2 (December 14, 1976); See also, N.Y. Times, Jan. 1, 1977 at 18.

³⁶ See, e.g., *China Reported Stepping In to Halt Fighting in a City South of Peking*, N.Y. Times, Dec. 30, 1976, at 1; Butterfield, *China's Year of Disorder*, N.Y. Times, Jan. 1, 1977, at 2.

³⁷ See, e.g., BAO RUO-WANG & CHELMINSKI, *supra* note 23, at 11; Whyte, *Inequality and Stratification in China*, 1975 CHINA Q. 684, 705 (No. 64). Saffire, *Chinese Say Purging of 'Gang of 4' Will Not Better Ties with Soviets*, N.Y. Times, March 25, 1977 at A9.

disillusionment subsequently created by the waves of mass movements and purges that culminated in the near civil war of the Cultural Revolution, the persisting "struggle between the two lines" over power, policy and personalities, the personal hardships and restraints imposed by revolutionary discipline, and the inability of most dissidents to leave the country, it surely would be remarkable if only five percent were politically discontented. My own view is that the five percent figure probably refers to all those who are under some form of restraint, supervision or surveillance by the public security system and the masses. Many of these are people who, because of their own or their parents' pre-1949 occupations, such as landlord, capitalist or ROC government official, are considered suspect and deserving of special attention even though they have committed no overt anti-social act against the PRC.³⁸ Nevertheless, although most members of the disfavored classes are too cowed and isolated to risk violating the law, others from "the exploiter class" continue to commit crimes.³⁹ Moreover, as Chairman Hua's reference to "new-born counterrevolutionaries" implies, a large proportion of recently reported criminals are people from good class background and responsible positions whose serious anti-social behavior leads to their being lumped with what the authorities like to call the "handful of class enemies."⁴⁰ Whether criminal or non-criminal, five percent of more than 900 million people yields forty-five million "class enemies," a population roughly equal to that of a west European country. This imposes an enormous burden on the public security system's resources. In addition, the system must cope with a large number of minor offenders whose conduct—perhaps hooliganism, petty theft, molesting women or disseminating obscene thoughts—is

not so grave as to warrant categorizing them as "class enemies."⁴¹

The second point worth making is that, despite China's huge population, the resources available to the criminal process are limited, in personnel as well as finances. I recall interviewing a former police officer from Fukien province about whether his county public security bureau had prosecuted persons suspected of adultery. His response was: "If we had prosecuted all those who committed adultery, we would have had no time to go after the counter-revolutionaries!" The relative scarcity of trained officials is not a new problem of justice in China. In view of the country's vast population and area, it has long been recognized that an immense and cumbersome state apparatus would be required to process all criminal cases and to impose sanctions against all offenders. Thus today, as in imperial China,⁴² the state's burden is shared by consigning the handling of many anti-social acts to persons other than officials. This has the traditional virtue of conserving state resources and allowing local groups to dispose of many of their own problems. It also comports with the PRC's ideological preference for the participation of the masses in the new society and evidences some progress in the long march toward the eventual withering away of the state that Marxists claim will mark the arrival of true communism.

Many minor acts that might otherwise be deemed criminal are therefore considered and disposed of "on the spot" by unofficial persons, such as members of an agricultural production team or a factory workshop, neighborhood residents, or even *ad hoc* clusters of bystanders. The "study" groups, in which most Chinese participate, sometimes discuss and settle problems involving minor infractions by their members. Certain citizens are especially active in informal sanctioning processes. Some have been selected to serve on a part-time volunteer basis to mediate disputes or to check on local conditions, report suspicious behavior, and otherwise cooperate with the police. Others,

³⁸ See the discussion of class status in the text accompanying notes 70 to 91, *infra*.

³⁹ See, e.g., cases 11 and 14 of the *Notice of the Intermediate People's Court of Tientsin* (Aug. 5, 1973), and case 2 of the *Notice Issued by the Chinese People's Liberation Army Military Control Committee of the Public Security Organs of the Szu-Mao Region of Yunnan Province*, in Edwards, *Reflections on Crime and Punishment in China*, (With Appended Sentencing Documents) 16 COL. J. TRANSNAT'L. L. 45, 75, 82, 84, 97-98 (1977).

⁴⁰ See *id.* for other cases reported. As Professor Edwards notes, these demonstrate that a striking number of serious offenders held responsible positions in PRC society until convicted as reported.

⁴¹ The case histories related by Professor Edwards also demonstrate that, prior to the convictions reported, many of the accused had already had brushes with the law that had resulted in their receiving less severe sanctions than those that had placed them in the "class enemy" category.

⁴² See Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1215-26 (1966) and authorities cited therein.

because of their responsibilities for production, education, neighborhood administration, Communist Party or Youth League work or other activities are naturally looked to for leadership in dealing with minor public order problems as well. Some of these persons may be state employees, although not employed by the public security apparatus. This is not to say that the public security apparatus has nothing to do with the handling of such cases. Practice varies, of course, depending upon whether the country is experiencing one of the anti-bureaucratic decentralizing campaigns that Chairman Mao periodically favored or the alternating periods in which strengthening organizational discipline is emphasized. At least during the latter periods, including Chairman Hua's present effort to strengthen the state security apparatus, the cop on the urban beat and the policeman assigned to maintain contact between a rural commune and his county public security bureau (or their superiors back at the office) will usually be consulted if there is doubt about the proper course of action. Often the police divert to the appropriate group minor cases already within their cognizance.

By classifying all such cases as "non-criminal," the PRC enables many offenders to avoid severe stigmatization and reduces its national "crime" statistics. Nevertheless, the sanctions dispensed in these cases may amount to considerably more than a private lecture on Maoist ethics, an informal warning, or the requirement that restitution, compensation or an apology be made. The offender may have to undergo the embarrassment of public criticism and self-criticism before a small or large group of his peers and may have to write out "statements of repentance" for posting in prominent places. If his act is regarded more seriously than most petty offenses, he may even have to endure the mortification and fright of a "struggle meeting," in which a large audience subjects him to intense vilification. The prospect of "being struggled" has sometimes led people to suicide.

Certain people are subject to special types of "non-criminal" sanctions that are dispensed by officials who are not responsible for public security work but who coordinate their decision-making with the public security apparatus. For example, the superiors of a government employee who engages in antisocial behavior

may, after consulting with the local public security bureau, impose a variety of "administrative punishments," such as the notation of a demerit in his record, demotion or expulsion from employment.⁴³ Party members who commit misconduct are subject to a similar range of Party-imposed sanctions.⁴⁴ Although serious misbehavior can lead the organization to impose severe "non-criminal" sanctions or recommend criminal prosecution as well as impose loss of official or Party status, the latter in itself is a very severe punishment, for it constitutes a disgrace, a loss of privileged employment and an assurance of downward mobility.

The police directly mete out many "non-criminal" sanctions. The Security Administration Punishment Act,⁴⁵ the nearest thing to a criminal code yet promulgated in the PRC, actually authorizes the public security force to impose a formal warning, a modest fine and up to fifteen days of detention upon those whose misconduct disrupts public order and yet "does not warrant criminal sanctions."⁴⁶

More disturbing is the unfettered power of the police, and, during periods of anti-bureaucratic decentralization, of agricultural and factory units as well, to impose substantial sanctions of a continuing nature, such as "supervised labor." This stigmatizes an offender and requires him to work under the supervision of the masses either at his existing job or at a special one, to absorb extra doses of indoctrination, and to restrict his activities and report about them regularly.⁴⁷

The ultimate in "non-criminal" sanctions is "rehabilitation through labor." This is confine-

⁴³ Law of Oct. 26, 1957, Provisional Regulations of the State Council of the PRC Relating to Rewards and Punishments for Personnel of State Administrative Organs, Chung-hua jen-min kung-ho-kuo fa-kuai hui-pien (Collection of Laws and Regulations of the PRC) VI, 198-202. For the English translation, see J. COHEN, *supra* note 21 at 193-195.

⁴⁴ See CONST. OF THE COMMUNIST PARTY OF CHINA, ch. 2, art. IV (adopted Aug. 28, 1973). See also, 16 PEKING REV. 27 (No. 35, 36, 1973), for the reprinted text.

⁴⁵ Law of Oct. 22, 1957, Security Administration Punishment Act of the PRC, 6 COLLECTION, *supra* note 43, at 245-54, English translation (excerpt by excerpt) in J. COHEN, *supra* note 21, at 205-37.

⁴⁶ Articles 2, 3, see J. COHEN, *supra* note 21 at 205.

⁴⁷ For discussion of "supervised labor" and its relation to other sanctions, see J. COHEN, *supra* note 21 at 286-95.

ment in a labor camp in physical conditions that are often indistinguishable in substance from those of the criminal punishment of "reform through labor." Although in stigma, loss of status, loss of wages and certain other respects the former is not as severe as the latter,⁴⁸ the term of confinement can be just as long. The term was originally unspecified and is now apparently limited to three years, at least in principle, but it reportedly can be renewed. The legislation that authorized "rehabilitation through labor" gives the impression of providing a significant check upon the power of the police to impose it, requiring the approval of the provincial level people's council or its designee,⁴⁹ but in practice the public security force has usually served as the designee, and the only restrictions against its arbitrary action derive from its own internal review procedures. During some periods work units have imposed this sanction as well as supervised labor without having to clear these decisions with the police.⁵⁰ In view of the availability of this sanction, which the authorizing legislation concedes is "a measure of a coercive nature for carrying out the education and reform of persons receiving it,"⁵¹ one can understand why the PRC has not had to follow the post-Stalin Soviet example by confining in mental institutions many of "[t]hose counterrevolutionaries and anti-socialist reactionaries, who because their crimes are minor, are not pursued for criminal responsibility."⁵²

III

Among the many factors that determine whether or not an offender will be "pursued for criminal responsibility," timing is one of the most crucial. The history of the People's Republic has been highly dynamic, and its progress has been dialectical. The Party line for running the country has changed in alternating cycles of pressure and relaxation. Not surprisingly, the criminal process, as one of

the regime's principal instruments for inducing compliance by the populace, has reflected those political changes.

Timing, that is, prevailing Party policy, is important in several respects. It often determines whether given conduct will be treated as antisocial. During the 1956-57 campaign to "Let a Hundred Flowers Bloom, Let a Hundred Schools of Thought Contend," nothing happened to those who accepted the invitation to voice their criticisms of the regime. When the anti-rightist movement began, however, many of the critics were sent to rehabilitation through labor or even convicted of crime and sent to reform through labor, and no continuation of the criticism was tolerated.

If certain conduct is to be suppressed, timing frequently determines the type of sanction to be used and therefore the type of process considered appropriate. For example, in certain periods a peasant who has stolen a large amount of grain from a collective granary has been processed as a criminal; yet, during the economic depression of 1960-62, which inflicted severe hardship upon the Chinese and made such thefts a widespread problem, he might only have received "criticism-education;" but if caught during the subsequent "socialist-education" movement, which sought to restore discipline to the countryside while de-emphasizing resort to criminal sanctions, he might have been given supervised labor.

Moreover, acts that are treated as crimes regardless of the era are punished more harshly in one period than another. Many who were executed for corruption during the PRC's earliest years would have been sentenced to prison during the 1956-57 era when moderation was at its peak. And, during the "Strike One-Oppose Three" campaign of 1970-71, the death penalty, which in the two previous decades had only been applied sparingly in the case of economic crimes, was reportedly employed widely in an effort to stamp out corruption, speculation and assorted blackmarket activities that proliferated due to the breakdown of social and production discipline caused by the Cultural Revolution.

The process itself, of course, has also been affected by political change. During the pre-Constitutional period, in addition to a range of "non-criminal" sanctioning processes, there were really a variety of criminal processes: with

⁴⁸ Compare the discussion in Whyte, *Corrective Labor Camps in China*, 13 *ASIAN SURVEY* 253, 257-58, (1973) with J. COHEN, *supra* note 21 at 249-74, 587-639.

⁴⁹ *Decision of the State Council of the PRC Relating to Problems of Rehabilitation Through Labor*, in 6 *COLLECTION*, *supra* note 43, at 243-44; English translation in COHEN, *supra* note 21 at 249-50.

⁵⁰ See Edwards, *supra* note 39 at 67, n. 77.

⁵¹ *Decision*, *supra* note 49 at 249, art. 2.

⁵² *Id.*, art. 1(2).

a minimum of formality major sanctions were dispensed by civilian courts, military courts, the police, and land reform and other *ad hoc* people's tribunals that were devised for the mass movements that swept over the country. The effort in the mid-1950's to import a unified, coherent legal system based on the Soviet model led to judicial experiments with formal public trials of a continental European type, but the anti-rightist movement of 1957-58 put an end to this. By the time that movement and the Great Leap Forward of 1958-59 subsided, a well-integrated, police-dominated, administrative-type of criminal process was established. It prevailed until the greatest upheaval of all, the Cultural Revolution of 1966-69, which went beyond previous mass movements and attacked not only the judiciary and the procuracy but also the public security agency itself. This eventually required the People's Liberation Army to restore order and to administer criminal justice well into the 1970's until a system that rather closely resembles the 1957-66 system gradually replaced it. It is this system that is the focus of our discussion, even though the armed forces are still called upon to restore order in areas where social discipline breaks down.

