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# WHEN THE PRICE IS TOO HIGH: RETHINKING CHINA'S DETERRENCE STRATEGY FOR ROBBERY

Peter D. Nestor<sup>†</sup>

*Abstract:* Economic property crime in China has soared since the country enacted market reforms in the early 1980s. Robbery rates are rising faster than most economic property crimes, such as larceny and fraud, and violent crimes, such as rape, murder, and assault. China's strategy for deterrence is to raise the "price" of the crime by increasing the severity of the penalty. Since 1979, China's criminal law has permitted the use of the death penalty for robbers in nearly all cases, and courts have applied it regularly and in many different types of robbery cases. Since 1983, China has formally engaged in "strike-hard" campaigns, in which the government dedicates massive law enforcement resources to fight a particular crime. The campaigns have targeted robbery and have resulted in mass arrests, swift trials, and severe sentences—including mass executions.

Despite these efforts, China has failed to deter individuals from committing more robberies. This Comment argues that China should reform its deterrence strategy by revising its criminal law and "strike-hard" campaigns. China should adopt new deterrence strategies that combine law with sociology, economics, and psychology. Not only will these strategies deter more robbery, they will also deter the more serious crimes often committed during robberies. The new strategies will also provide incentives for individuals to commit less violent crime.

## I. INTRODUCTION

Since the early 1980s, China's strategy to deter rising crime has been to impose severe punishment, including the death penalty, on crimes that do not necessarily result in the victim's death.<sup>1</sup> The theory, captured in the traditional Chinese saying, "kill the chicken and let the monkey watch," is that severe penalties will effectively deter individuals from committing a particular crime.<sup>2</sup> Accordingly, nearly all forms of robbery are punishable by death under the codified criminal statutes.<sup>3</sup>

China's deterrence strategy, however, has been ineffective over the last twenty-five years. China's official statistics are often incomplete and

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<sup>1</sup> HAROLD M. TANNER, STRIKE HARD! ANTI-CRIME CAMPAIGNS AND CHINESE CRIMINAL JUSTICE, 1979-1985 139, 141 (1999); RONALD C. KEITH & ZHIQIU LIN, NEW CRIME IN CHINA 108 (2006); BORGE BAKKEN, THE EXEMPLARY SOCIETY 396 (2000).

<sup>2</sup> Holly Williams, *China Executions 'Part of Culture,'* BBC NEWS, July 6, 2001, <http://news.bbc.co.uk/2/hi/asia-pacific/1426210.stm>; see also BAKKEN, *supra* note 1.

<sup>3</sup> Xing shi fa [Criminal Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997), art. 263, translated in WEI LUO, THE 1997 CRIMINAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA WITH ENGLISH TRANSLATION AND INTRODUCTION (1998) [hereinafter 1997 Criminal Law]. See also discussion *infra* Part II.

unreliable,<sup>4</sup> but even official statistics show that China's crime rate, including the rate of robberies, has risen dramatically since the early 1980s.<sup>5</sup> The Ministry of Public Security reports that crime nearly quadrupled in twenty years, rising from eighty crimes per 100,000 people in 1981 to approximately 360 per 100,000 people in 2001.<sup>6</sup> Economic property crimes accounted for the greatest single increase in crime between 1981 and 1990, and continued to rise faster than most violent crimes through the 1990s.<sup>7</sup> Robbery increased nearly sixteen times in twenty years, from 22,266 reported cases in 1981 to 352,216 in 2001, faster than theft, fraud, homicide, rape, and assault.<sup>8</sup>

Confronted with this dramatic increase in robbery, the government made concerted efforts to reduce robbery and other violent crimes.<sup>9</sup> China's two-pronged deterrence strategy authorized the death penalty for robbery through its Criminal Law, and initiated "strike-hard" campaigns intended to deter crime through a broad show of force. China has authorized the death penalty for robbery since first codifying its Criminal Law in 1979.<sup>10</sup> In

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<sup>4</sup> Jianhong Liu, *Crime Patterns During the Market Transition in China*, 45 BRIT. J. CRIMINOLOGY 613, 621-22 (2005). Liu identifies several problems with relying on official statistics in China, including the changing definitions of crime, under- and over-reporting, and that the rate of reporting for economically motivated crimes increased during the transition to a market economy. See also TANNER, *supra* note 1, at 106 (noting under- and over-reporting of cases in the China Law Yearbook in an attempt to "prove" that government had reduced crime).

<sup>5</sup> See TANNER, *supra* note 1, at 107 (noting an "overall increase in crime" during the 1980s and 1990s based on statistics for cases published by the public security organs); LI ZHANG, STRANGERS IN THE CITY 140 (2001) (noting the general increase in urban crime); Borge Bakken, *Comparative Perspectives on Crime in China*, in CRIME, PUNISHMENT, AND POLICING IN CHINA 64-65 (Borge Bakken ed., 2005).

<sup>6</sup> BAKKEN, *supra* note 5, at 64-65.

<sup>7</sup> TANNER, *supra* note 1, at 107.

<sup>8</sup> BAKKEN, *supra* note 5, at 64-66. See also Liu, *supra* note 4, at 624-26. Between 1978 and 1999, the crime rate for larceny, grand larceny, fraud and robbery all increased faster than homicide, rape, and assault. Grand larceny (defined as theft worth more than approximately \$365) increased the fastest at 9,042 percent; robbery increased 2,722 percent; and larceny (adjusted for the change of the definition of larceny in 1992 by the Chinese government, which led to a lower post-1992 larceny rate). Less or non-economically motivated crimes increased at a slower rate, generally: homicide increased 253 percent; rape increased 131 percent; and assault increased 491 percent. While these percentage increases seem shocking, it is important to remember that, although crime is rising quickly, China's crime rates are still relatively low compared to other countries.

<sup>9</sup> Supreme People's Procuratorate, *Work Report*, 2001 <http://www.spp.gov.cn/site2006/2006-02-22/00018-292.html> [hereinafter *2001 Work Report*]; Supreme People's Procuratorate, *Work Report*, 2004 <http://www.spp.gov.cn/site2006/2006-02-22/00018-295.html> [hereinafter *2004 Work Report*] (both reports emphasizing the government's focus on reducing violent crime, specifically robbery). See also *Chinese Police Dealt With Over 4.65 Million Criminal Cases Last Year*, WORLD NEWS CONNECTION, Sept. 27, 2006, at 1, available at DIALOG, File No. 985 (quoting senior government officials: "Criminal cases have become more violent, organized and professional. Serious crimes such as murder, robbery, kidnapping, arson, and car theft have been causing serious harm to society.").

<sup>10</sup> Xing shi fa [Criminal Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, effective Jan. 1, 1980) [hereinafter 1979 Criminal Law], art. 150, [http://www.novexc.com/criminal\\_law.html](http://www.novexc.com/criminal_law.html). See discussion *infra* Part II.A.

1983, the government enacted its first strike-hard campaign.<sup>11</sup> The campaigns target a particular crime, such as robbery, and ramp up law enforcement and state propaganda machines to obtain mass arrests, swift trials, and mass executions.<sup>12</sup> But over the long run, the death penalty and the strike-hard campaigns have failed to deter robbery.<sup>13</sup>

This Comment argues that China should reform its deterrence strategy by revising its Criminal Law and strike-hard campaigns to incorporate interdisciplinary deterrence strategies that combine law, economics, sociology, and psychology. The oversimplified notion that a more severe penalty will deter crime has lost traction to novel developments in deterrence theory.<sup>14</sup> Because China's Criminal Law has developed new legal hooks on which to hang arguments for reform,<sup>15</sup> China is in a good position to adopt several new deterrence strategies to deter robbery more effectively.

Part II of this Comment examines how China attempts to deter robbery through its Criminal Law. Part III discusses how China's strike-hard campaigns fail to deter robbery. Part IV argues that China should improve deterrence by reforming the strike-hard campaigns and by discontinuing the death penalty for robbery. The conclusion points out that criminal law reform faces significant but surmountable barriers if reforms are couched in gradual and pragmatic terms.<sup>16</sup>

## II. SEVERE PENALTIES IN CHINA'S CRIMINAL LAW ARE AN INEFFECTIVE DETERRENT FOR ROBBERY

The 1997 Criminal Law clarified when courts may impose the death penalty for robbery, but retained its use for almost all types of robbery. While public support for the death penalty remains high, legislators and scholars have called for a reduced reliance on it as a deterrent measure. This is consistent with important rhetorical additions to the 1997 Criminal Law,

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<sup>11</sup> See discussion *infra* Part III.

<sup>12</sup> *Id.*

<sup>13</sup> Bakken, *supra* note 5, at 65. Senior government officials stated that robbery and theft cases accounted for eighty percent of total criminal cases in 2005. *Criminal Cases Up 4.6 Percent in 2005 Year-on-Year*, WORLD NEWS CONNECTION, Jan. 19, 2006, at 1, available at DIALOG, File No. 985. Officials also reported that economic property crimes increased 1.6 percent from 2005 to 2006, with robbery rising 4.9 percent. *PRC Sees Decline of Violent Crimes, Rise of Property Infringement in 1st Quarter*, WORLD NEWS CONNECTION, Apr. 11, 2006, at 1, available at DIALOG, File No. 985.

<sup>14</sup> Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2477 (1997).

<sup>15</sup> See discussion *infra* Part II.C.

<sup>16</sup> Randall Peerenboom, *Law and Development of Constitutional Democracy in China: Problem or Paradigm?* 19 COLUM. J. ASIAN L. 185, 229 (2005) (noting that successful legal reforms in China are generally gradual and grounded in pragmatism).

including the provision that punishment should fit the crime.<sup>17</sup> With rising crime rates, lawmakers should continue to question the efficacy of severe punishment as a deterrent measure and use provisions in the Criminal Law as a guidepost for reform.

A. *Courts Impose the Death Penalty for Nearly All Types of Robbery*

China codified its Criminal Law in 1979 after rewriting draft legislation thirty-three times since 1951.<sup>18</sup> From 1979 to 1997, the Standing Committee of the National People's Congress (NPC), a quasi-legislative organ, amended the law twenty-four times.<sup>19</sup> After lively scholarly debate, China substantially rewrote its Criminal Law for the first time in 1997 and incorporated many of the revisions passed in the interim.<sup>20</sup>

Since 1979, Chinese society has been transformed from an insular socialist regime to an international market economy and, as a result, has undergone tremendous economic, social, and political change.<sup>21</sup> In response to these changes, the 1997 Criminal Law codified 100 new crimes and incorporated 220 offenses that were created or amended pursuant to legislation passed between 1979 and 1997.<sup>22</sup> The codification of many new crimes, including securities fraud, intellectual property crimes, tax fraud, and land-use sale or transfer crimes, reflects China's economic and social development.<sup>23</sup> The new crimes indicated the government's willingness to respond to social change by creating legal provisions to fill gaps in the law.<sup>24</sup> In addition, the lack of uniformity and ambiguity in many of the 1979 provisions created problems in applying the law fairly and accurately.<sup>25</sup> The 1997 Criminal Law thus addressed these deficiencies and formulated a more complete criminal code.<sup>26</sup>

The effect of lack of uniformity and ambiguity in the 1979 provisions can be seen in the context of robbery. The 1979 Criminal Law's definition of

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<sup>17</sup> 1997 Criminal Law, *supra* note 3, art. 5.

<sup>18</sup> ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 233-34 (3d ed. 2004).

<sup>19</sup> WEI LUO, THE 1997 CRIMINAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA: WITH ENGLISH TRANSLATION AND INTRODUCTION 5 (1998) (noting that the National People's Congress interim laws and regulations could not be codified in 1979 because China lacked a system whereby new legislative laws could be codified in the corresponding statutory section).

<sup>20</sup> CHEN, *supra* note 18, at 236 (noting that the 1997 revision was the "most significant development in Chinese criminal law since 1979").

<sup>21</sup> KEITH & LIN, *supra* note 1, at 142.

<sup>22</sup> CHEN, *supra* note 18.

<sup>23</sup> LUO, *supra* note 19, at 5-6, 16.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*; KEITH & LIN, *supra* note 1, at 142.

<sup>26</sup> LUO, *supra* note 19, at 5-6.

robbery is vague, and it is unclear when courts may impose the death penalty on offenders. The 1979 Criminal Law states that “[w]hoever takes public or private property by force, threat or other methods” is subject to three to ten years’ imprisonment.<sup>27</sup> However, if the “circumstances of the crime” are “serious” or “grievous bodily injury or death has been caused,” the offender is subject to a sentence of at least “ten years’ [imprisonment], life imprisonment or death.”<sup>28</sup> The law does not define “serious” or “grievous bodily injury.”

Because of the problems in applying this vague provision, the 1997 Law attempted to clarify “serious” and “grievous bodily injury” by listing eight provisions authorizing the death penalty for certain types of robbery.<sup>29</sup> However, a closer examination reveals that the eight provisions of 1997 Law are equally vague and nearly as broad. A review of several cases below shows that China uses the death penalty extensively for robberies. The cases also shed light on how the Criminal Law fails to deter criminals from committing crimes more serious than robbery during the commission of robbery.<sup>30</sup> The government does not publicize all cases involving the death penalty, particularly those involving criminals who have committed relatively petty crimes.<sup>31</sup>

*1. The Robbery Provisions are Vague and Give Courts Broad Discretion to Impose the Death Penalty*

The basic elements of robbery in the 1997 Criminal Law are larceny (theft) combined with the use of violence or coercion.<sup>32</sup> As in the 1979 Criminal Law, basic robbery is subject to three to ten years’ imprisonment.<sup>33</sup> Attempting to clarify “serious or grievous injury,” the 1997 Law listed eight provisions under which robbery is subject to at least ten years’ imprisonment, life imprisonment, or death.<sup>34</sup> A closer look at the eight

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<sup>27</sup> 1979 Criminal Law, *supra* note 10.