Before proceeding with this discussion, however, because the PRC is likely to witness new mass movements in the future—indeed, Chairman Hua Kuo-feng launched a major campaign in 1977 to purge Party and government officials loyal to Chairman Mao's widow and other members of "the gang of four"⁵³—we should note the changes that tend to occur in the criminal justice system during such a campaign. The central Party leadership in Peking usually erects a special organization to direct each nationwide movement, and the organization establishes at every level down to the factory, commune, university, government agency or other unit affected by the particular movement an *ad hoc* group to coordinate its operation. In a campaign to weed out counter-revolutionaries or rightists, for example, the groups may be told, as they have been on occasion, that roughly five percent of the members of each unit might fall within the category designated as targets of the campaign. Each group then proceeds to investigate potential

targets, interrogating people, studying personnel dossiers, preparing reports on each possible target and discussing the reports. It then submits its findings and recommendations for dealing with each selected target to the office superior to it in the campaign's organizational hierarchy. The superior office reviews the submission and decides whether to approve the designation of the person in question as a target and, if so, which sanction he should receive, perhaps ordering that some people in the unit be given supervised labor and some rehabilitation through labor while formal criminal proceedings be instituted against others. Upon receipt of the superior office's order, the group usually will stage a series of "struggle meetings" against each target, requiring him to write out statements of "self-examination" before each session and making the statements the focus of attack during the actual sessions. Under the mounting pressure of these meetings, the target generally confesses at some point, and the group then announces the label or "cap" that is being placed upon him and often, but not always, the sanction meted out.⁵⁴ If the sanction to be imposed is one that can be carried out by the masses without the aid of the police, such as supervised labor, criticism and self-criticism or restitution of unlawfully obtained property, the police may play no role at all.⁵⁵ But if it is a matter of rehabilitation through labor or reform through labor the police are simply instructed by the campaign organization to impose the approved sanction. In any event the police generally do not initiate their own inquiry before taking action as they would do in cases unaffected by the campaign.

Because of their excesses, campaigns arouse tensions not only between the authorities and the people who are their potential and actual targets, but also between the police and the campaign organizations. What often happens is that many campaign apparatchiks, eager to

⁵⁴ For an example of how the process works, see J. COHEN, *supra* note 21 at 261-64.

⁵⁵ Stanley Lubman has pointed out that during the "socialist education" campaigns from late 1962 until 1965 "police-administered sanctions in the countryside to a considerable degree gave way to direct mass action—criticism and denunciation meetings—and intraorganizational sanctions (i.e., punishments within the communes) that were controlled primarily by local Party officials." Only "the most extremely bad elements" were dealt with "according to the law," that is, by the criminal process. Lubman, *supra* note 32, at 554-55.

⁵³ Butterfield, *Hua Predicts Purge Across China in '77*, N.Y. Times, Dec. 29, 1976, at 1; see Hua, *supra* note 34, at 31.

prove their zeal to the Party, act as though the percentage suggested to them as a guide for selecting targets is a quota imposed on them, and they then proceed to overfulfill it regardless of the availability of appropriate targets. When the movement subsides, its apparatus disbands, leaving to the police the problem of dealing with large numbers of persons whom they do not believe should have been classified as targets. Much to their distaste the police then suffer the burden and embarrassment of sorting out a messy situation and making amends to those who should not have been caught up in the net.

Chairman Mao was perfectly aware of this situation. Indeed, he consciously endorsed excess as a tool for breaking the hold of tradition and revolutionizing a conservative and backward society. As early as 1927, in his famous Report on an Investigation of the Peasant Movement in Hunan,⁵⁶ he argued that a reign of terror was necessary for a period in order to suppress counterrevolutionaries. "Proper limits have to be exceeded in order to right a wrong . . .," he concluded.⁵⁷ There would be time to make amends later. For example, toward the close of the 1955-56 campaign to suppress counterrevolutionaries, one of a series that had swept over China, Mao, apparently concerned that the killing had gotten out of hand, called for fewer arrests and executions among the ordinary people and for "killing none and arresting few" among Party and government officials, with exceptions to be sure.⁵⁸ Not long

after, Mao proposed that the work of liquidating counterrevolution be completely examined

few.' Confirmed counter-revolutionaries are to be screened by the organizations concerned, and the public security bureaus are not to make any arrest, the procuratorial organs are not to start any legal proceedings and the law courts are not to put anyone on trial. Well over 90 out of every hundred counter-revolutionaries should be dealt with in this way. This is what we mean by 'arresting few.' As for executions, kill none.

What kind of people are those we don't execute? We don't execute people like Hu Feng, Pan Han-nien, Jao Shu-Shih, or even captured war criminals such as Emperor Pu Yi and Kang Tse. We don't have them executed, not because their crimes don't deserve capital punishment but because such executions would yield no advantage. If one such criminal is executed, a second and a third will be compared with him in their crimes and then many heads will begin to roll. This is my first point. Second, people may be wrongly executed. Once a head is chopped off, history shows it can't be restored, nor can it grow again as chives do, after being cut. If you cut off a head by mistake, there is no way to rectify the mistake, even if you want to. The third point is that you will have destroyed a source of evidence. You need evidence in order to suppress counter-revolutionaries. Often one counter-revolutionary serves as a living witness against another, and there are cases where you may want to consult him. If you have got rid of him, you may not be able to get evidence any more. And this will be to the advantage of counter-revolution and not of revolution. The fourth point is that killing these counter-revolutionaries won't (1) raise production, (2) raise the country's scientific level, (3) help do away with the four pests, (4) strengthen national defence, or (5) help recover Taiwan. It will only earn you the reputation of killing captives, and killing captives has always given one a bad name. Another point is that counter-revolutionaries inside Party and government organs are different from those in society at large. The latter lord it over the masses while the former are somewhat removed from the masses, and therefore make enemies in general but seldom enemies in particular. What harm is there in not killing any of them? Those who are physically fit for manual labour should be reformed through labour, and those who are not should be provided for. Counter-revolutionaries are worthless, they are vermin, but once in your hands, you can make them perform some kind of service for the people.

But shall we enact a law stipulating that no counter-revolutionary in Party and government organs is to be executed? Ours is a policy for internal observance, which need not be made public, and all we need do is carry it out as far as possible in practice. Supposing someone should throw a bomb into this building, killing everybody here, or half or one-third of the

⁵⁶ Translated in 1 SELECTED WORKS OF MAO TSE-TUNG, 23, 29 (1964).

⁵⁷ *Id.* at 29.

⁵⁸ Mao Tse-tung, *On the Ten Major Relationships*, (April 25, 1956); English translation in 20 PEKING REV. 10, 20-21 (No. 1, 1977). Mao's speech is worth quoting at length for the light it sheds upon this point and others relating to the criminal process:

Third, from now on there should be fewer arrests and executions in the suppression of counter-revolutionaries in society at large. They are the mortal and immediate enemies of the people and are deeply hated by them, and therefore a small number should be executed. But most of them should be handed over to the agricultural co-operatives and made to do farm work under supervision and be reformed through labour. All the same, we cannot announce that there will be no more executions, and we must not abolish the death penalty.

Fourth, in clearing out counter-revolutionaries in Party and government organs, schools and army units, we must adhere to the policy started in Yen-an of 'killing none and arresting

and that all discovered errors be "corrected."⁵⁹ As good Communists the police are undoubtedly familiar with Mao's view about the utility of going too far, but their sense of vocation, of pride in their professionalism even in a society that has often been critical of expertise, nevertheless makes them resent the interference of the mass movement.⁶⁰

IV

In the absence of a movement it is the police who generally determine whether an offender will be consigned to the formal criminal process. As we have seen, a large number of minor offenses are handled "on the spot" by work and residential units, and during periods of decentralization some of these units have even imposed severe "non-criminal" sanctions without checking with the police. But during periods of emphasis upon organizational discipline, such as the one introduced by the Hua Kuo-feng government in 1977, they usually consult representatives of the public security apparatus if there is doubt about whether to dispose of the case outside the formal process or if a severe non-criminal sanction is thought appropriate. Of course, like every other agency in China the police are not divorced from Party guidance and control. Although not every cop

on the beat or traffic policeman may be a Party member, most members of the public security force are. Party organizations exist within each public security bureau and sub-bureau, and the chief of the unit usually plays an important role in the Party political-legal group that coordinates the handling of local public order problems. This group in turn is part of the broader Party apparatus that governs the area. There is a considerable division of labor within a public security bureau, with requirements for internal review of the major decisions in the criminal process. A neighborhood policeman cannot issue an arrest warrant, nor can an investigator decide to initiate prosecution, without the approval of higher authority.

Whereas in the past the police, at least as a matter of law if not always of practice, were required to obtain the approval of the procurator's office prior to issuance of an arrest warrant⁶¹ or initiation of prosecution,⁶² the abolition of the procurator's office—now formally acknowledged by the 1975 PRC Constitution⁶³—relieves them of that obligation. The procuratorial function, however, has been absorbed within the police institution.⁶⁴ Although this change puts an end to an external check upon police activity, additional internal review may be required as a safeguard against arbitrary police action.

Plainly the police exercise a vast amount of discretion. To be sure, the PRC has made efforts to limit that discretion. The 1954 and

people present, what would you say—to execute or not to execute him? Certainly he must be executed.

Adopting the policy of killing none when eliminating counter-revolutionaries from Party and government organs in no way prevents us from being strict with them. Instead, it serves as a safeguard against irretrievable mistakes, and if mistakes are made, it gives us an opportunity to correct them. In this way many people will be put at ease and distrust among comrades inside the Party avoided. If counter-revolutionaries are not executed, they have to be fed. All counter-revolutionaries should be given a way out through earning a living, so that they can start anew. This will be good for the cause of the people and be well-received abroad.

Id. at 20–22.

⁵⁹ Mao Tse-tung, *Problems Relating to the Correct Handling of Contradictions Among the People* (Feb. 27, 1957), in 5 COLLECTION, *supra* note 43, at 1; English translation in COMMUNIST CHINA 1955–1959, POLICY DOCUMENTS WITH ANALYSIS 273–94 (1962); partial translation in J. COHEN, *supra* note 21, at 83–88.

⁶⁰ One of the grounds on which the police were criticized during the Cultural Revolution was that they overemphasized the role of trained experts at the expense of the masses. Lubman, *supra* note 32, at 573.

⁶¹ CONST. OF THE PEOPLE'S REPUBLIC OF CHINA, art. 89 (1954), in 1 COLLECTION, *supra* note 43, at 4–31, had provided "No citizen may be arrested except by decision of a people's court or with the sanction of a people's procuracy." An English translation can be found in Lindsay, ed., *supra* note 32, at 293, 310. The expectation was that the police would ordinarily seek approval from the procuracy rather than the court.

⁶² See Law of Sept. 28, 1954, Law of the PRC for the Organization of People's Procuracies, in COLLECTION, *supra* note 43, at 133, 136; English translation in COHEN, *supra* note 21, at 406.

⁶³ CONST. OF THE PEOPLE'S REPUBLIC OF CHINA, art. 25, ¶2 (1975), provides: "The functions and powers of procuratorial organs are exercised by the organs of public security at various levels." An English translation can be found in Lindsay, ed., *supra* note 32, at 328, 335.

⁶⁴ *Id.* The successor provision to Article 89 of the 1954 Constitution now reads: "No citizen may be arrested except by decision of a people's court or with the sanction of a public security organ." CONST. OF THE COMMUNIST PARTY OF CHINA, art. 28 (adopted 1975). Lindsay, *supra* note 32, at 336.

1975 Constitutions and relevant legislation, such as that authorizing the imposition of various "non-criminal" sanctions,⁶⁵ proscribing certain conduct as criminal,⁶⁶ and prescribing standards for detention, arrest and search of suspects,⁶⁷ purported to provide some general guidelines, although some were never observed and others soon fell into disuse. Furthermore, in the mid-'50's some scholars sought to articulate the factors to be taken into account in determining whether in specific circumstances a given act should be deemed a crime. They urged law enforcement officials to consider the social danger of the act, as manifested by its nature, the harm actually inflicted, the actor's intention and purpose, the circumstances of the particular time and place, and other factors.⁶⁸ Yet in important respects, as a result of the anti-rightist movement, their text became obsolete even before publication in the fall of 1957.

Because the PRC does not make it possible for foreign observers to catch more than a glimpse of its legal system,⁶⁹ we cannot estimate the extent to which its law enforcement officials are responsive to articulated standards. As this essay makes clear, there is considerable evidence that the police have often ignored such standards and have acted arbitrarily. Nevertheless, their common training, ideology and work experience, the existence of unpublished instructions that supplement published laws, the

continuing flow of new internal directives to meet evolving conditions and changing Party policies and the functioning of hierarchical review procedures under Party leadership are factors that may produce a substantial degree of consistency in handling similar cases at any given time. Interviews with former police officials as well as those who were targets of the system reinforce this impression, but, unfortunately, it can only remain an impression. It should be noted that, although the police have resented the intrusions into their bailiwick of the non-professionals who preside over the mass movements, they also frequently differed with the procuracy and the courts over the proper interpretation of constitutional and legislative prescriptions. This was especially true during the mid-'50's, and these frictions were eliminated or minimized through the subjugation of the latter agencies to police and Party control, diminution of the scope of procuratorial and judicial activity, and eventual abolition of the procuracy.

One of the most sensitive questions relating to the administration of justice in the PRC is whether a suspect's class status⁷⁰ is one of the

⁷⁰ At the time of the land reform campaign, launched shortly after the Communist takeover in rural areas, families were grouped into class categories based on the economic position of the family head. The principal classifications were landlords, rich peasants, middle peasants, poor peasants and hired peasants or other workers. During the PRC's early years a similar, and even more complex, classification took place in the cities, again based on occupation. There the principal categories were bureaucratic bourgeoisie, national bourgeoisie, petit bourgeoisie, workers, and idlers and drifters, and numerous sub-categories evolved. In addition to these economically-derived labels, in both the countryside and the cities other categories and sub-categories were created in accordance with a person's political and social records. "Counterrevolutionaries" and "bad elements" were the two major disfavored non-economic categories devised. In the generation since the founding of the PRC there has been a good deal of ferment in theory and practice regarding the definition, relevance and implications of what is compendiously referred to as "class status." Among the many fascinating and difficult questions, apart from those involved in appropriate application of the labels, are: Which categories should be treated as "the class enemy"? What consequences should attach to that stigma? In what circumstances, if at all, is it possible for individuals to shed their label and acquire a more favorable one? Can children and grandchildren shed economically-derived labels? Politically-derived ones? For discussion of what is known on this topic, see Whyte, *Inequality and Stratification in China*, 1975 CHINA Q. 684, 698-711 (No. 64), and sources

⁶⁵ See notes 45, 49 *supra*.

⁶⁶ See note 21 *supra*; Law of April 21, 1952, Act of the PRC for Punishment of Corruption, in COLLECTION, *supra* note 21, at 25-28; English translation in J. COHEN, *supra* note 21, at 308-11.