<sup>28</sup> *Id.*

<sup>29</sup> See 1997 Criminal Law, *supra* note 3, art. 263(1)–(8).

<sup>30</sup> See discussion *infra* Part IV.B.

<sup>31</sup> Virgin K.Y. Ho, *What is Wrong with Capital Punishment? Official and Unofficial Attitudes Toward Capital Punishment in Modern and Contemporary China*, in *THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVES* 274, 279 (Austin Sarat & Christian Boulanger eds., 2005). Consequently, these cases are by no means exhaustive or representative of a statistical proportion of cases where the death penalty was applied. Rather, they are illustrative of how the criminal law is applied and of the criminal law’s deficiencies.

<sup>32</sup> 1997 Criminal Law, *supra* note 3, art. 263.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* art. 263(1)–(8).

provisions under Article 263 governing robbery shows that nearly all forms of robbery are still punishable by death.<sup>35</sup>

The first, second, and third provisions under Article 263 cover all burglaries,<sup>36</sup> robberies committed on public transportation,<sup>37</sup> and bank robberies.<sup>38</sup> The fourth provision states that “multiple robberies” and robberies involving “large sums of money” are punishable by death.<sup>39</sup> In 2005, the Supreme People’s Court clarified that “multiple robberies” means three separate robberies that involve different locations, intentions, and times.<sup>40</sup> This is a similar policy to the “three strikes and you’re out” criminal law policy adopted in some jurisdictions in the United States.<sup>41</sup> The difference is that an individual who commits robbery three times in China may be subject to the death penalty.<sup>42</sup>

Courts interpret “large sums of money” loosely. One striking example from 2004 involved two robbers targeting taxi drivers.<sup>43</sup> They stole approximately seventy dollars and a cell phone from a taxi driver, then placed the driver in the trunk of the car and escaped. One month later, they took approximately four dollars and a cell phone from another taxi driver, then threw her in a nearby river. Neither taxi driver died, yet the court sentenced both robbers to death for stealing a total of seventy-four dollars and two cell phones.

The fifth provision adopts the vague 1979 provision regarding “serious” injury, and makes robbery punishable by death when the robbery involves “serious injury or death to another person” in the course of committing a robbery.<sup>44</sup> Again, the 1997 Criminal Law does not define “serious injury,” and courts have applied a broad interpretation. In 2006, officials in Henan Province executed four men for stealing hundreds of tons of crude oil by drilling holes in pipelines, even though no one was injured in

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<sup>35</sup> China does not make all criminal cases publicly available or publish official statistics on the types of crimes or cases that receive the death penalty. See Ho *supra* note 31.

<sup>36</sup> 1997 Criminal Law, *supra* note 3, art. 263(1).

<sup>37</sup> *Id.* art. 263(2).

<sup>38</sup> *Id.* art. 263(3).

<sup>39</sup> *Id.* art. 263(4).

<sup>40</sup> Opinion on Robbery and Forcible Seizure, (Supreme People’s Court, June 8, 2005), [http://www.chinacourt.org/flwk/show1.php?file\\_id=107473](http://www.chinacourt.org/flwk/show1.php?file_id=107473).

<sup>41</sup> See, e.g., 18 U.S.C. § 3559 (1994).

<sup>42</sup> 1997 Criminal Law, *supra* note 3, art. 263(4).

<sup>43</sup> Yongsheng Zhang, *Nan zi qiangjie chuzu che jiang nu si ji kunbang hou touru Huang He* [Men Rob Female Taxi Driver and Throw Her Into the Yellow River], LANZHOU MORNING POST, Apr. 12, 2006, <http://news.sina.com.cn/s/2006-04-15/23599629147.shtml>.

<sup>44</sup> 1997 Criminal Law, *supra* note 3, art. 263(5).

the process.<sup>45</sup> In 1996, the Henan provincial court sentenced the leader of a criminal gang to death after his gang was found guilty of committing eighteen counts of burglary worth more than six thousand dollars where there was no indication that anyone was injured.<sup>46</sup>

## 2. *Robbery-Murder Cases Demonstrate the Flawed Penalty Structure*

Robbery-murder is a felony-murder in which the commission of a robbery results in death.<sup>47</sup> Typical robbery-murder cases involve situations where robbery was the intended crime and murder was committed to improve the chance of escape by killing witnesses. For example, in 2005, criminals in Chongqing involved in a robbery were sentenced to death for stealing goods and then killing witnesses to the robbery.<sup>48</sup> In 2006, four unemployed migrant workers were executed for robbing a van driver and later killing him.<sup>49</sup> The two criminals additionally kidnapped two college students and extorted approximately \$8750 from their relatives. In 2005, on the same day, a court in Fujian sentenced to death a man who robbed and later killed a prostitute, and a prostitute who robbed and later killed a customer.<sup>50</sup> The two criminals were executed shortly before National Day in October 2005.<sup>51</sup>

One particular robbery-murder case in 2005 clearly connects the legal implications of robbery, murder, and the flawed penalty structure.<sup>52</sup> Three unemployed men in eastern Jiangxi Province decided to rob their neighbor's house. One of the men, Liao Hui, suggested killing anyone in the house after the robbery. His two accomplices disagreed, saying that they were afraid to murder people, but agreed to go ahead with the robbery. The robbery occurred two days later, and the three obtained approximately \$5084 from the neighbor. During the robbery, the female owner of the house and

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<sup>45</sup> *Four Executed for Stealing Oil from Pipelines in China*, GERMAN PRESS AGENCY, Oct. 26, 2006, [http://rawstory.com/news/2006/Four\\_executed\\_for\\_stealing\\_oil\\_from\\_102622006.html](http://rawstory.com/news/2006/Four_executed_for_stealing_oil_from_102622006.html).

<sup>46</sup> *Henan Court Sentences Criminals to Death, Imprisonment*, WORLD NEWS CONNECTION, Dec. 6, 1996, at 1, available at DIALOG, File No. 985.

<sup>47</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 556 (LexisNexis, 4th ed. 2006).

<sup>48</sup> *Robbers Kill Two, Injure One in China's Chongqing Municipality*, WORLD NEWS CONNECTION, May 16, 2005, at 1-2, available at DIALOG, File No. 985.

<sup>49</sup> *China Executes Four for Killing, Kidnapping, Robbery*, WORLD NEWS CONNECTION, June 9, 2006, at 1, available at DIALOG, File No. 985.

<sup>50</sup> *Man Who Impersonated Official Among 26 Executed in PRC Ahead of National Day*, WORLD NEWS CONNECTION, September 29, 2005, at 1-2, available at DIALOG, File No. 985.

<sup>51</sup> See discussion *infra* note 132 (noting that executions tend to increase around national holidays).