⁶⁷ See *supra* note 62; Law of Dec. 20, 1954, Arrest and Detention Act of the PRC, in COLLECTION, *supra* note 43, at 239-42; English translation in J. COHEN, *supra* note 21, at 360-62, 386.

⁶⁸ Chung-hua jen-min kung-ho-kuo hsing-fa tsung-tse Chiang-yi, (Lectures on the General Principles of Criminal Law of the PRC) 56-59, 60-65, 67, 68 (Teaching and Research Office for Criminal Law of the Central Political-Legal Cadres' School ed. 1957); English translation in J. COHEN, *supra* note 21, at 328-34.

⁶⁹ See text accompanying note 25. In 1972 a visiting Philippine delegation was told that "the legal organs are not for sightseeing." See Cohen, *Notes on Legal Education in China*, HARV. L. SCH. BULL. 18 (1973). Since then, the PRC has returned to its pre-Cultural Revolution policy of permitting occasional favored groups to interview legal officials, view a trial, visit a prison and, most recently, tour a labor camp. The renewal of such brief opportunities, while welcome, does not permit scholarly study of the legal system.

factors to be taken into account in determining whether he should be charged with a crime. Whatever the realities of practice, justice in the West has increasingly demanded respect for the principle of equality before the law; although too much remains to be done in coping with inequalities deriving from factors such as race, wealth, education and political views, considerable progress has been made toward realizing the principle. In China, by contrast, the principle of equality before the law is derided as a bourgeois sham, the observance of which would only cripple the class struggle and the dictatorship of the proletariat. The 1954 PRC Constitution, following the Soviet model, had provided that citizens "are equal before the law,"⁷¹ and legislation had spelled this out by stating: "In the adjudication of cases by people's courts, the law shall be applied uniformly to all citizens irrespective of their nationality, race, sex, occupation, social origin, religious belief, level of education, property status, or duration of residence."⁷² Moreover, during the PRC's early years, at times when the masses were not being mobilized in one campaign or another, commentators admonished law enforcement cadres to overcome the "subjectivism" revealed by their tendency to detain and convict suspects largely because of their "bad" class background.⁷³ But the anti-rightist movement of 1957-58 witnessed the repudiation of the principle of equality before the law in both theory and practice,⁷⁴ and no mention is made of it in the 1975 Constitution.

cited therein. I am grateful to Frances Fung-wei Lai for permission to read her unpublished paper, *Contradictions Among Personal Status, Family Status and the Concept of Class in the People's Republic of China* (1976). For an excellent discussion of the relation of an individual's "family origin" and personal "political rating" to his "class status" and his fate in the criminal process, see Edwards, *supra* note 39, at 61-65.

⁷¹ Article 85, translated in Lindsay, *supra* note 32, at 309.

⁷² Law of Sept. 28, 1954, Law for the Organization of the People's Courts of the PRC, art. 5, in *COLLECTION*, *supra* note 43, at 123, 124.

⁷³ See Liu K'un-lin, *Resolve to Oppose Subjectivism in the Holding of Hearings*, Ch'ang-chiang jih-pao (Yangtze Daily, Hankow), July 15, 1950, and I Kuang, *Overcome Subjectivist Ideology, Raise the Quality of Investigation of Cases*, Kuang-ming Daily, (Peking) April 15, 1957. These are cited in Lubman, *supra* note 32, at 544, 551, 565.

⁷⁴ See e.g., Mao Jung-kuang, *On Handling Cases from the Viewpoint of Class Analysis*, FA-HSÜEH [Legal

In his report explaining the new Constitution, Vice Premier Chang Ch'un-ch'iao (subsequently purged as one of "the gang of four") emphasized that according to Marxism-Leninism: "The proletarian state is a machine for the suppression of the bourgeoisie by the proletariat."⁷⁵ Implicitly he was drawing attention to a fundamental theoretical difference between Peking and Moscow, one that has great practical significance. It is the Chinese view that class struggle and the dictatorship of the proletariat must continue until the great day when communism is attained and the state withers away. The USSR, by contrast, adopted the position in 1961 that in the Soviet Union the class struggle and the dictatorship of the proletariat had ended, even though the country was still in the socialist stage en route to communism, and that the USSR had become "a state of the whole people" that no longer discriminated against some of its people.⁷⁶ This position has been reaffirmed in the draft of the new USSR Constitution released in the spring of 1977.⁷⁷

Following the Maoist line, Chang's report went on to note that the dictatorship of the proletariat means dictatorship over the enemy and democratic centralism within the ranks of the people.⁷⁸ He thereby invoked Mao's famous distinction between two kinds of contradictions:

Science] 9 (No. 7, 1958), and the discussion in TAO-TAI HSIA, *GUIDE TO SELECTED LEGAL SOURCES OF MAINLAND CHINA* 21 (1967), and see J. COHEN, *supra* note 21, at 510.

⁷⁵ Chang Chün-ch'iao, *Report on the Revision of the Constitution*, delivered January 13, 1975), in *THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA* 47, 55 (1975).

⁷⁶ The 1961 Program of the Communist Party of the Soviet Union declared that "with the liquidation of the exploiting class, the state's function of suppressing their resistance withers away." *ROAD TO COMMUNISM: DOCUMENTS OF THE 22ND CONGRESS OF THE CPSU, OCTOBER 17-31, 1961* at 546 (1971) Khrushchev, in his report on the Program, stated: "The transition from capitalism to socialism is effected under conditions of class struggle. . . . It is natural . . . that the building of communism is effected by most democratic methods. . . . Society will no longer experience the difficulties induced by class struggle within the country." Nikita Khrushchev, *On the Program of the Communist Party of the Soviet Union*, in *id.* at 381; see Lai, *supra* note 70.

⁷⁷ See, *The New Draft USSR Constitution*, art. 1, translated in 29 *CURRENT DIGEST OF THE SOVIET PRESS* 62 (No. 22, 1977).

⁷⁸ See note 75 *supra* at 57.

those "between the enemy and ourselves" and those "within the people."⁷⁹ This basic dichotomy has been taught to every criminal justice administrator, although there has been considerable debate over both how to determine whether a suspect should fall in one category or the other and what are the specific implications of the categorization.⁸⁰ In some cases, of course, it is easy to determine, without regard to a suspect's class status, that a given act reveals "a contradiction between the enemy and ourselves" and deserves severe punishment. If, for example, an individual assassinated an important official while shouting "Down with communism," there would be no difficulty, whatever his class status, in convicting him of the crime of counterrevolution and sentencing him to the death penalty.⁸¹ But many cases are not so simple. If a peasant is caught stealing a few bowls of rice from a commune granary, the authorities may be puzzled. Should he be treated as an enemy or a member of the people, and with what consequence? Although, as we have seen, other factors are also considered, in such cases the suspect's class status often proves decisive. If he is classified as a "poor peasant," he may simply be released after some private criticism-education or after criticism and self-criticism before members of his production team. If he has "landlord" or "rich peasant" status, however, he may be prosecuted and sentenced to five years of reform through labor for the counterrevolutionary crime of sabotaging socialist production. Because he is a member of one of the "reactionary classes," evil intent can be attributed to him even though he may actually have been motivated by hunger. Surely there is at least a presumption to be overcome.⁸²

These class labels were first attached at the time of the Communist takeover a generation ago. They do not connote any current economic status in an economy that has been

collectivized for two decades, and are often inherited by children and even grandchildren.⁸³ Actually, the labels have not remained constant. The constitutional definition of reactionary classes has expanded over the years. The 1954 Constitution listed "feudal landlords" and "bureaucrat capitalists" as the only politically disfavored classes,⁸⁴ but the 1975 Constitution, reflecting the intervening theory and practice, refers to all landlords, adds the category of rich peasants, substitutes the broader term "reactionary capitalists" for "bureaucrat capitalists" and then adds, as a catchall, "other bad elements."⁸⁵ The category of "bad elements" is not a class at all but a hotch-potch of miscellaneous offenders. In his famous 1957 speech on "Problems Relating to the Correct Handling of Contradictions Among the People"⁸⁶ Mao made clear that "bad elements," like counterrevolutionaries, were to be lumped with "the enemy" and treated as objects of the dictatorship of the proletariat. He stated: "In order to protect the social order and the interests of the vast [number of] people, it is also necessary to put dictatorship into effect over robbers, swindlers, murderer-arsonists, hooligan groups, and all kinds of bad elements who seriously undermine social order."⁸⁷ Mao conceded that many people confused the two different types of contradictions, and he admitted that "it is sometimes easy to confuse them" and that "[i]n the work of liquidating counterrevolutionaries, good people were mistaken for bad." He went on to say that "such things have happened before and still happen today. We have been able to keep our mistakes within bounds because it has been our policy to prescribe that there must be a clear distinction between the enemy and us and to prescribe that mistakes should be rectified."⁸⁸

The challenge of keeping mistakes within bounds persists. This is why the Preamble to the 1975 Constitution emphasized the importance of correctly distinguishing and handling the two kinds of contradictions.⁸⁹ And a 1976

⁷⁹ See Mao Tse-tung, *supra* note 59.

⁸⁰ See, e.g., *Are All Crimes to Be Counted as Contradictions between the Enemy and Us? Are They All to Be Regarded as Objects of Dictatorship?* CHENG-FA YEN-CHIU (Political-Legal Research) 73-76 (No. 3, 1958); partial translation in J. COHEN, *supra* note 21, at 89-96.

⁸¹ See also the example of the bomb-thrower cited by Mao Tse-tung, *supra* note 58.

⁸² See the discussion in the sources cited in note 74 *supra*.

⁸³ See note 70 *supra*.

⁸⁴ CONST. OF THE PEOPLE'S REPUBLIC OF CHINA art. 19 (1954); see Lindsay (ed.), *supra* note 32, at 297.

⁸⁵ CONST. OF THE PEOPLE'S REPUBLIC OF CHINA art. 14 (1975); see Lindsay (ed.), *supra* note 32, at 332.

⁸⁶ See note 59 *supra*.

⁸⁷ J. COHEN, *supra* note 21, at 85.

⁸⁸ *Id.*, at 88.

⁸⁹ See Lindsay (ed.), *supra* note 32, at 329.

radio broadcast from Kiangsu reported that all courts in the province, while taking "class struggle as the key link" in dealing with "a handful of class enemies engaged in sabotage," were acting "firmly, unerringly and severely—with emphasis on unerringly."⁹⁰ New China's leaders seem well aware that they would risk endangering their society if they allowed unrestrained use of the criminal law as an instrument of the political warfare called "class struggle." Yet they believe that it would be premature to follow the Soviet example by announcing an end to class struggle, especially in view of the ongoing, ever more intense contest for power in Peking and the purges that this periodically generates at every level of government.

The difficulty of keeping mistakes within bounds during the present "acute and complex struggle between the two lines" is illustrated by Chairman Hua Kuo-feng's "important speech" outlining the "fighting tasks for 1977," which stated:

In the struggle to expose and criticize the 'gang of four,' it is necessary to draw a strict distinction between the two types of contradiction of differing nature and handle them correctly and carry out Party policy in earnest. Our contradiction with the 'gang of four' is one between ourselves and the enemy. We must have a clear understanding of this. Those who followed the 'gang of four' and made mistakes must be treated on the merits of each case. Among them only a few participated in the conspiracy, while the great majority erred because they had come under the influence of the gang ideologically. Even those who participated in the conspiracy did so to a greater or lesser extent. Whatever the extent, they are welcome once they make a clean breast of their part in the conspiracy and draw a clear line between themselves and the 'gang of four.' The target of attack should be confined to the 'gang of four' and the handful of their unrepentant sworn followers.⁹¹

How lower ranking cadres are supposed to apply this general instruction to concrete cases is their problem. It is one with which I sympathize, however, for I recall that, during my own brief career as a prosecutor, my superiors frequently told me, in response to questions about how to exercise discretion in the absence

of specific guidelines: "You've got to play it by ear."

Thus far, even though the Hua government has been quick to reject certain policies of the "gang of four," such as their views of foreign trade, there is no evidence that it has repudiated the Maoist line calling for continuing class struggle that was espoused by one of the principal members of the gang, Chang Ch'un-ch'iao, in his report on the new Constitution.

V

Does the existence of broad police discretion to initiate prosecution mean that an accused can "plea bargain" in China? A Chinese law enforcement official would have difficulty recognizing the concept. He might even be shocked at the idea of officials allowing an accused to plead guilty to a lesser offense than the evidence can sustain and thereby avoid judicial examination of the case. Of course, the criminal "trial" in China is in most cases merely an *in camera* judicial scrutiny of the dossier compiled by police investigation and interrogation, sometimes but not always supplemented by a court official's questioning of the accused, and perhaps witnesses, in private. This procedure is observed whether or not the accused confesses and is otherwise cooperative. Thus Chinese law enforcement officials do not have as much incentive as American prosecutors do to strike a bargain in order to save the state and its citizens the considerable time, expense, burden and uncertainty of a trial, especially trial by jury.

Moreover, in China a criminal accused is in an extremely weak position to bargain because he lacks the procedural protections accorded to his American counterpart. In all but minor cases he is detained and cut off from any outside contact while police interrogation and investigation run their course. He sees no lawyer, no friends, no family, even if processing of his case takes years. Usually he is given only a subsistence diet that leaves him slightly hungry and on edge. He is frequently kept in a cell with other prisoners who seek to improve their own prospects by mobilizing group and other pressures to urge him to make a full confession and to reveal the involvement of others.⁹² And

⁹⁰ *Kiangsu Court Holds Civil Affairs Conference*, Feb. 10, 1976, printed in [United States] FOREIGN BROADCAST INFORMATION SERVICE [F.B.I.S.], 1 PEOPLE'S REPUBLIC OF CHINA G5 (1976) [hereinafter cited as F.B.I.S.].

⁹¹ See Hua, *supra* note 34, at 38.

⁹² In recent years some ex-prisoners interviewed in Hong Kong have indicated that cellmates were no longer being mobilized to induce confession. See Jones, *supra* note 32, at 230 n.4.

he is subjected to interrogation, often for long periods and late at night, by officials who have been taught to use intimidation, ruses and various psychological techniques to elicit his cooperation. There is no presumption of his innocence, the presumption, rather, is that he would not have been detained unless he had done something wrong, and it is up to him to tell the police all about it instead of awaiting specific accusations. Not only does he possess no privilege against self-incrimination, but stubborn refusal to talk can even result in the application of leg irons or handcuffs or a tour in solitary confinement. Overt torture, however, is forbidden, although angry cellmates have been known to assault the obdurate. The fate of the accused is entirely in the hands of his jailers. So far as foreign observers can tell, there is currently no outside institutional restraint upon police detention, whether by judges, legislators or others.⁹³ Nor can an accused rely on customary restraints upon the state interrogation process, for the imperial Chinese tradition attached great importance to obtaining a confession and, in order to get it, even authorized the use of judicial torture, albeit within carefully prescribed, if not always observed, limits.⁹⁴

Thus the accused in the PRC confronts what may well be the nearest thing to the Inquisition in the contemporary world. In dealing with those suspected of being "class enemies" the dominant leadership of the Chinese Communist Party, like the Inquisition, views the criminal process as an official inquiry into an evil that must be stamped out. In these circumstances it would be absurd, China's leaders believe, to conduct that inquiry as a contest between equals with the judiciary playing the role of umpire to make certain that if the prosecution violates the rules, it loses the game. The state cannot be neutral in the struggle against evil, they maintain; all of its agencies must cooperate in, not interfere with, that

struggle. If the "class enemies" were permitted a host of procedural protections, they would take advantage of them, refuse to reveal the truth and thereby frustrate the investigation. China has no belief that it is better to let many guilty go free than to convict a single innocent person. This is not to say that the Chinese are indifferent to accuracy. They are not. Their criminal law seeks to identify and punish offenders, isolate them from society when necessary, rehabilitate all those who are susceptible, and deter and educate the populace. To the extent that the guilty go free, these purposes cannot be achieved. Nor can they be achieved to the extent that the innocent are convicted. The Chinese are aware that the coercive atmosphere of their inquisitorial process increases the likelihood of eliciting not only true confessions but also false ones. But they believe that through outside investigation and repeated careful interrogation of the suspect, followed by internal review within the police and verification by the judiciary, there is, on balance, a higher probability of reaching accurate results than if they employ a more adversarial, more public process that offers the suspect greater procedural safeguards.⁹⁵

Should this rationale for subjecting "the enemy" to an inquisitorial process also apply to members of "the people" who are detained by the police for criminal investigation? The system of dictatorship does not apply to "the people," Chairman Mao maintained, and one might therefore suppose that even in a criminal case different procedures would apply in dealing with "a contradiction among the people" than in dealing with "a contradiction between the enemy and ourselves." Yet they do not. One reason for this, of course, is that often the proper classification can only be made after the process has been completed. Moreover, according to PRC ideology, there is no fundamental inconsistency between the interests of the Chinese state and those of the people.

⁹³ The demise of the procuracy and the failure of the National People's Congress and lower level legislative bodies to develop the possibilities for curbing extended police detention eliminated two potential restraints. Intervention by party officials has always been possible but this has taken place on an *ad hoc*, rather than institutionalized, basis. See note 121 *infra*.

⁹⁴ See Shuzo Shiga, *Criminal Procedure In the Ch'ing Dynasty* 33 TOYO BUNKO 120-22 (1975); D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA* 97-98 (1967); J. DOOLITTLE, *I SOCIAL LIFE OF THE CHINESE* 335-46 (1865).

⁹⁵ This is not to say that arguments in favor of an adversarial criminal process have not been voiced in the PRC. During the 1956-57 era they plainly were voiced, and with the Party leadership's approval. But even that short-lived effort to introduce the benefits to be derived from allowing "people's lawyers" to defend accused was focussed on their role in public trials before the courts rather than on assistance rendered during pre-trial confinement. See Cohen, *Continuity and Change in China: Some 'Law Day' Thoughts*, 24 S. CAR. L. REV. 3, 12-13 (1972).

Unlike the situation in bourgeois countries, there is thus no need to protect a suspect by means of rules that are based upon mistrust of the state. A member of "the people" who is detained for investigation should simply cooperate and tell all. He can be confident, the Chinese Communists claim, that the state will do the right thing, for it has his interests at heart.

After all, if a parent returns home to find that his children have destroyed the furniture, he doesn't say: "Children, you are under suspicion, but you are under no obligation to tell me anything about what happened, you have a right to counsel before you make any statement, and anything you say may be used against you." In this kind of situation parents often privately interrogate their children, comparing the answers and demeanor of each with those of the others and drawing appropriate inferences if anyone refuses to answer. In family life, if parents want to know whether a child has done something, they ask the child in circumstances calculated to elicit a response. Because parents have the best interests of the child at heart and the child is supposed to know this, our society generally accepts the practice as a reasonable way to proceed. This is the attitude that the People's Republic adopts toward apparently wayward citizens.

The attitude is not a new one in China. Traditionally the family was taken as the model for relations between government and people, and the county magistrate, the imperial official closest to the people, was called the *fu-mu kuan*, "the father and mother official."⁹⁶ Sir George Staunton noted in 1810 that "[t]he vital and universally operating principle of the Chinese government is the duty of submission to parental authority, whether vested in the parents themselves, or in their representatives. . . ."⁹⁷ Nor is the attitude unique to China. As Harold

J. Berman has emphasized, Soviet law has a strong parental flavor.⁹⁸

Having said all this, I do not want to leave the impression that in the Chinese criminal process there are no similarities whatever to plea bargaining. In the settlement of disputes involving what are generally regarded as minor offenses, such as simple assault or petty theft, the outcome often depends on the alleged offender's attitude as demonstrated by his willingness to provide compensation, make restitution, apologize and express repentance. He thus has some ability to manipulate the system during his negotiations with local mediators or police and the injured party in order to avoid serious "non-criminal" sanctions and criminal prosecution.

Similarly, if we consider the processing of graver crimes, we find that, although the suspect cannot "cop a plea" to a lesser offense, he does have an opportunity to influence his sentence through his preconviction behavior. To most accused, after all, it is the length of the sentence rather than the name of the crime that counts, especially in the PRC, where there are few limits upon sentencing discretion whatever the crime. For example, today in China, as two millennia ago, someone who voluntarily surrenders before the authorities either know that a crime has been committed or identify the suspect, or at least before they apprehend him, is often dealt with less harshly than otherwise.⁹⁹ Further, a cardinal precept of the Chinese criminal process, drummed incessantly

through the hereditary influence of particular families, can never be expected to attain. Parental authority and prerogative seem to be, obviously, the most respectable of titles, and parental regard and affection the most amiable of characters, with which sovereign or magisterial power can be invested, and are those under which, it is natural to suppose, it may most easily be perpetuated.

Id. at xix.

⁹⁸ H. BERMAN, JUSTICE IN THE U.S.S.R. (rev. ed. 1963). *See id.* at 282-84. Professor Berman points out that K. Llewellyn, *Lectures on Jurisprudence* (mimeographed: 1948), "contrasts the 'adversary' with the 'parental' system, drawing for his definition of 'parental' on the law of the New Mexican Pueblo Indians, the medieval Inquisition, and the Soviet trials of major political offenders." H. BERMAN, *supra* at 421.

⁹⁹ *See* Rickett, *Voluntary Surrender and Confession in Chinese Law: The Problem of Continuity*, 30 J. OF ASIAN STUD. 797 (1971).

⁹⁶ T'UNG-TSU CH'Ü, LOCAL GOVERNMENT IN CHINA UNDER THE CH'ING 14 (1962).

⁹⁷ STAUNTON, *supra* note 7, at xviii. Staunton goes on to note:

A government, constituted upon the basis of parental authority, thus highly estimated and extensively applied, has certainly the advantage of being directly sanctioned by the immutable and ever-operating laws of Nature, and must thereby acquire a degree of firmness and durability to which governments, founded on the fortuitous superiority of individuals, either in strength or abilities, and continued only

into the ears of every detained person, is: "Leniency for those who confess. Severity for those who resist." This, like the relevance of a suspect's class status, is an illustration of how the PRC endorses, at the level of principle, a practice long familiar in our own country despite our reluctance to recognize it in theory and our efforts to curb its existence. The preference promised by the PRC—and often, but not always, given—to a suspect who makes a full and honest confession early in his interrogation rests in part upon the fact that this conserves state resources both with respect to interrogation and outside investigation. Prompt confession and demonstrated repentance, in addition to putting a feather in the cap of interrogators, also usually represent the first step toward rehabilitation, which the PRC emphasizes more than we do.

Because confession and repentance can result in a lighter sentence than otherwise, and in some cases even in a decision not to prosecute,¹⁰⁰ in the coercive environment of the detention house some innocent suspects become tempted to try this as a way out. Of course, a suspect who stubbornly maintains his innocence is often vindicated, but, if he is not, he is likely to be treated as a recalcitrant and given a stiff sentence, or he may simply languish in jail interminably pending further investigation. To avoid this risk and to put an end to the psychological pressures of long detention and interrogation, some innocent suspects make false confessions¹⁰¹ and these are not always exposed by outside investigation, repeated interrogation or judicial verification.

VI

If the Chinese criminal process is essentially a secret, inquisitorial, administrative process, how does this square with Peking's frequently-voiced endorsement of "the mass line" and the educational and deterrent purposes of punishment? In its brief section on adjudication and procuratorial organs the 1975 Constitution

¹⁰⁰ Recall Chairman Hua Kuo-feng's recent speech declaring that erring comrades who participated in the conspiracy of the "gang of four" will be welcome to remain in the Party "once they make a clean breast of their part in the conspiracy before the Party and the people." Text at note 91 *supra*.

¹⁰¹ For a vivid account of the circumstances that elicit false confessions, see BAO RUE-WANG & CHELMINSKI, *supra* note 23, at 39–40, 46, 60–62.

omits any reference to the guaranties enshrined in the 1954 Constitution. They had afforded an accused the right to make a defense in what was ordinarily to be a public trial¹⁰² before a tribunal that was composed of not only a judge but also two representatives of the masses called "people's assessors"¹⁰³ and that was to be independent and subject only to the law.¹⁰⁴ Apart from the occasional trial of an alien or a trial to which foreign visitors are permitted, the PRC has shown little interest in implementing those guaranties since the "anti-rightist" movement of 1957–58. The new Constitution provides instead that: "The mass line must be applied in procuratorial work and trying cases. In major counterrevolutionary criminal cases the masses should be mobilized for discussion and criticism."¹⁰⁵ In practice what this has meant is that in the course of their investigation of a case the police, and sometimes judicial workers, consult knowledgeable members of the masses about the facts and often also gather opinions about the seriousness of the case and even the appropriate punishment. In one of the rare criminal trials that foreigners have been allowed to attend since the Cultural Revolution—a trial that seemed to adapt the experimental public trial model of the mid-'50s in ways that allow more mass participation—the court took pains not only to hear people in the courtroom as witnesses but also to solicit their views about proper disposition of the case.¹⁰⁶ Foreign visitors were recently told how a serious embezzlement case was handled—by police investigation and then extensive discussions among judicial workers, the masses and the Party committee, which produced a consensus decision prior to "trial."¹⁰⁷

¹⁰² CONST. OF THE PEOPLE'S REPUBLIC OF CHINA art. 76 (1954) (in Lindsay (ed.), *supra* note 32, at 308).

¹⁰³ *Id.* art. 75.

¹⁰⁴ *Id.* art. 75.

¹⁰⁵ CONST. OF THE PEOPLE'S REPUBLIC OF CHINA art. 25 (1975) (in Lindsay (ed.), *supra* note 32, at 335).

¹⁰⁶ See Sanji, *Observations of China's Criminal Adjudication*, 47 HÖRITSU JIHÖ (The Law Times) 112, 115–16 (July, 1975). I am grateful to Walter Ames, Ph.D., for allowing me to read his unpublished translation of this article.

¹⁰⁷ Garbus, *Justice Without Courts*, 60 JUDICATURE 395, 399–400 (1977). According to this account, delivered by a Shanghai judge, because this was a case that would eventually result in a "mass trial," two workers were appointed to serve as temporary co-judges (apparently people's assessors) together with a career judge.

Ever since 1949, Chinese Communist authorities, when imposing the death penalty, have frequently claimed that they were doing so in response to *min-fen*, "popular anger," an explicit recognition of the legitimacy of providing an outlet for the spirit of vengeance aroused by the most heinous crimes. In a recently publicized 1956 speech Mao defended the mass executions of 1951-52 on the ground that those executed "were counterrevolutionaries who owed the masses many blood debts and were bitterly hated by them."¹⁰⁸ Of course, in interpreting the wishes of the masses the law enforcement authorities receive the guidance of the Communist Party, "the vanguard of the proletariat." In order to leave no doubt about the desires of the masses and to give full play to the deterrent and educational roles of the criminal process, after a decision has been made in a case that has educational significance, such as the embezzlement case mentioned above or a major counterrevolutionary case, the Party often decides to announce the sentence to a public meeting that may be attended by hundreds and occasionally thousands of people. At these so-called "mass trials" representatives of the police and the judiciary recite the crimes of the accused, who subsequently confesses to them with bowed head. The authorities may then announce the sentence and ask the masses for their approval, or they may first ask the masses what should be done with the defendant and then pronounce sentence. In either event, thanks to careful planning and the efforts of Party activists in the audience, who join officials on the stage in fostering an atmosphere that has elements of both a religious revival and a Roman amphitheater, consensus is preordained. This fulfills the constitutional requirement that "in major counterrevolutionary criminal cases the masses should be mobilized for discussion and criticism," and it does not preclude other group meetings or extensive resort to detailing the facts of the case in wall posters in order to maximize the deterrent and educational value of the case. If, as sometimes happens in counterrevolutionary and even ordinary criminal cases, the consensus favors the death penalty, the accused is led to a nearby field and publicly executed by shooting.