<sup>52</sup> Jun Xie, *3 Wuye nan 67 dao jiesha lingju muzi san ren, yishen beipan sixing* [Three Unemployed Men Kill Neighbors, a Woman and Her Son, By Stabbing Them Sixty-Seven Times], JIANGNAN CITY NEWSPAPER, Oct. 10, 2006 available at <http://news.eastday.com/eastday/node79841/node79860/node165110/u1a2368104.html>.



her two sons confronted the three intruders. Liao Hui killed the woman and insisted that his accomplices kill the sons, but they refused. Liao Hui then killed both of the sons. The court sentenced all three individuals to death.

This case demonstrates the Criminal Law's flawed penalty structure for two reasons. First, the two men who intended to commit the less harmful crime, robbery, gained no benefit from their restraint because the current penalty scheme punishes robbery and murder with death. The men would have had a much stronger argument not to commit murder if only murder, not robbery, was punishable by death. Second, the man who committed murder had incentive to hedge his bets against vague provisions for robbery. If an individual cannot reasonably predict the punishment for a crime, the current law provides an incentive to err on the side of caution, which for the criminal means killing any potential witnesses and thus causing more harm to society.

### 3. *Attenuated Connections to Robbery Are also Punishable by Death but Are an Ineffective Deterrent*

The sixth, seventh, and eighth provisions of Article 263 make robbery punishable by death where the offender impersonated a police officer or serviceman,<sup>53</sup> committed robbery with a gun,<sup>54</sup> or committed robbery of materials used for emergency rescue or disaster relief.<sup>55</sup> In 2000, seven members of a gang were executed in the southern city of Kunming for impersonating military personnel, robbing, and then killing the victims.<sup>56</sup> On the use of guns, cases confirm that courts will impose the death penalty for the corollary activity of selling or providing guns to robbers. In 1997, several unemployed migrants in Beijing were sentenced to death after providing guns that were later used by third parties in armed bank robbery.<sup>57</sup>

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<sup>53</sup> 1997 Criminal Law, *supra* note 3, art. 263(6).

<sup>54</sup> *Id.* art. 263(7).

<sup>55</sup> *Id.* art. 263(8).

<sup>56</sup> *Kunming Holds Public Execution of Seven Killers*, WORLD NEWS CONNECTION, Nov. 17, 2000, at 1, available at DIALOG, File No. 985 (20,000 Kunming residents attended their public trial, evidence of the high public support for the death penalty). Recent campaigns have targeted criminal gang activity. In 2004, eight members of a criminal gang in Wenzhou were executed after a crime spree in which they stole approximately \$2415 and snatched mobile phones and valuables from at least 120 people. Some of the victims were killed. *Eight Members of Crime Gang Executed in Eastern China*, WORLD NEWS CONNECTION, Aug. 23, 2004, at 1, available at DIALOG, File No. 985.

<sup>57</sup> *Three Executed in Beijing*, WORLD NEWS CONNECTION, Mar. 25, 1997, at 1, available at DIALOG, File No. 985.

In 2006, a peasant from Guangxi was punished for making and selling guns out of his home.<sup>58</sup>

Imposing the death penalty for corollary crimes of owning and producing guns may be an attempt to curb violent crime. Over the last several years, the government has targeted violent crime as the focus of police resources and strike-hard campaigns.<sup>59</sup> The current criminal law is vague enough that these corollary crimes may be punished by death under the provisions for robbery or in a catch-all sweep during a strike-hard campaign.<sup>60</sup> But based on the rising robbery rates, it is far from certain that punishing corollary crimes to robbery will deter those who actually commit the robberies.

#### 4. *The 1997 Criminal Law Further Increased the Severity of Robbery's Penalty by Abolishing Parole*

The 1997 Criminal Law raised the price of committing robbery, hoping to improve deterrence by tightening parole provisions.<sup>61</sup> Under the 1979 Criminal Law, all criminals on fixed term imprisonment were eligible for parole once they served more than half of their original sentence and showed "true repentance" for their crime.<sup>62</sup> The 1997 Criminal Law modified this provision by prohibiting parole for criminals sentenced to more than ten years for violent crimes, and specifically listed robbery as a violent offense.<sup>63</sup>

These parole reforms track similar views held toward plea-bargaining in criminal systems such as in the United States.<sup>64</sup> Some Chinese scholars posit that "plea-bargaining distorts the correct relationship between social harm and criminal liability" by letting the defendant receive lesser punishment for a crime.<sup>65</sup> In short, once an offender commits a robbery, the chances of being imprisoned and staying in prison for the full term are high, which further increases the price of committing the crime.

The 1997 revisions removed the 1979 provision permitting the death sentence where the "circumstances of the crime" are serious. However,

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<sup>58</sup> *Roundup Report of Crime and Punishment monitored in PRC 15 May - 05 Jun 06*, WORLD NEWS CONNECTION, June 14, 2006, at 4, available at DIALOG, File No. 985.

<sup>59</sup> *2004 Work Report*, *supra* note 9 (emphasizing the use of strike-hard campaigns and the focus on curbing violent crime).

<sup>60</sup> 1997 Criminal Law, *supra* note 3. See also discussion *infra* Part III.

<sup>61</sup> *2001 Work Report*, *supra* note 9; *2004 Work Report*, *supra* note 9.

<sup>62</sup> 1979 Criminal Law, *supra* note 10, art. 73.

<sup>63</sup> 1997 Criminal Law, *supra* note 3, art. 81.

<sup>64</sup> KEITH & LIN, *supra* note 1, at 161.

<sup>65</sup> *Id.*

robbery is still ultimately punishable by death for all burglaries and bank robberies, attenuated use (or sales) of guns, any amount of money defined as “huge,” or if a court finds that an injury in the course of the robbery was “serious.” Not only did the 1997 Criminal Law have little softening effect on punishing robbery, it reemphasized the government’s intent to impose harsh penalties in an attempt to deter the rising robbery rates.<sup>66</sup>

*B. Extensive Use of Capital Punishment Is Intended to Deter Crime*

Increasing use of the death penalty reflects a belief among policy makers that the most effective way to deter rising crime is to impose a severe penalty.<sup>67</sup> Despite recent calls for reducing use of the death penalty, policy makers still believed in 1997 that the death penalty was an effective deterrent against serious crime.<sup>68</sup> The Eighth National People’s Congress strongly endorsed the position that “death sentences for existing crimes should remain unchanged to act as a forceful deterrent against wrongdoers in the new [1997] law.”<sup>69</sup>

The 1997 Criminal Law permits use of the death penalty for nearly three times as many crimes as in 1979, bringing the total number of crimes punishable by death to eighty-eight crimes, or nearly twenty-two percent of the criminal law.<sup>70</sup> The 1997 Criminal Law reaffirmed much of the language in the 1979 Criminal Law permitting use of the death penalty. Both Laws state that courts should use the death penalty only for the “extremely

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<sup>66</sup> TANNER, *supra* note 1, at 139.