The death penalty leaves no possibility of

¹⁰⁸ Mao Tse-tung, *supra* note 58, at 20.

reforming the criminal. Not everyone can be saved, the Chinese concede, even by the government that prides itself more than any other on rehabilitation. PRC authorities are sensitive about the large number of persons executed in the early 1950s and the continuing resort to the death penalty, because they claim to have brought China more humane rule than their predecessors.¹⁰⁹ The leading criminal law text produced by the PRC has stated somewhat defensively:

If the death penalty were not applied, state law and discipline could not be dignified, social justice could not be extended, and the anger of the masses could not be pacified. . . . To use the death penalty is not only necessary but also just. One cannot confuse our country's death penalty with that of the exploiter countries and discuss them as if they were the same.¹¹⁰

In order to differentiate their death penalty from that of the exploiters and to reduce the frequency of its application, the Chinese Communists have developed a genuine innovation, the suspended death sentence, which consists of "sentencing to death, suspending execution of sentence for two years, compelling labor, and observing the consequences."¹¹¹ If during the two-year period of reform through labor the condemned demonstrates sincere repentance and reform, his sentence is commuted to life or long-term imprisonment; otherwise he is executed. Although some visitors to China have been told that the death sentence is always meted out in the first instance in its suspended form, both media reports and official Chinese announcements leave no doubt that death sentences continue to be immediately carried out against certain types of offenders.¹¹² The newly-issued Volume V of Chairman Mao's selected works, personally edited by Hua Kuo-feng, pointedly includes a 1951 statement that

¹⁰⁹ See Mao Tse-tung, *supra* note 58 and accompanying text. Note especially the excerpt from Chairman Mao's 1956 speech in the note.

¹¹⁰ Lectures, *supra* note 68, at 201; English translation in J. COHEN, *supra* note 21, at 535-36.

¹¹¹ See Lectures, *supra* note 68, at 20; English translation in J. COHEN, *supra* note 21, at 537.

¹¹² See *Notice of the Intermediate People's Court of Tientsin*, (Aug. 5, 1973), translated in Edwards, *supra* note 39, at 75-79, which lists four persons sentenced to immediate execution for rape and one for murder; *China Executes 29 in Clampdown*, LONDON TIMES, March 18, 1977 at 9.

the suspended death penalty should never be applied to those who owe "blood debts" or have committed heinous crimes that have aroused the demands of the masses for the sternest punishment.¹¹³

Not surprisingly, the PRC reports that the suspended death sentence has achieved very good results and embodies "to a high degree the spirit of revolutionary humanitarianism in our country's criminal law and the state's policy of 'uniting suppression with leniency.'"¹¹⁴ Rejecting "imperialist" claims that it is cruel to require convicts to live in uncertainty about life or death for so long, in 1959 Lo Jui-ch'ing, then Minister of Public Security (later sacked in the Cultural Revolution), boasted:

In fact most of the criminals who are dealt with in this way are spared. Where was there ever in ancient or modern times, in China or abroad, so great an innovation? Where could one find in the capitalist world so humane a law?¹¹⁵

Another aspect of the PRC's effort to implement a policy of "less killing" and to put the best face on its use of the death penalty is its adoption of special procedures for reviewing capital cases. A 1957 law required that death sentences be approved not only by the provincial-level high court but also by the Supreme People's Court.¹¹⁶ It is unclear, however, whether this law is still operative. No one has reconciled it with the continuing practice of carrying out the death sentence immediately

¹¹³ Mao Tse-tung, *To Suppress Counterrevolution We Must Carry Out the Party's Mass Line*, (May, 1951) in 5 MAO TSE-TUNG HSÜAN-CHI (Selected Works of Mao Tse-tung) 39, 40 (1977). This statement has been invoked during the current purge of provincial political opponents by the Director of the Political-Legal Work Leadership Group of the Kiangsi Provincial Party Committee to support his call for killing the ringleaders among counterrevolutionaries. See Richard Lee, *Hua Presses on With the Purge*, 97 FAR EASTERN ECON. REV. 23 (1977).

¹¹⁴ See note 111 *supra*.

¹¹⁵ Lo Jui-ch'ing, *The Struggle of the Revolution Against Counterrevolution in the Past Ten Years*, *People's Daily*, Sept. 28, 1959, at 3; English translation in J. COHEN, *supra* note 21, at 539.

¹¹⁶ See *Reply of the Standing Committee of the National People's Congress of the PRC to the Supreme People's Court Relating to Problems of How to Execute the Resolution That Death Penalty Cases Shall Be Decided by Judgment of or Approved by the Supreme People's Court*, (Sept. 26, 1957), in 6 COLLECTION, *supra* note 43, at 297; English translation in J. COHEN, *supra* note 21, at 541-42.

after its announcement at a "mass trial," although it is conceivable that in such cases the lower court obtains Supreme Court approval prior to the public pronouncement of sentence. Yet a 1973 notice of the Tientsin Intermediate Level Court announcing the immediate execution of five offenders whose crimes had made the people "extremely indignant" stated only that the sentences, like others of lesser severity, had been ratified by the revolutionary committee that governs the city.¹¹⁷ Moreover, since the Cultural Revolution the general role of the Supreme Court has become murkier than ever. In 1975, for example, two law professors at Peking University told an incredulous visiting judge from the United States that they didn't even know how many judges served on the current Supreme Court,¹¹⁸ and in 1977 a Deputy Chief Justice of the Supreme Court told a group of American lawyers that his court only decides serious cases of national significance but had heard no such cases in recent years; nothing was said about reviewing capital cases.¹¹⁹

In theory, of course, one appeal—to the court immediately above the sentencing court—is available to all convicted persons. All those sentenced by the Tientsin Intermediate Level Court, for example, have a right to appeal to the High Court of the province. In the mid-1950s appeals were relatively few but they appeared to be surprisingly effective for those courageous enough to try their luck.¹²⁰ Since then, however, the realities of life seem to have further diminished resort to appeal, although we have little information on this topic. The demise of "people's lawyers" in the late 1950s deprived defendants of any opportunity for assistance in preparing an appeal on legal grounds, and the defendant, who has usually confessed and who remains in confinement, is ill-equipped to seek review of the facts as well.

More fundamentally, the very concept of appeal is antithetical to the thinking of many who administer the Chinese system. An appeal, after all, is an open challenge to the officials in charge that may embarrass them and lead to repudiation of their decision. Further, like a request for a lawyer, it shows that the defend-

¹¹⁷ See Edwards, *supra* note 39, at 93.

¹¹⁸ Interview with the Honorable Stanley Weigel, United States District Court, San Francisco.

¹¹⁹ Interview with a member of the group.

¹²⁰ See J. COHEN, *supra* note 21, at 38, n.111.

ant is not sincerely reflecting on his misdeeds, repenting and seeking to reform himself, but is still recalcitrant, mistrustful and attempting to evade responsibility. Such a defendant risks informal retaliation by cellmates annoyed at their failure to "straighten out his thinking" as well as by detention authorities.

Finally, Chinese appellate courts are free to increase as well as decrease the original sentence even when it is the defense rather than the government that appeals. In these circumstances the accused may understandably decide against appeal and hope that the public security force, the courts or other agencies will eventually review his case during one of the surveys they occasionally make, that through letter-writing or personal interviews family or friends may interest some influential Party or government officials in stimulating a review¹²¹ or that by exemplary behavior at labor camp he may become one of the relatively rare persons who earns a reduced sentence or conditional release. Perhaps the decision to forego appeal is made somewhat easier for those knowledgeable persons who are aware of the fact that the PRC places a low value on the finality of decision-making and in the interest of accuracy permits attack upon a criminal judgment for a substantial reason at any time after the opportunity for appeal has expired.

VII

As I have already indicated, the sentencing discretion of Chinese courts, like police discretion to initiate prosecution, is very broad. The few published criminal statutes, in addition to indicating the elements of novel crimes such as

counterrevolution and corruption and the range of applicable sanctions, also offer some criteria for determining appropriate sentences in different circumstances. Nevertheless, they do little to limit decision-making. As in the case of common crimes, such as murder, rape and arson, which have yet to be dealt with in published PRC legislation, unpublished regulations and previous practice provide a certain amount of guidance.¹²² In considering the recommendation of the police for handling the case, the court takes into account the same factors as the police, including the offender's class status and political record.¹²³ Judges are generally Party members, each court has a Party unit within it, and the presiding judge is usually a member of the Party political-legal group that coordinates the handling of local public order problems and that, under the direction of the Party committee for the area, provides guidance in cases of any importance or difficulty.

More unusual to us than the sentencing discretion of the judiciary, or that exercised jointly by the public security organ and the sentencing court when considering reduction of sentence or conditional release of a convict for good behavior, is the discretion that the public security and court jointly enjoy to extend sentences. They may do so in the cases of those who "do not labor actively but repeatedly violate prison rules, and the facts prove that they still have not reformed and that there is a real possibility that they will continue to endanger the security of society after release . . ." ¹²⁴ Although only a relatively small number of prisoners have their sentences extended, most are aware that

¹²¹ Among the many charges lodged against the "gang of four" is the accusation that, at least in Kweichow Province, they threatened

the provincial and prefectural Communist Party committees, wanting them to release those on the lists of criminals who had been in the custody of the public security bureaus and sentenced by the judicial organs of various counties, in order to make these criminals their backbone elements for opposing the party and seizing power.

Bonavia, *China: The Heat's on in the Provinces*, 97 *FAR EASTERN ECON. REV.* 24-25 (1977). In 1957 the then Chief Justice of the Supreme Court, Tung Pi-wu, reported that more than half the court's workload that year involved informal special petitions rather than regular appeals or statutory reviews. *Report on the Work of the Supreme People's Court*, in 6 *COLLECTION*, *supra* note 43, at 272-73.

¹²² Chairman Mao's recently revealed 1956 speech, already extensively quoted, *see* note 58 *supra*, illustrates one kind of secret policy instruction communicated to law enforcement officials. It was plainly designed to circumscribe their discretion and does provide some additional, up to date guidance as well as interesting justification of the new policy. Yet, as Mao implies, officials retain the flexibility to act according to the circumstances of each case because, as he says, "Ours is a policy for internal observance which need not be made public, and all we need do is carry it out as far as possible in practice."

¹²³ *See* Edwards, *supra* note 39, at 54-74. Edwards presents an excellent analysis of PRC sentencing theory and practice.

¹²⁴ Law of Sept. 7, 1954, Act of the PRC for Reform Through Labor, art. 72 in *COLLECTION*, *supra* note 21, at 33-42; English translation in J. COHEN, *supra* note 21, at 619.

such action, which is often taken without giving the convict notice or an opportunity to be heard, is a possibility.

Even more distinctive and disturbing is the practice of "retaining" convicts whose sentences have expired and "employing" them as civilian members of reform through labor groups or resettling them as ordinary peasants in newly-established villages near the labor camp. Some prisoners genuinely volunteer to stay on at labor camp after expiration of their sentence, because they have neither family nor job awaiting them at home, worry about getting into trouble or fear a hostile reception or other difficulties of readjustment in their original community. Some who have special skills that are needed by the camp may be pressured through "persuasion-education" into agreeing to stay on. But if convicts have no family and job awaiting them or if they are needed to help settle sparsely inhabited areas, their reform through labor unit is authorized, after obtaining the approval of the competent public security organ (usually the unit that recommended prosecution), to retain them and find employment for them without their consent.¹²⁵ No judicial approval is required as it is for modification of sentence, apparently on the theory that such action relates to employment rather than criminal sanctions. Although they may continue to work with prisoners, retained persons live apart, receive regular wages, are relatively unrestricted in nonworking hours and may obtain government assistance to enable their families to resettle with them. Nevertheless, it is difficult not to regard involuntary retention in what is usually a remote place as a significant sanction, one that makes a prison sentence even more unattractive than commonly realized.

Bao Ruo-wang, who was confined in a series of Chinese prisons and labor camps from 1957 to 1964, has written:

There is a simple, basic truth about the labor camps that seems to be unknown in the West: For all but a handful of exceptional cases . . . the prison experience is total and permanent. The men and women sentenced to reform through labor spend the remainder of their lives in the camps, as prisoners first and then as "free workers" after their terms have expired.

Labor camps in China are a lifetime contract.

They are far too important to the national economy to be run with transient personnel.¹²⁶

Until the PRC chooses to provide us with statistics, we shall not know whether Bao is right in suggesting that only a handful of prisoners ever return from labor camp. While confirming that prisoners who refuse to reform can have their sentences extended, Chinese reform through labor authorities recently told a visiting group of Americans that, once sentences have been served, the offenders are released and returned to their home communities, where they are given jobs and placed under surveillance.¹²⁷ A Chinese emigré who from 1969 to 1972 served as an official in work relating to the criminal process in Fukien province has reported that, following a cryptic 1969 statement by Chairman Mao, many labor camps in Fukien were closed and their inmates dispersed for "supervised reform" in factories, communes and residential units.¹²⁸ In these circumstances it is unclear whether large numbers of released offenders stay on in labor camps. We should bear in mind the possibility that they do stay on when considering Chinese claims of success in transforming offenders into new persons. To the extent that released offenders do not return to their old haunts, then the graduates of thought reform do not confront the same test that released criminals do in countries admittedly troubled by recidivism.

From time to time PRC propaganda focuses on the unconditional return to society of certain supposedly reformed offenders, such as former Kuomintang generals released after twenty-five years in prison as war criminals.¹²⁹ We also know that some foreigners have had their thinking genuinely transformed after years in Chinese prison.¹³⁰ Yet other foreigners have not, and many Chinese have only paid lip service to the reform efforts of prison authorities and are quite cynical about them.¹³¹ Without Peking's cooperation, any studies of the

¹²⁶ BAO RUO-WANG, *supra* note 23, at 11.

¹²⁷ Interview with a member of a lawyer's delegation that visited China in May 1977.

¹²⁸ See Edwards, *supra* note 39, at 50 n.12, 55.

¹²⁹ See, e.g., NPC Standing Committee's Decision Granting Special Amnesty To and Releasing All War Criminals in Custody, 18 PEKING REV. 11 (No. 12, 1975).

¹³⁰ See, e.g., A. RICKETT & A. RICKETT, PRISONERS OF LIBERATION (2nd ed. 1973).

¹³¹ See BAO RUO-WANG & CHELMINSKI, *supra* note 23, at 305-08; Whyte, *supra* note 48, at 264-66.