<sup>67</sup> TANNER, *supra* note 1; BAKKEN, *supra* note 1, at 395-396; Marina Svensson, *State Coercion, Deterrence, and the Death Penalty in the PRC*, Paper presented to the Annual Meeting of the Association for Asian Studies, Chicago, IL (Mar. 22-25, 2001), at 2. In addition to deterrence, officials have made utilitarian arguments that capital punishment will benefit society in a time of social change and instability. Deng Xiaoping, in response to the worsening social and economic conditions in the 1980s said that the “death penalty cannot be abolished, and some criminals must be sentenced to death.” Zhiqiu Lin & Ronald Keith, *The Changing Substantive Principles of Chinese Criminal Law*, 13 CHINA INFORMATION 1, 101 (1998). Deng reaffirmed that the goal of using the death penalty was not only to punish the criminal but also to “educate” potential future criminals about the consequences of committing crime. TANNER, *supra* note 1, at 136. Guo Daohui, senior professor of law in China and close acquaintance of former premier Zhu Rongji, said with respect to the current crime wave that putting to death a number of convicted criminals, society can be cleaned of “trash,” which brings well-being to the general populace. Ho, *supra* note 31, at 278. Additionally, using the death penalty to assert state authority over the individual is a central feature of Chinese legal history. Traditional authoritative attitudes are based on the deep-rooted belief in retribution for crimes and the belief that severe penal codes are the answer to social disorder. Bin Liang, Hong Tu, Terance D. Miethe, & Lening Zhang, *Sources of Variation in Pro-Death Penalty Attitudes in China*, 46 BRIT. J. CRIMINOLOGY 119, 123 (2006).

<sup>68</sup> Lin & Keith, *supra* note 67, at 102.

<sup>69</sup> *Id.*

<sup>70</sup> CHEN, *supra* note 18, at 239 (noting that the 1979 Criminal Law provided for twenty-eight capital offenses and the 1997 Criminal incorporated an additional sixty offenses).

serious" crimes, but leaves that term undefined.<sup>71</sup> The 1997 Criminal Law also adopts the two-year suspension of the death penalty if the court does not believe the execution is immediately necessary and the convicted criminal has an opportunity for reprieve.<sup>72</sup>

According to official published statistics, China uses the death penalty more than every other country combined.<sup>73</sup> The government classifies the actual use of the death penalty as a state secret, so information on how many death sentences courts impose and for what crimes is incomplete and unreliable.<sup>74</sup> However, based on official statistics, use of the death penalty continued to rise throughout the 1990s.<sup>75</sup> In 1990, official statistics showed that 960 people were sentenced to death.<sup>76</sup> Death sentences peaked at 6100 people in 1996.<sup>77</sup> Since then, use of the death penalty has declined but has not dipped below 1990 levels.<sup>78</sup> Amnesty International estimated that 3900 people were sentenced to death in 2005 and that 1770 were executed.<sup>79</sup> Based on information from local officials and judges, however, Chinese legal experts estimate that in 2005 the number may actually be as high as 8,000-10,000 executions.<sup>80</sup>

Public support for the death penalty as a means to deter crime remains generally high.<sup>81</sup> The Ministry of Public Security surveyed 15,000 people and found that the vast majority believed the state's handling of criminals was adequate or "not tough enough."<sup>82</sup> Nearly sixty percent believed that the existing laws were "too lenient," while only two percent found the law too strict.<sup>83</sup> A separate survey of over 5000 individuals found that less than one percent believed the death penalty should be abolished, and twenty-two

<sup>71</sup> 1997 Criminal Law, *supra* note 3, art. 48; 1979 Criminal Law, *supra* note 10, art. 43.

<sup>72</sup> 1997 Criminal Law, *supra* note 3, art. 48. Under the two-year suspended death penalty, the individual has an opportunity to repent and attempt to show that they have reformed their criminal mindset. Depending on the success of reform, the death sentence may be reduced to life imprisonment or fixed-term imprisonment of at least fifteen years. See 1997 Criminal Law, *supra* note 3, art. 50.

<sup>73</sup> Amnesty International, *Death Penalty Developments in 2005*, available at <http://www.amnesty.org/deathpenalty>.

<sup>74</sup> Svensson, *supra* note 67, at 6.

<sup>75</sup> *Id.* at 10-11.

<sup>76</sup> *Id.* at 11.

<sup>77</sup> *Id.*

<sup>78</sup> *Death Penalty Developments in 2005*, *supra* note 73.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* See also *China Makes Major Shift on Execution*, N.Y. TIMES, Nov. 1, 2006, at A1.

<sup>81</sup> Lin & Keith, *supra* note 67, at 98; KEITH & LIN, *supra* note 1, at 162 (noting the "bedrock support for the death penalty among the general population"). See also Antoaneta Bezlova, *China to "Kill Fewer, Kill Carefully,"* ASIA TIMES ONLINE, Mar. 31, 2006 available at <http://www.atimes.com/atimes/China/HC31Ad01.html>.

<sup>82</sup> Borge Bakken, *Introduction: Crime, Control and Modernity in China*, in CRIME, PUNISHMENT, AND POLICING IN CHINA 14 (Borge Bakken ed., 2005).

<sup>83</sup> *Id.*

percent believed that it was not used frequently enough.<sup>84</sup> Recognizing this public support, the government frequently publishes death sentences meted out to the most heinous criminals, frequently before major public holidays to celebrate the “triumph of the State in the battle against serious crimes.”<sup>85</sup> Such high public support for the death penalty could prove to be a barrier to reform unless government leaders articulate the practical pitfalls of the penalty structure for robbery.

C. *Provisions in the 1997 Criminal Law Encourage Reform and Critics Suggest Reforming Use of the Death Penalty*

In light of the high public support for the death penalty, do death penalty reforms stand any chance of success? Among its most significant changes, the 1997 Law codified three principles commonly considered to be foundational principles of criminal law in liberal democracies.<sup>86</sup> These principles will provide reformers with legal hooks on which to hang significant policy reforms.<sup>87</sup>

First, the 1997 Criminal Law codified the principle of *nulla crimen nulla poena sine lege* (no crime or punishment without law).<sup>88</sup> This principle prevents courts from arbitrarily creating crimes retroactively. It also makes the criminal justice system more predictable in two ways: (1) it provides fair notice to individuals of the legal consequences of their actions, and (2) it allows policy makers to make better decisions because they know that their laws will not be undermined by unilaterally-created laws or punishments in any given court.<sup>89</sup>

Second, the 1997 Criminal Law adopted the principle that the law will be applied equally to all individuals.<sup>90</sup> This provision further improves predictability because it prevents individuals from evading the law based on high social or economic status and privilege.<sup>91</sup>

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<sup>84</sup> Svensson, *supra* note 67, at n. 10. One independent survey of civilians, legal experts and officials found that the majority of respondents held an affirmative view of the death penalty “unreservedly” and regard it as essential for their country. Ho, *supra* note 31, at 285. Among peasants, who comprise the majority of China’s population, most believed that “since capital punishment has been a part of the Chinese penal system since time immemorial, its continuous existence is simply a matter of course.” *Id.* at 281. The respondents who agreed with capital punishment expressed “absolute confidence” in the death penalty as an effective deterrent against crime, and as a way of safeguarding law-abiding citizens. *Id.*

<sup>85</sup> Ho, *supra* note 31; Svensson, *supra* note 67, at 14, 16.

<sup>86</sup> DRESSLER, *supra* note 47, at 41.

<sup>87</sup> KEITH & LIN, *supra* note 1, at 160.

<sup>88</sup> 1997 Criminal Law, *supra* note 3, art. 3. See also CHEN, *supra* note 18, at 236.

<sup>89</sup> DRESSLER, *supra* note 47, at 42.

<sup>90</sup> 1997 Criminal Law, *supra* note 3, art. 4.

<sup>91</sup> LUO, *supra* note 19, at 9.

Third, Article Five states that the severity of the punishment shall be “equivalent” to the crime committed.<sup>92</sup> Although the Law does not define “equivalent,” the provision helps counter a rise in “neo-traditional ‘heavy penalty-ism,’” which some thought harkened too closely to feudal criminal law.<sup>93</sup> Further, the provision gives reformers a hook on which to hang arguments that the criminal law may in some cases, such as robbery, punish individuals too harshly.<sup>94</sup>

On the punishment side, the 1997 Criminal Law made subtle changes that allow courts to apply punishments more selectively. It increased the types of punishments available to courts. These punishments include criminal detention, fines, and confiscation of property.<sup>95</sup> In several provisions, the Law also varies the length of imprisonment by limiting prison time for certain crimes.<sup>96</sup> The 1997 Criminal Law abolished the requirement that the execution be performed with a bullet to the back of the head,<sup>97</sup> and the use of the death penalty for minors (under the age of eighteen) and pregnant women.<sup>98</sup>

Besides the 1997 Criminal Law, legislators enacted major reforms related to the death penalty intending to ensure that courts apply it more uniformly. These reforms will likely lower the overall number of state executions.<sup>99</sup> In late 2006, the Standing Committee of the NPC passed legislation giving the Supreme People's Court final review for all death penalty cases because leaders thought that provincial courts imposed the death penalty too widely and arbitrarily.<sup>100</sup> Xiao Yang, President of the Supreme People's Court, commented that the move was an “important procedural step to prevent wrongful convictions.”<sup>101</sup>

This legislation is in line with calls for reform by critics of the death penalty. Critics contend that expansion of the death penalty is contrary to

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<sup>92</sup> 1997 Criminal Law, *supra* note 3, art. 5.

<sup>93</sup> KEITH & LIN, *supra* note 1, at 21.

<sup>94</sup> KEITH & LIN, *supra* note 1, at 160.

<sup>95</sup> 1997 Criminal Law, *supra* note 3.

<sup>96</sup> Compare, e.g., 1979 Criminal Law, *supra* note 10, art. 151, with 1997 Criminal Law, *supra* note 3, art. 264 (1997 Criminal Law expanding and clarifying punishment for grand larceny).

<sup>97</sup> 1979 Criminal Law, *supra* note 10, art. 45.

<sup>98</sup> 1997 Criminal Law, *supra* note 3, art. 49.

<sup>99</sup> Susan Jakes, *China's Message on the Death Penalty*, TIME MAGAZINE, Nov. 3, 2006 available at <http://www.time.com/time/world/article/0,8599,1554379,00.html>.

<sup>100</sup> *China Makes Major Shift on Executions*, N.Y. TIMES, November 1, 2006. See also Decision of the Standing Committee of the National People's Congress Concerning Amendments to the Law of the Organization of Courts, (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 2006, effective Jan. 1, 2007) available at [http://www.gov.cn/jrzq/2006-10/31/content\\_429258.htm](http://www.gov.cn/jrzq/2006-10/31/content_429258.htm).

<sup>101</sup> *China Makes Major Shift on Executions*, *supra* note 100.

recent statements from party leaders to “kill fewer, kill less.”<sup>102</sup> Responding to the 2006 legislation, Xiao Yang stated that “[i]n cases where the judge has legal leeway to decide whether to order death, he should always choose not to do so.”<sup>103</sup> Those who oppose the 1997 Criminal Law’s expansion of capital crimes argue that the move “undermine[s] the Party policy of ‘not abolishing the death penalty, but limit[ing] its application.’”<sup>104</sup>

Successful criminal law reforms in the past were based on gradual, piecemeal policy reforms grounded in pragmatism.<sup>105</sup> Some scholars now advocate reform of the death penalty from a pragmatic perspective. They believe the new legislation created more problems and failed to deter crime, which may be a subtle reference to the newly adopted principle that the punishment should fit the crime.<sup>106</sup> Other scholars support abolition of the death penalty for non-violent crimes, specifically economic crimes like tax fraud and embezzlement.<sup>107</sup> Ma Kechang, a Chinese professor of law, argues that extensive use of the death penalty may have actually contributed to the occurrence of more serious crime because authorizing capital punishment for so many crimes encourages criminals to commit the more serious crimes.<sup>108</sup> Others claim that the deterrent rationale panders to the public’s taste for retribution against criminals, but does not necessarily deter crime.<sup>109</sup> Instead, China should “reduce [its] overreliance on the death penalty by adopting as many other methods of punishment as possible to alleviate the problem of crime.”<sup>110</sup>

In sum, the 1997 Criminal Law laid an important foundation for reform. Even though it retains extensive use of the death penalty for robbery, lawmakers can argue from textual and pragmatic positions that the death penalty should be reformed for robbery. Case studies further confirm

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<sup>102</sup> Xingliang Chen, *An Examination of the Death Penalty in China*, 36-37 CONTEMPORARY CHINESE THOUGHT 3, 36 (2005).

<sup>103</sup> Jane McCartney, *Innocent Man Who Made China Rethink Death Penalty*, THE TIMES ONLINE, Nov. 20, 2006 available at <http://www.timesonline.co.uk/article/0,,3-2461218,00.html>.

<sup>104</sup> Lin & Keith, *supra* note 67, at 101. See also Bezlova, *supra* note 81.

<sup>105</sup> Peerenboom, *supra* note 16, at 229. See also KEITH & LIN, *supra* note 1, at 165 (reforming the criminal law in China is not a matter of wiping the slate clean to start over, but is rather a “messy palimpsest where old characters are only partially erased and new characters are scribbled over the remnants of still visible old characters.”).

<sup>106</sup> Chen, *supra* note 102, at 37.

<sup>107</sup> See ZHAO BINGZHI, ON THE ROAD TOWARD ABOLITION OF THE DEATH PENALTY FOR NON-VIOLENT CRIMES (2004); Chen, *supra* note 102, at 39; KEITH & LIN, *supra* note 1, at 163 (noting that “practically no other country applies the death penalty in cases of non-violent economic crime.”).

<sup>108</sup> Ma Kechang, *Jiade gaige lidu, xiugai, wanshan xingfa* [Expanding the Strength and Power of Reform, Revising and Perfecting the Criminal Code], FAXUE [Law], No. 11, 4-11 (1996). See also discussion *infra* Part IV.