¹²⁵ *Id.*, art. 62 at 40; translated in J. COHEN at 634.

subject must necessarily be based on fragmentary sources. One of the few studies thus far published suggests that thought reform may achieve better results with offenders while they are awaiting their sentences than while they subsequently are serving their sentences.¹³² Whether the pre-sentence ideological transformation is genuine or merely displayed to elicit a favorable sentence is uncertain. Presumably those given a suspended death sentence are in a position more analogous to the unsentenced than to the sentenced.

In evaluating the PRC's success in reforming offenders, we should not overlook the enormous effort expended to alter the behavior and thinking of those whose misconduct was not serious enough to result in a term of reform through labor or the "non-criminal" rehabilitation through labor. The application of sanctions ranging from private criticism to supervised labor, while the offenders remain functioning members of society, may be far more effective than the measures applied to those who are confined.

Before concluding, we should note one further change made in the 1975 Constitution that relates to the criminal process. Article 97 of the previous Constitution had provided:

Citizens of the People's Republic of China have the right to bring complaints against any person working in organs of state for transgression of law or neglect of duty by making a written or verbal statement to any organ of state at any level. People suffering loss by reason of infringement of their rights as citizens by persons working in organs of state have the right to compensation.¹³³

Under that provision someone who suffered false arrest or wrongful conviction had the right not only to file a complaint against the responsible law enforcement officials but also to be compensated for the monetary damage suffered, such as wages lost during the period of unlawful detention or the cost of necessary medical care. Indeed, some persons were compensated in cases of this nature prior to the 1954 Constitution; after its promulgation, although no such cases are known to have been reported, and no statute established procedures for handling complaints, the national

budget did set aside funds for compensation.¹³⁴ Moreover, interviews suggest that, although most persons who believed that they had suffered false arrest or wrongful conviction were too ignorant, fearful or skeptical to file complaints and apply for compensation, in some cases of the most severe hardship the state granted on its own initiative what was euphemistically termed a "living allowance."¹³⁵

In light of this background it is significant that the 1975 Constitution, while retaining almost verbatim the first sentence of old Article 97 guaranteeing the right to complain, eliminated the entire second sentence authorizing compensation for infringement of that right. Instead it substituted a new sentence providing that: "No one may attempt to hinder or obstruct the making of such complaints or retaliate against those who make them."¹³⁶ The addition of this provision is welcome because practice under the 1954 Constitution had demonstrated that, if a detained citizen was sufficiently educated to know of his right to complain about being held unlawfully, he was also likely to know that those who sought to exercise that right frequently were not allowed to do so or were deemed recalcitrant and deserving of retaliation.¹³⁷ It is unclear whether the desire to curb the reemergence of bureaucratism was a more powerful motivation of the sponsors of this provision than any intrinsic concern for assuaging grievances and vindicating rights. Similar multiple motivations have inspired the periodic rectification campaigns that seek to improve government operations and offer additional opportunities to complain about ill treatment at the hands of law enforcement officials. The cause of human rights, of course, was not promoted by elimination of the compensation provision of the previous Constitution. That provision, however, probably offended those Party leaders who believe that the award of monetary compensation by the

¹³⁴ See Fukushima, *Chinese Legal Affairs (Second Discussion)*, in CHŪGOKU NO HO TO SHAKAI (Chinese Law and Society) 47 (1960), English translation in J. COHEN, *supra* note 21, at 583.

¹³⁵ See J. COHEN, *supra* note 21, at 41-42.

¹³⁶ CONSTITUTION OF THE COMMUNIST PARTY OF CHINA, art. 27 (1975) in Lindsay (ed.), *supra* note 32, at 336.

¹³⁷ See also THE HUNDRED FLOWERS CAMPAIGN AND THE CHINESE INTELLECTUALS 229 (R. MacFarquhar ed. 1960).

¹³² Whyte, *supra* note 48, at 265.

¹³³ See Lindsay (ed.), *supra* note 32, at 311.

state smacks of bourgeois society and encourages individual selfishness.

VIII

Some useful perspective on criminal justice in the PRC can be gained by briefly considering the situation in the Republic of China (ROC) on Taiwan. Superficially the contrast seems to be very great. "Free China," a type of capitalist regime that is increasingly tied to the market economies of the world and has made remarkable economic and social advances in recent years, maintains published European-style codes of criminal law and procedure and a legal profession, under the impressive Constitution of 1946 that melds Chinese and Western democratic institutions and concepts.¹³⁸ For almost thirty years, however, because of the continuing civil war with the Communists, martial law has suspended the implementation of key provisions of the Constitution, including those relating to criminal justice. In practice what is in fact an authoritarian dictatorship by the Kuomintang (the Nationalist Party) has, through the use of military tribunals, Party controls and other techniques, considerably restricted the formal, civilian legal system described in the codes.¹³⁹

Although the subject has yet to be studied—it is too politically sensitive for Chinese scholars and has been ignored by foreign observers—there are certain striking similarities between the ROC and the PRC with respect to dispensation of severe sanctions. A provincial level committee composed of representatives of the Garrison Command of the Chinese Nationalist army, the Bureau of Investigation of the Ministry of Justice, the Military Police Headquarters, and the Taiwan Provincial Police, on the

recommendation of the similarly-constituted county or city committee, is empowered to send "hooligans" to renewable three-year terms in labor camps that have stricter discipline than regular prisons.¹⁴⁰ "Hooligans" are sweepingly and vaguely defined to include not only those who organize secret societies or extort, harass, oppress and cheat others, but also those who aid and abet litigation, or fail to give themselves up to the authorities and reform themselves after committing acts injurious to public order, or are vagrants and lazy-bones and habitual violators of police regulations.¹⁴¹ Because this sanction of "reformatory education," like the PRC's "rehabilitation through labor," is said to be "non-criminal," no court approval is required for its imposition; nor apparently is any notice or hearing required prior to the decision, although an administrative appeal has been available since 1965.

Professor Ming-min Peng has claimed that this sanction and the procedure for applying it are applicable, under the Measure for the Reform of Rebels During the Period of Communist Rebellion,¹⁴² to political dissidents who may be suspected of violating any of a host of vague and repressive laws that prohibit strikes, demonstrations, unapproved petitions and public meetings, rumor-mongering, and other "subversive activities."¹⁴³ On its face, however, Article 2 (1) of this Measure requires reformatory education of rebels to be ordered by a military tribunal rather than the provincial committee that decides upon the reform of hooligans. Whichever is the authorized agency, Professor Peng maintains that:

As a matter of practice, the order for internment is given when the Government, while having

¹³⁸ For English translations of the Constitution of the Republic of China and the codes of criminal law and procedure as of 1961, see *THE LAWS OF THE REPUBLIC OF CHINA* 3-41, 893-996, 1085-1208 (1st Series, 1961). For up-to-date versions of these laws in Chinese, see *TSUI-HSIN LIU-FA CH'UAN-SHU* (Complete Collection of the Six Codes) 1-7, 307-24, 359-82 (Lin Chi-tung ed., 1977). For an English translation of the code of criminal procedure as revised in 1966, see 2 *A COMPILATION OF THE LAWS OF THE REPUBLIC OF CHINA* 333-460 (1967).

¹³⁹ See Ming-min Peng, *Political Offences in Taiwan: Laws and Problems*, 1971 *CHINA Q.* 471 (No. 47), for a detailed discussion of the consequences of the "state of siege" proclaimed throughout the island on May 19, 1949.

¹⁴⁰ See written statement of the Taiwan Provincial Police Department and verbal statement of Commissioner Chou Chung-feng in 15 *T'AI-WAN-SHENG I-HUI KUNG-PAO* (Official Gazette of the Taiwan Provincial Assembly) 261, 263 (No. 9, 1966).

¹⁴¹ See *The Regulation for the Control of Hooligans in the Province of Taiwan Under Martial Law*, in 56 *SSU-FA CHUAN-K'AN* (The Judicial Special Gazette) 2294-95 (1955).

¹⁴² Issued by the Executive Yuan May 4, 1957 and amended December 3, 1957 and January 16, 1959, in 2 *CHUNG-HUA MIN-KUO HSIEN-HSING FA-KUEI HUI-PIEN* (Collection of current laws and ordinances of the Republic of China) 2038-39 (1970).

¹⁴³ See Ming-min Peng, *supra* note 139, at 472, 476, 491-93.

suspicions concerning a person's thought or behaviour, is unable to find sufficient basis for formal prosecution and conviction, and simply decides to "reform" the person's thoughts.¹⁴⁴

Where sufficient evidence of "subversive activities" does exist, the authorities will bring a criminal prosecution against a political dissident, as they did against Professor Peng himself in 1964 when, while an expert on international law at National Taiwan University's Faculty of Law, he and two associates were arrested as they prepared to distribute handbills advocating the independence of Taiwan.¹⁴⁵ In these circumstances the case need not be tried by the civilian courts but by the military courts, which employ more summary procedures than the civilian courts and dispense much harsher punishments, including the death penalty for many offenses. In such cases, as on the mainland, the accused faces a classic inquisitorial situation. He enjoys no privilege against self-incrimination or presumption of innocence, can be held incommunicado for a long period in a coercive environment that may feature "third-degree" interrogation methods, and finds that full revelation is the only way to end the ordeal. Confessions and all other statements by the suspect are carefully checked through outside investigation. Although a trial before the military tribunal contains more formal elements than are usual in criminal adjudications on the mainland, it is nevertheless psychologically intimidating. The role of defense counsel is limited; trials are generally secret; and the judges are under the political control of both their military superiors and the security police. Professor Peng goes so far as to claim that: "As a matter of fact, before its delivery, the court's decision on a political case must be 'approved' by the security organ which arrested and investigated the defendants and which reserves the right to ask the court to alter its planned sentence, usually to the defendant's disadvantage."¹⁴⁶ Conviction is followed by long confinement in either prison or labor camp, where intensive doses of thought reform are administered by techniques that include group study — not of Marxism-Leninism-Maoism, but of the ideas of Confucius, Sun Yat-sen and Chiang

Kai-shek. Those accused of political offenses can remain confined indefinitely, even after they are eligible for release and even if found not guilty, unless satisfactory persons on the outside are willing to guarantee their future behavior and thoughts.¹⁴⁷ Those who are released are expected to make public their repentance and express their thanks for the magnanimity of the regime, as is the case in the PRC as well.

Despite the fact that the Kuomintang also controls the civilian courts, in times of tension not only political offenses but also certain common crimes are prosecuted before the military courts in order to assure swift and harsh retribution as effective deterrence. In early 1976, for example, a number of civilians charged with robbery, including a purse snatcher who was a first offender, were brought before military courts, quickly convicted, sentenced to death and executed.¹⁴⁸

There are also similarities between the ROC and the PRC in the dispensation of some minor sanctions. The Security Administration Punishment Act¹⁴⁹ on the mainland is modelled upon the ROC's Law for the Punishment of Police Offenses,¹⁵⁰ which went into effect long before Chiang Kai-shek's government fled to Taiwan. And the PRC legislation that authorizes popular mediation committees to settle disputes including minor criminal cases¹⁵¹ is a descendant of the Republican mediation statute of 1930 that, as amended, is still in operation in Taiwan.¹⁵² Republican society, however, is not as tightly organized as mainland society, and the ROC does not call upon its constituent social groups to play as important a role in the informal sanctioning process as mainland social units do.

¹⁴⁷ *Id.* at 488.

¹⁴⁸ See Chung Yang Jih Pao (Central Daily News), Jan. 22, 1976, at 3; Jan. 25, 1976, at 3. See also China News (Taipei), Jan. 23, 1976, at 2.

¹⁴⁹ See note 45 *supra*.

¹⁵⁰ For an English translation of this law as of 1960, see THE LAW FOR THE PUNISHMENT OF POLICE OFFENCES OF THE REPUBLIC OF CHINA (L. Fuller & H. Fisher, Jr., trans. 1960). For an up-to-date Chinese version, see Lin Chi-tung (ed.), *supra* note 138, at 456-61.

¹⁵¹ See Law of March 22, 1954, Provisional General Rules of the PRC for the Organization of People's Mediation Committees, art. 3; English translation in J. COHEN, *supra* note 21, at 124.

¹⁵² For the current version of this legislation, see *The Statute for Mediation in Villages and Towns*, in Lin Chi-tung (ed.), *supra* note 138, 303-04.

¹⁴⁴ *Id.* at 480.

¹⁴⁵ The events are vividly, yet coolly, described in MING-MIN PENG, A TASTE OF FREEDOM 135-75 (1972).

¹⁴⁶ Ming-min Peng, *supra* note 139, at 487.

This brief excursus concerning the criminal process in Taiwan does not do justice to the overall sophistication of the ROC legal system, which seems to have used coercive measures against a far smaller number of political dissidents than the PRC and which evidences in all branches of government much greater concern for the technical legal problems that such measures entail. I hope that these remarks not only present some comparative perspective on mainland developments but also will stimulate much-needed research into the administration of justice in Taiwan. In any event they provide a bridge to our final section, which offers an overview and some thoughts about the future.

IX

Taking another look at the criminal process in the People's Republic over a decade after my first look, I am more struck than ever by its continuities with China's imperial tradition. The PRC's creation of a semi-official substructure that is closely integrated with the official structure to form a single sanctioning system is itself an extrapolation of the traditional imperial process that linked, albeit in a looser way, village, clan, guild and other social groups to the mandarin magistracy.¹⁵³ Observers have resorted to a variety of terms to characterize the network of contemporary social units, such as rural production brigades, urban residents' committees and factory workshops, that play a major role in administering justice. These have been called "informal,"¹⁵⁴ "internal,"¹⁵⁵ "mass mobilization"¹⁵⁶ or "societal"¹⁵⁷ institutions as distinguished from the "formal," "external," "bureaucratic" or "jural" sanctioning apparatus to which analyses of foreign legal institutions ordinarily confine themselves. Whatever the terminology used by scholars and whatever their appraisal of the relative importance of the two components of the system during a given period, all scholars acknowledge this link between past and present, even while debating its precise nature.

¹⁵³ For an analysis of the Ch'ing or Manchu dynasty's social and legal systems, see S. VAN DER SPENKEL, *LEGAL INSTITUTIONS IN MANCHU CHINA* (1962).

¹⁵⁴ See J. COHEN *supra* note 21, ch. 2, *Informal Adjustment and Sanctioning*.

¹⁵⁵ See Li, *supra* note 32, at 72.

¹⁵⁶ See Lubman, *supra* note 32, at 566.

¹⁵⁷ See Shao-chuan Leng, *The Role of Law in the People's Republic of China As Reflecting Mao Tse-tung's Influence*, 68 J. CRIM. L. & C. 356 (1977).

Despite some significant differences between the current "formal" criminal process and its Manchu predecessor, their similarities in the handling of serious offenses are overwhelming. To be sure, the traditional system published a comprehensive criminal code and required judicial officials to write reasoned opinions applying and elaborating upon it.¹⁵⁸ Yet the presumption of guilt, the absence of counsel or other assistance for the accused, the long detention, the coercive environment, the lack of a privilege against self-incrimination and the inadequate opportunity to make a defense are as noticeable today as they were almost two centuries ago. The PRC's recent abolition of the procuracy adds to the similarity between present and past. What Professor Shuzo Shiga has written of the task of the Manchu judge seems equally applicable to the *ex parte* interrogations by Communist police officials and judicial workers that generally substitute for formal trials in the PRC:

On the assumption that the truth regarding a certain action was best known to the perpetrator of the action, the duty of the judge became to win over the offender and have him tell the truth in his own words. Therefore, what was required of a judge was the ability to fathom the inner workings of human nature, rather than adherence to legal procedure.¹⁵⁹

Is the future likely to witness significant change in China's criminal process? Here the Nationalist experience on Taiwan is suggestive. In the early 1960's, economic development and educational progress began to erode traditional authoritarian ideas that exalted the interests of the state over those of the individual.¹⁶⁰ This stimulated popular demands for securing individual rights against arbitrary state power, and some government officials and intellectuals who cooperate with the government supported these demands. As a consequence, an attempt was made to revise the ROC code of criminal procedure to bring it closer to Anglo-American conceptions. This effort might have come to naught had not the ROC and the United States in 1965 concluded an agreement on the legal

¹⁵⁸ See D. BODDE & C. MORRIS, *supra* note 94.

¹⁵⁹ Shuzo Shiga, *Criminal Procedure in the Ch'ing Dynasty*, 2 THE TOYO BUNKO 123 (1975).

¹⁶⁰ This paragraph is based upon Lung-sheng tao, *Reform of the Criminal Process in Nationalist China*, 19 AM. J. OF COMP. L. 747 (1971).

status of American forces stationed in Taiwan.¹⁶¹ Because that agreement guaranteed a variety of due process protections to American servicemen suspected of having committed crimes within ROC jurisdiction, it was bitterly attacked as an "unequal treaty" by Chinese whose government denied them similar protections.

To placate the public, the ROC revised the code of criminal procedure to grant its own nationals certain American-style pre-trial safeguards, restraining police power to arrest, search, detain and interrogate suspects.¹⁶² Despite these new formal restrictions in the code of criminal procedure, however, ROC police remained largely unfettered because they continued to avail themselves of the opportunities for inquisitorial investigation presented by the Law for the Punishment of Police Offenses,¹⁶³ the Regulation for the Control of Hooligans,¹⁶⁴ and the Measure for the Reform of Rebels¹⁶⁵ and other martial law legislation.¹⁶⁶ Nevertheless, within the bounds permitted by the ROC's authoritarian dictatorship, ferment over reform of the criminal process persists, reflecting "a complex value system in Taiwan, one that is combined with a totalitarian conception of social control, liberal demands by the [articulate] segments of the society, as well as traditional way[s] of thinking about the relationship between the state and the individual."¹⁶⁷

Although the mainland regime does its best to prevent us from learning whether similar tensions exist in the People's Republic, it would be a mistake to assume that they do not. The 1956-57 campaign to "Let a Hundred Flowers Bloom" revealed unexpectedly broad dissatisfaction with the administration of justice, at least among the educated.¹⁶⁸ It would be surprising if the subsequent widespread abuses of the criminal process, especially during the anti-rightist movement of 1957-58, the Great Leap

Forward of 1958-59 and the Cultural Revolution of 1966-69, had not magnified this feeling and even caused ferment among "the masses," who are supposed to be consulted in every case. My own interviews with former residents of China indicate that many Chinese accused would gladly resort to procedural safeguards if the opportunity were offered.¹⁶⁹ Some Red Guard newspapers published during the Cultural Revolution condemned arbitrary acts of the political-legal organs.¹⁷⁰ More recently, demobilized soldiers have complained about illegal beating inflicted by the police and their assistants.¹⁷¹ Factory workers have protested against the unjust rape conviction of one of their number.¹⁷² Co-workers in an organization have intervened to save an innocent comrade from imprisonment for allegedly seeking to escape to Hong Kong.¹⁷³ And an unusually long "large-character-poster" in Canton called upon the Fourth National People's Congress to plainly prescribe measures to punish the high officials who committed the heinous crimes of knowingly violating the law while enforcing it, fabricating cases, using the public prosecution to avenge personal grudges, establishing their own jails and resorting to unrestrained corporal punishment and murder.¹⁷⁴

¹⁶⁹ *Id.* at 257-58, 294-95.

¹⁷⁰ See, e.g., Kuo Chia-hung, *I Accuse* in CHING-KANG MOUNTAINS (March 22, 1967) (Kuo is from Chenkiang Sericulture Industry, Kiangsu Province); Li Keng-lien, in *I Accuse*, in a special issue on *The Chien Liang Case* (1968) (published by the Joint Red Comm. of the Construction System) (the article relates how an investigation of the author's husband's alleged crime drove him to murder and suicide); *The True Story of the Chaoli Case—A Political Plot Hatched by the Peng Chen Clique is Exposed* (June 24, 1967) (published by the Political-Legal Commune of the Peking Political-Legal Institute). See also Hsieh Fu-chih's *Denunciation of Lo Jui-ch'ing* (the Minister of Public Security's denunciation of his predecessor, early 1966, but no date or publisher).

¹⁷¹ See MING PAO MONTHLY 98-99 (No. 112, 1975); in Shao-chuan Leng, *supra* note 157, at n.59.

¹⁷² See *China's "Masses" Hit Authorities Over Rape Case*, Washington Post, Aug. 16, 1976, at A8; cited in Shao-chuan Leng, *supra* note 157, at n.56.

¹⁷³ See the interview cited in Shao-chuan Leng, *supra* note 157, at n.56.

¹⁷⁴ See Li I-che, *Concerning Socialist Democracy and Legal System*, reproduced in 12 ISSUES AND STUDIES 110, 145-46 (No. 1, 1976). For a general plea for greater observance of human rights in China, see the letter to President Carter allegedly written by a disillusioned Shanghai intellectual, in Weintraub, *An inside view of China*, 97 FAR EASTERN ECON. REV. 28-29 (1977).

¹⁶¹ Status of United States Armed Forces in the Republic of China, Aug. 31, 1965, 1 U.S.T. 373, T.I.A.S. No. 5986 (1966); see note 15 *supra*.

¹⁶² Lung-Sheng Tao, *supra* note 160, at 748, cites Articles 93, 77, 128, 154 and 156 of the new code of criminal procedure. For an English translation of this 1966 code, see note 138 *supra*.

¹⁶³ See note 150 *supra*.

¹⁶⁴ See note 141 *supra*.

¹⁶⁵ See note 142 *supra*.

¹⁶⁶ See Lung-Sheng Tao, *supra* note 160, at 756.

¹⁶⁷ *Id.*

¹⁶⁸ See J. COHEN, *supra* note 21, at 14.

It is interesting to note that the current leaders' campaign to discredit the "gang of four" has included charges that it gravely abused the criminal process. In recounting how the deposed leaders allegedly sought to conceal their criminal past, the Party has claimed that:

They also sent people disguised as Red Guards to ransack the homes of those in the know and even had them arrested on trumped-up charges, kept them in jail for a long time and cruelly persecuted them to the point of murder to prevent divulgence of their secrets.¹⁷⁵

Party officials recently arranged for a famous opera star and member of the National People's Congress to tell American journalists how the "gang of four" detained her incommunicado for three years of political investigation, subjecting her to the psychological intimidation of "struggle sessions," middle of the night interrogations and forced confessions.¹⁷⁶ And, as part of its effort to strengthen the state security apparatus and build public confidence in it, the Hua Kuo-feng government has accused the "gang" of seeking to smash the public security, the procuracy and the courts, of thinking up "pretexts for grabbing people and locking them up" and of "publicly agitating to use militia forces to handle the people's internal contradictions in a vain attempt to impose fascist dictatorship."¹⁷⁷

Despite the fact that both Confucianism and Maoism have indoctrinated the Chinese people in the belief that the interests of individuals must inevitably be subordinated to those of state and society, and despite the vast differences between China's conditions and those that gave rise to the Western liberal tradition, one cannot be certain that the Chinese people will continue to tolerate the arbitrary exercise of state power in all circumstances. To be sure, the 1975 PRC Constitution, which was importantly influenced by the so-called radical faction of the Communist Party that maintained Mao's support, offered little comfort to those who hope for greater safeguards of personal liberty. Yet that product of political compromise re-

tained certain guaranties promulgated by its predecessor, such as the right to be free of arbitrary arrest and the right to complain against violations of law by state officials, even while eliminating previously prescribed modes of implementing those guaranties.¹⁷⁸ Moreover, the ouster of the "gang of four" has dramatically put an end to the espousal of radical policies, at least for a time, and the current leaders have taken pains to emphasize the need to restore law and order and to "improve rational rules and regulations," as the late Chou En-lai repeatedly urged, in order to modernize the country.¹⁷⁹ Of course, they are careful to condemn the "counter-revolutionary revisionist line" of former President Liu Shao-ch'i, who to Mao's distaste had advocated a Soviet-style legal system in the mid-1950's and who, it is said, had sponsored some irrational rules and regulations that had to be abolished.¹⁸⁰ But the current campaign, which is actually supported by many leaders who were Liu's followers, focuses its attack upon those whose slogan was "Smash all rules and regulations."

Thus in mainland China as well as Taiwan the drive for modernization can be expected to stimulate continuing pressure to reduce the scope of arbitrary state power over the criminal process. Moreover, the PRC, like the ROC and other Chinese governments since the last years of the Manchus, may find that external stimuli are gradually reinforcing internally generated pressures. The present concern over "human rights," for example, is subjecting the PRC to increasing foreign criticism of its administration of justice and other aspects of its treatment of its own nationals, especially now that the PRC is a full participant in the world community.¹⁸¹

Peking's rivals in Taipei and Moscow, although conscious that "human rights" is a two-edged sword that can be turned against them as well, have sought political advantage by enhancing foreign interest in the situation on

¹⁷⁸ See text accompanying notes 61-64, 133-37 *supra*.

¹⁷⁹ For a recent interesting survey of the problem of "rules and regulations," see Wang Che, *The "Gang of Four" Risked Anarchism*, 20 PEKING REV. 23-26 (No. 14, 1977).

¹⁸⁰ See, e.g., *id.*

¹⁸¹ See, e.g., BAO RUO-WANG & CHELMINSKI, *supra* note 23; Padoul, *Droit et Ideologie en Chine*, in ACTES 3-8 (June-July 1975); Goldwater, *supra* note 29.

¹⁷⁵ Commentators of Renmin Ribao (People's Daily), Hongqi (Red Flag) and Jiefangjun Bao (Liberation Army Daily), *A Sinister Cabal of New and Old Counter-Revolutionaries*, 20 PEKING REV. 35, 38 (No. 19, 1977).

¹⁷⁶ Mathews, *A Case of Political Persecution*, Wall St. J., May 18, 1977, at 22.

¹⁷⁷ See Bonavia, *supra* note 121.

the mainland. ROC propagandists never lose an opportunity to charge PRC leaders with having "wrongly imprisoned, tortured and killed millions of their own people."¹⁸² The USSR has condemned China's allegedly lawless departure from the standards of "socialist legality" ever since the Sino-Soviet dispute became public.¹⁸³

Peking has sought to deflect the growing foreign interest in human rights in China by a variety of techniques. One technique is to divert attention by indicting the USSR for: imposing a "police tyranny" and "inquisitorial persecution" upon the Soviet people; frequently confining political dissenters in mental hospitals; completely isolating them and depriving them of all rights including an open trial; and sending more than a million other prisoners to labor camps (after allowing them legal protections far greater than those available to their counterparts in the PRC, it should be noted).¹⁸⁴ Another technique is to denounce "the so-called 'human rights' issue" as "nothing more than a hypocritical farce" staged by the rival superpowers, "a regular slanging match with each letting the other's skeleton out of the closet."¹⁸⁵ A third technique is to claim that China "is the country where human rights are best observed," as "a responsible official" in the Chinese Foreign Ministry recently did. More than ninety-five percent of the Chinese people enjoy human rights, the diplomat maintained, and the rest can also "if they are receptive to re-education." He stated that in the United States, by contrast, only five percent of the population enjoyed human rights, and in the USSR not merely intellectuals but also workers and peasants were oppressed. "So if you criticize China on this point, we think it is ridiculous," the official commented.¹⁸⁶

¹⁸² Chung Hua Jih Pao (China Daily News), May 11, 1977, as quoted in FREE CHINA WEEKLY, May 15, 1977, at 3.

¹⁸³ See, e.g., *Revolutionary Theory Is Guide to Action: On the Dictatorship of the Proletariat*, Izvestia, May 17, 1964; translated in 16 CURRENT DIGEST OF THE SOVIET PRESS at 5; L. Gudoshnikov, *Two Constitutions of the People's Republic of China*, 3 FAR EASTERN AFFAIRS 72-80 (1975).

¹⁸⁴ See Soviet "Psychiatric Hospitals" Prisons in Disguise, 20 PEKING REV. 20-22 (No. 11, 1977); Soviet Concentration Camps, 19 PEKING REV. 15-16 (No. 10, 1976).