<sup>109</sup> Chen, *supra* note 102, at 37.

<sup>110</sup> *Id.*

that authorizing the death penalty for robbery may lead to greater social harm than intended, and that, in light of rising crime, the death penalty has not been an effective deterrent.

### III. STRIKE-HARD CAMPAIGNS DO NOT EFFECTIVELY DETER CRIME

The Criminal Law authorizes capital punishment as a legal attempt to deter crime. The policy-based attempt by law enforcement agencies to deter crime is through “strike-hard” campaigns. However, these campaigns also fail to deter robbery and other serious crimes. The government should reform these campaigns to improve deterrence.

#### A. *The Purpose of Strike-Hard Campaigns is to Enact Swift and Severe Punishment to Deter a Particular Crime*

The first strike-hard campaign occurred in 1983, but they have become a permanent fixture in the Chinese legal system.<sup>111</sup> The central government initiates new campaigns periodically, which are then implemented by provincial and local authorities. Nationwide campaigns were implemented in 1983-1987, 1990, and 1996.<sup>112</sup> The campaigns are characterized by “mass arrests, swift and harsh sentencing, mass rallies, extensive propaganda work, and widespread use of the death penalty.”<sup>113</sup> Extensive media coverage about the arrests and sentencing focuses on death penalty cases and seeks to reinforce the strength of the state, educate people, and deter future individuals from committing the same crime.<sup>114</sup>

The last national strike-hard campaign targeting robbery and other violent crimes occurred in 2001.<sup>115</sup> But provincial campaigns targeted toward a particular type of robbery are a constant presence.<sup>116</sup> In one local campaign, officials in two provinces recently encouraged police to shoot and kill bag snatchers on the spot and advocated imposing the death penalty if

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<sup>111</sup> Svensson, *supra* note 67, at 3.

<sup>112</sup> Murray Scott Tanner, *Campaign-Style Policing in China and Its Critics*, in CRIME, PUNISHMENT AND POLICING IN CHINA, 171 (Borge Bakken ed., 2005).

<sup>113</sup> Svensson, *supra* note 67, at 3.

<sup>114</sup> *Id.* at 3, 6; Tanner, *supra* note 112, at 171.

<sup>115</sup> KEITH & LIN, *supra* note 1, at 147.

<sup>116</sup> Beijing recently initiated a campaign to crackdown on “theft, robbery, and fraud” that involved 1200 plain-clothes police officers spreading out over the city. *261 Suspects Arrested In Beijing's New Campaign Against Street Crimes*, WORLD NEWS CONNECTION, Oct. 23, 2006, at 1, available at DIALOG, File No. 985.



the case went to trial.<sup>117</sup> The recent “Iron Eagle” campaign focused law enforcement efforts on preventing robberies committed on public transportation, resulting in 3504 arrests in ten months.<sup>118</sup> Trumpeting the success of the campaign before the National Holiday in October (when passenger rates on trains will rise), officials declared that trains were “basically clear of robbery.”<sup>119</sup> Without providing statistics, and considering the economic motives for making such a statement, the government may have intended the announcement to pander to nationalistic sentiment rather than to accurately describe reduction of train robberies.

The purpose of the strike-hard campaigns is to impose swift and severe punishment to deter crime over the long run and to reinforce the authority of the state.<sup>120</sup> The deterrence rationale holds—“rather simplistically”—that a severe penalty will deter individuals from committing crime.<sup>121</sup> When the first strike-hard campaign was launched in 1983, Deng Xiaoping stated, “only by being severe can we cure crime for good.”<sup>122</sup>

The majority of death sentences handed down during the campaigns are for robbery, murder, and robbery-murder cases.<sup>123</sup> During strike-hard campaigns, “courts may and should lean towards the heavier punishment within the range of punishment for a particular crime that is prescribed by law.”<sup>124</sup> This creates a “tension between this policy orientation and the third general principle of the criminal law, which would require the court to attempt to individualize the punishment in accordance with the circumstances of the offender.”<sup>125</sup>

#### *B. The Strike-Hard Campaigns are an Ineffective Deterrent to Crime and Create Unintended Problems for Law Enforcement Officials*

The two main criticisms of the strike-hard campaigns are that they fail to deter crime and waste law enforcement resources. The two largest spikes

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<sup>117</sup> *Chinese Official Urges Police to Shoot Arm-hacking Bag-snatchers*, REUTERS, Apr. 6, 2006 available at <http://news.oneindia.in/2006/04/06/china-police-urged-to-shoot-arm-hacking-bag-snatchers-1144298101.html>.

<sup>118</sup> *Thousands Arrested in China for Railway, Robbery, Theft*, WORLD NEWS CONNECTION, Oct. 11, 2006, at 1, available at DIALOG, File No. 985.

<sup>119</sup> *Id.*

<sup>120</sup> Bakken, *supra* note 82, at 14.

<sup>121</sup> Tanner, *supra* note 112, at 173 (noting that the Shanghai Public Security Bureau Chief emphasized during the 1996 campaign that severity of punishment “is the most fundamental special characteristic” of strike-hard campaigns).

<sup>122</sup> Bakken, *supra* note 82, at 14. *See also* CHEN, *supra* note 18, at 240.

<sup>123</sup> Svensson, *supra* note 67, at 3.

<sup>124</sup> CHEN, *supra* note 18, at 240.

<sup>125</sup> *Id.*

in crime between 1981 and 2001 occurred shortly after two major national campaigns.<sup>126</sup> Analyzing data from the failure of the first campaign from 1983 to 1987, Chinese scholars predicted that the 1996 national campaign would also fail, which it did.<sup>127</sup> Another scholar noted that the investment in “sheer putativeness” in strike-hard campaigns is a “futile strategy” to deter crime; rather, the Party uses it to appear tough on crime and shore-up its legitimacy.<sup>128</sup>

The strike-hard campaigns waste police resources and prevent police from implementing tactics that contribute to crime prevention. One scholar interviewing a local official described the wasted resources:

“[The local police] are under terrific pressure from above to show statistical results, in particular an increase in the number of arrests and the percentage of all formally opened cases that are ‘cracked.’ Personnel and energy end up being focused almost exclusively on ‘investigation, attacks, and arrests.’ Preventative social order management activities—such as patrolling, household registration, strengthening neighborhood resident groups, and management of guns, explosives, and other dangerous materials—all slip by the wayside, with the consequences for crime that are only likely to be felt after the campaign has ended.”<sup>129</sup>

In addition, strike-hard campaigns have become too routine, undermining their deterrent purposes by making the campaigns easier to predict. Consequently, police morale and credibility are lowered.<sup>130</sup> One Anhui police officer described the five campaigns implemented by the police station in 1994, saying, “month after month we have unified operations, day after day there are ‘specialized struggles.’ There are 365 days in a year, and every one of them is supposedly the ‘key link.’”<sup>131</sup> Campaigns are often instigated at the same time, and many experienced and often more dangerous

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<sup>126</sup> Bakken, *supra* note 5, at 65 (noting spikes in crime after the 1983-1987 campaign and the 1996 campaign). See also Tanner, *supra* note 112, at 181 (noting that officials noticed the upward increase after the 1983-1987 campaigns, too).