¹⁸⁵ Absurd Champion of "Human Rights," 20 PEKING REV. 23-24 (No. 11, 1977).

¹⁸⁶ See Safire, *supra* note 37.

The PRC will need more than skillful propaganda to meet this challenge of the world community. The fact that it is now represented in the United Nations means that it is caught up in the slow but inexorable multilateral efforts to formulate international legal norms to regulate nation-states' treatment of their own nationals. Because it has long opposed UN invocation of "human rights" as a means of influencing China's domestic affairs,¹⁸⁷ even while appreciating the opportunities that this vehicle offers for influencing the domestic affairs of other states,¹⁸⁸ the PRC has attempted to tread carefully in what is becoming a legal minefield.

Peking has not directly criticized the UN General Assembly's Universal Declaration of Human Rights, which proclaims, "as a common standard of achievement for . . . all nations," principles including equality before the law, the right to an effective judicial remedy for violation of one's legal rights, freedom from arbitrary arrest and detention, the presumption of innocence, and the right to defend one's self against criminal charges in a fair and public trial by an independent and impartial tribunal.¹⁸⁹ Yet the PRC has never endorsed the Declaration, despite the fact that the PRC has accused the colonial and racist regimes of southern Africa of violating it.¹⁹⁰ Peking's pretext for failing to endorse it is that, because the ROC had participated in its adoption, the PRC "reserved its right to comment on that Decla-

¹⁸⁷ See, e.g., Ch'ien Szu, *A Criticism of the Views of Bourgeois International Law on the Question of Population*, 5 KUO-CHI WEN-T' I YEN-CHIU (Research on International Problems) 41-43 (1960); translated in COHEN & CHIU, *supra* note 12, at 607-09; Cohen, *China and Intervention: Theory and Practice*, 121 U. PA. L. REV. 471, 479-81 (1973).

¹⁸⁸ KUO CH'UN, LIEN-HO-KUO (The United Nations) (1956); *Special UN Security Council Meetings*, 15 PEKING REV. 14-15 (No. 6, 1972).

¹⁸⁹ See arts. 7, 8, 9, 10 and 11 of the Universal Declaration, G.A. Res. 217A, 3(1) U.N. GAOR 71-77, U.N. Doc. A/810 (1948). The text may conveniently be found in BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS 30-34 (L. Sohn & T. Buergenthal ed. 1973).

¹⁹⁰ For examples of such accusations, see U.N. Doc. A/C. 3/SR. 1910, ¶17 (1972); *Special UN Security Council Meetings*, *supra* note 157. I am grateful to Mr. Olin L. Wethington, Harvard Law School 1977 and Columbia University Ph.D. candidate, for permission to draw upon his unpublished paper *China's Position on International Legal Norms On Human Rights Governing A State's Treatment Of Its Own Citizens* (May, 1977).

ration."¹⁹¹ The real reason, plainly enough, is the inconsistency between the Declaration's content and the norms applied by the PRC at home. For the same reason Peking has failed to comment on the International Convention on Civil and Political Rights,¹⁹² which goes beyond the Declaration in spelling out Western-style procedural guaranties.

Although the PRC has not chosen to sit in the U.N. Commission on Human Rights, it is represented in both the Commission's parent body, the Economic and Social Council, and the Social, Humanitarian and Cultural Committee of the General Assembly, as well as in the Assembly itself. Thus it has had to react to various human rights proposals that have come before these bodies. Apart from questions of colonialism and apartheid, Peking generally prefers to abstain or not even participate in the voting and to be as silent as possible. For example, it appears to have purposely absented itself from the Assembly's 1976 vote on a resolution concerning the protection of human rights in Chile.¹⁹³

Nevertheless, it has voted for Assembly resolutions that condemn torture on the basis of the Universal Declaration, the International Covenant on Civil and Political Rights and other internationally articulated standards.¹⁹⁴ Yet the PRC has opposed most Assembly efforts to call upon states to: report laws and administrative and judicial measures that prohibit torture; give urgent attention to developing an international code of ethics for law enforcement agencies; and approve the Standard Minimum Rules for the Treatment of Prisoners adopted by the First U.N. Congress on the Prevention of Crimes and the Treatment of Offenders, which guarantees an accused the presumption of innocence, the right to be informed of the charges and a proper opportunity to make a defense.¹⁹⁵

¹⁹¹ See, e.g., U.N. Doc. A/C.3/SR. 2068, ¶23 (1974).

¹⁹² G. A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) 52-58, U.N. Doc. A/6316 (1966); also in SOHN & BUERGENTHAL, *supra* note 189, at 44-62.

¹⁹³ See UN Press Release GA/5571, Dec. 29, 1976, at 232, concerning Resolution 31/124, Dec. 16, 1976, on Protection of Human Rights in Chile.

¹⁹⁴ See, e.g., G. A. Res. 3059, 28 U.N. GAOR, U.N. Doc. A/PV 2163 (1973) (unanimously adopted); G. A. Res. 3218, 29 U.N. GAOR Supp. 31 U.N. Doc. A/9631 (1974) (adopted without objection).

¹⁹⁵ See U.N. Doc. A/C.3/SR. 2071, ¶13 (1974), for PRC reservations to draft Resolution 3218 in committee. See note 194 *supra*.

The PRC did not object to the Assembly's adoption by acclamation of the "Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," even though that Declaration called upon states to: provide appropriate training for law enforcement personnel; undertake systematic review of interrogation practices; make criminal all acts of torture; and establish complaint and disciplinary procedures.¹⁹⁶ It is not clear whether the PRC voted favorably or merely abstained regarding an Assembly resolution entitled "Human Rights in the Administration of Justice,"¹⁹⁷ but in committee Peking approved a draft version of the resolution despite the fact that it indirectly called on states to consider, when formulating national legislation, draft principles that are completely at odds with those endorsed in China, such as an independent judiciary, access to legal counsel, the right to a defense and a privilege against self-incrimination.¹⁹⁸

It is difficult to reconcile the PRC's actions on these last two resolutions with its general sensitivity about international interference in China's domestic affairs. To be sure, PRC scholars have long maintained that General Assembly resolutions are not legally binding but merely recommendatory.¹⁹⁹ Yet this has not prevented the PRC from opposing or not taking a position on other resolutions that endorse principles contrary to those prevailing in China.²⁰⁰ It is possible to explain Peking's support for simple anti-torture resolutions on the ground that their provisions are not inconsistent with the norms of China's criminal process.

¹⁹⁶ G. A. Res. 3452, 30 U.N. GAOR Supp. 34, U.N. Doc. A/10034 (1975).

¹⁹⁷ G. A. Res. 3144, 28 U.N. GAOR Supp. 30, U.N. Doc. A/9030 (1973) (adopted by a vote of 107 to 0, with 20 abstentions).

¹⁹⁸ See U.N. Doc. A/C.3/SR.2043, ¶42 (1973), which reveals the PRC's favorable vote on the draft resolution contained in A/C.3/L. 2048.

¹⁹⁹ See, e.g., K'ung Meng, *A Criticism of the Theories of Bourgeois International Law Concerning the Subjects of International Law and Recognition of States*, in 2 KUO-CHI WEN-T'I YEN-CHIU (Research on International Problems) 44-51 (1960); translated in COHEN & CHIU, *supra* note 12, at 88, 97-98.

²⁰⁰ See text at notes 187 and 195 *supra*; Chou Keng-sheng, *The United Nations' Intervention in the Question of Tibet Is Illegal*, 6 CHENG-FA YEN-CHIU (Political-Legal Research) 8-11 (1959); translated in COHEN & CHIU, *supra* note 12, at 1329-32.

But this cannot explain Peking's acquiescence in those parts of the 1975 Declaration that go beyond simple condemnation of torture, and surely the administration of justice resolution is at odds with the PRC's domestic system. Perhaps China did not wish to appear to be the only country unprepared to endorse these humanitarian standards. In the case of China's support in committee for the administration of justice resolution, perhaps the understaffed PRC delegation to the U.N. lacked the expertise to understand the consequences of its action, or Peking may have been too eager to oppose the USSR, which had urged postponement.²⁰¹ Whatever the explanation, enough has been said to suggest that the People's Republic is now enmeshed in a complex web of international negotiations that may heighten its sensitivity to the criminal process and add to the pressures favoring increased protections for the individual.

Nor is human rights the only topic of multilateral concern that bears upon the domestic criminal process. Prior to the PRC's entry into the U.N., the U.N. precluded the Peking regime from signing or acceding to the 1961 Vienna Convention on Diplomatic Relations²⁰² and the 1963 Vienna Convention on Consular Relations.²⁰³ In late 1975 the PRC quietly acceded to the Diplomatic Convention,²⁰⁴ thereby obligating itself to grant foreign diplomats an immunity from prosecution that the PRC's practice under customary international law has not always recognized.²⁰⁵ Adherence to the Consular Convention would have an additional impact on the administration of justice. For example, the PRC has long maintained that, when a foreign national is detained on

criminal charges, it is consistent with customary international law to deny his country's representatives access to him until all formal criminal proceedings, including appellate review, have run their course.²⁰⁶ This is contrary to the Consular Convention, which requires the host state to permit consular visits prior to the entry of a judgment.²⁰⁷ As the PRC's relations with various countries develop, it may be pressed to accede to the Consular Convention as well as the Diplomatic Convention.

Of course, as early as 1952 the PRC recognized the 1949 Geneva Convention Relative to the Treatment of Prisoners of War²⁰⁸ despite the fact that that treaty makes applicable to a state's criminal prosecution of protected persons due process standards that are clearly inconsistent with China's administration of justice.²⁰⁹ When in 1973-74 Peking belatedly joined in efforts to revise the POW treaty and related conventions, its participation raised hopes of increasing China's sensitivity to the criminal justice provisions as well as other aspects of the treaties. After 1974, however, the PRC did not take part in the annual sessions of the diplomatic conference that has drafted texts to supplement the existing treaties.

In a curious way the enormous publicity that the PRC has generated about the alleged crimes of "the gang of four" focuses world interest upon China's criminal process. None of the previous Chinese leadership struggles so explicitly directed foreign attention to legal considerations. The handling of the case to date

²⁰⁶ See COHEN & CHIU, *supra* note 12, at 647-56.

²⁰⁷ See U.N. Doc. A/CONF, *supra* note 203, art. 36.

²⁰⁸ See *On China's Recognition of the 1949 Geneva Conventions*, 1952 PEOPLE'S CHINA 33 (No. 15); reprinted in COHEN & CHIU, *supra* note 12, at 1123-24.

²⁰⁹ Article 84 of the convention requires trial by a court that offers "the essential guarantees of independence and impartiality as generally recognized." Article 99 provides in part:

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused. No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.

Article 103 states that in no circumstances can pre-trial confinement exceed three months; and Article 105 prescribes detailed protections for the accused in connection with trial. For a discussion of the relation between the PRC's domestic legal system and the POW convention, see Cohen, *People's Republic of China*, in *THE LAW OF WAR* 233, 246 (Miller ed. 1975).

²⁰¹ See U.N. Doc. A/C.3/SR.2043, ¶17 (1973).

²⁰² For the text of this convention, see U.N. Doc. A/CONF 20/13 (1961); 55 AM. J. INT'L. L. 1064 (1961).

²⁰³ For the text of this convention, see U.N. Doc. A/CONF 25/12 (1963); 57 AM. J. INT'L. L. 995 (1963).

²⁰⁴ See U.N. SECRETARIAT, MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITORY FUNCTIONS: LIST OF SIGNATURES, RATIFICATIONS, ACCESSIONS, AS OF DEC. 31, 1975 ST/Leg/Ser. d/10, at 51.

²⁰⁵ See *Foreign Ministry Protest Note*, broadcast, New China News Agency [N.C.N.A.] (Peking) (June 12, 1967), in F.B.I.S. (No. 114/67:BBB2-3, 1967) [hereinafter cited as N.C.N.A.]; *Public Trial Convicts Indian Embassy Spy*, broadcast, N.C.N.A. (Peking) (June 13, 1967), in F.B.I.S. (No. 115/67:BBB2-4, 1967); reproduced in COHEN & CHIU, *supra* note 12, at 1004-07.

demonstrates the extent to which the administration of justice in the PRC departs from the world community's evolving notions of universal minimum standards. The accused have simply been detained incommunicado with no opportunity to defend themselves against the dossiers compiled and circulated against them, even though, as we have seen, one of the charges is that they subjected their political opponents to the same kind of incommunicado detention that they now suffer.²¹⁰

Such ironies are lost upon the Party's current leaders, who confront a genuine dilemma in seeking to chart an appropriate way of disposing of the case. Is there to be a formal "show trial" reminiscent of the Stalin purge trials of the 1930s? A "mass trial" in the Chinese Communist tradition? Can Chiang Ch'ing and her cohorts be relied upon to confess in public? Can they be shown to the country and the world after long months of intense interrogation? Would it leave a better impression to confine them indefinitely without any form of adjudication? Should the regime simply announce that they have been found guilty and sentenced? There is no easy way out for the victors, and the case seems sure to stimulate further concern about China's criminal process, both inside and outside the country.

²¹⁰ See text at notes 175-77.

²¹¹ See J. COHEN, *supra* note 21, at 53.

Over a decade ago, I wrote: "Perhaps the least hazardous prediction one can make about the criminal process at this juncture is that, as long as Mao remains in power, we are unlikely to witness any substantial improvement in the plight of the individual in relation to the state."²¹¹ Now that Mao is gone, will such improvement take place? "Only the event will teach us in its hour," but my own expectation is that, just as internal and external pressures have brought about certain formal procedural protections for the individual on Taiwan, so too will they eventually on the mainland. Yet in the People's Republic, as in Taiwan, enhanced safeguards in the formal system are not likely to make a significant impact upon the overall process. The police and the Party, supplemented by the military whenever public order is seriously threatened, will continue to enjoy sufficient flexibility to operate an essentially inquisitorial system. In both the PRC and the ROC self-constituted governing elites are determined not only to mobilize the people and resources of a nation that has an authoritarian heritage but also to permit no challenge to their rule. In these circumstances the prospects for major change in the criminal process must remain modest.