<sup>127</sup> Tanner, *supra* note 112, at 181.

<sup>128</sup> Bakken, *supra* note 82, at 21.

<sup>129</sup> Tanner, *supra* note 112, at 181-182.

<sup>130</sup> *Id.* at 178-179.

<sup>131</sup> *Id.* at 179 (additionally quoting a Harbin police officer who said that his bureau dedicated 340 days in one year to various campaigns and “specialized struggles”).

criminals are able to recognize the patterns and lay low to avoid detection.<sup>132</sup> Consequently, public officials usually will arrest “superficial” offenders to meet arrest quotas.<sup>133</sup> In itself, this is an intrinsic failure of the campaigns.

In sum, not only do the campaigns fail to deter crime, but they also cause more harm by creating the impression that crime is widespread and enforcement is weak. With crime rates rising, it is a good time for lawmakers to consider reforming the ineffective campaigns.

#### IV. CHINA’S LAWMAKERS SHOULD ADOPT NOVEL DETERRENCE THEORIES TO IMPROVE DETERRENCE OF ROBBERY

The confluence of law, economics, sociology, and psychology introduces fresh solutions to longstanding problems in criminal law, including deterrence strategies. Interdisciplinary scholarship has flourished in the United States,<sup>134</sup> and China is in a particularly ripe position to adopt reforms to its criminal law based on an interdisciplinary strategy. Although criminal law reform in China has been sporadic,<sup>135</sup> casting reforms as gradual shifts based on pragmatic solutions are more likely to gain traction with the public and help alleviate fear of being soft on crime.<sup>136</sup> Deng Xiaoping’s famous aphorism describing the virtues of pragmatism—that “regardless of the color of the cat, as long as it catches mice it’s a good cat”—provides an effective foundation for pragmatic arguments in modern China.<sup>137</sup> China should recognize advancements in deterrence strategy and, absent endogenous reasons why the same social and psychological effects would not occur in China, reform its criminal law and strike-hard campaigns to improve deterrence of robbery.

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<sup>132</sup> *Id.* (noting that most campaigns occur around Chinese holidays including the New Year, Lunar New Year, May Day, June Fourth Tiananmen Anniversary, and the October 1 National Holiday to augment feelings of nationalism).

<sup>133</sup> *Id.*

<sup>134</sup> Kahan, *supra* note 14, at 2478; Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 367 (1997).

<sup>135</sup> KEITH & LIN, *supra* note 1, at 160 (noting that reforms have often produced either “extraordinary success or failure”).

<sup>136</sup> Randall Peerenboom, *Out of the Pan and Into the Fire: Well-Intentioned but Misguided Recommendations to Eliminate All Forms of Administrative Detention in China*, 98 NW. U. L. REV. 991, 997 (2004).

<sup>137</sup> Peerenboom, *supra* note 16, at 232.

A. *China Should Reform Strike-Hard Campaigns in Favor of Order-Maintenance Policing Based on "Social Influence" Effects*

The first policy recommendation is to recognize the impact of "social influence" and abolish the strike-hard campaigns in favor of directing resources toward order-maintenance policing strategies. Social influence theory holds that the perception of widespread criminal activity induces potential criminals to commit crimes.<sup>138</sup> By "advertising" the widespread commission of a particular crime, the strike-hard campaigns inadvertently signal to potential criminals that enforcement of that crime is weak.

Empirical studies have shown that social influence is pervasive in the social, economic, and political life of a community. Social psychologists describe the phenomenon of "social influence" as "the propensity of individuals to conform to the behavior expectation of others."<sup>139</sup> Diners, for example, prefer to eat at restaurants that they perceive to be popular with other diners.<sup>140</sup> Voters will often vote for political candidates whom they believe or know are popular among other voters.<sup>141</sup> Teenage girls are more likely to become pregnant when they perceive that other teenage girls have become pregnant too.<sup>142</sup>

In criminal law, social influence theory holds that individuals are more likely to commit crimes when they perceive that criminal activity is widespread, which is the same effect as the non-criminal examples above.<sup>143</sup> Several empirical studies confirm that this phenomenon exists in criminal decision-making. People are more likely to cheat on their taxes when they think other people are cheating on their taxes.<sup>144</sup> Neighborhood crime rates have shown geographical variance in crime rates with more accuracy than individual criminal records, demographics, and law enforcement tactics.<sup>145</sup> People arrested for looting and rioting tend to have no prior criminal record, indicating that the acts of others heavily influence them.<sup>146</sup>

One experiment tested the influence of social norms on the decision to vandalize an abandoned car.<sup>147</sup> A car was placed in the middle of Stanford University campus where it remained in pristine condition for over a week.

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<sup>138</sup> Kahan, *supra* note 134, at 350.

<sup>139</sup> Kahan, *supra* note 14, at 2486.

<sup>140</sup> See Kahan, *supra* note 14, at 2486.

<sup>141</sup> See Kahan, *supra* note 134, at 353.

<sup>142</sup> See Kahan, *supra* note 14, at 2486.

<sup>143</sup> Kahan, *supra* note 134, at 350.

<sup>144</sup> *Id.* at 358.

<sup>145</sup> See Kahan, *supra* note 14, at 2486.

<sup>146</sup> *Id.*

<sup>147</sup> Kahan, *supra* note 134, at 355-56.

The researcher then smashed the windshield with a sledgehammer, at which point passersby spontaneously joined in the destruction to further vandalize the car and strip it of valuable parts. The researcher concluded that the sight of others openly vandalizing the car “released passersby from their inhibitions against vandalism and theft.”<sup>148</sup> When individuals perceived that others were profiting from crime, they joined in. Why?

The reason that the perception of widespread crime influences others to commit crime is because of criminal law’s “signaling effect.”<sup>149</sup> Individuals are likely to infer that when criminal activity is widespread, enforcement must be weak and therefore the risk of being caught is low and the potential rewards high.<sup>150</sup> The signaling effects are likely to be exceptionally potent for economic crimes such as robbery because individuals perceive that others have found a way to make a profit without paying the price of being caught. Consequently, criminal law policies that “create the impression that crime is widespread can actually increase law breaking, even if that policy efficiently maintains or even raises the expected penalty for crime.”<sup>151</sup>

The connection to China’s strike-hard campaigns targeting robbery is unmistakable. The theory predicts that even when authorities raise the expected penalty for robbery during the strike-hard campaigns, the impression that robbery is widespread implies that criminals have avoided capture for committing a crime and have thereby benefited from its commission. In turn, this leads to increased lawbreaking by other criminals after the strike-hard campaign.

Indeed, China’s robbery rates have grown exponentially in spite of the strike-hard campaigns since 1983. In fact, the two largest spikes in crime occurred after the strike-hard campaigns occurred.<sup>152</sup> Like the vandalized car at Stanford, widespread awareness that others are committing a particular crime creates a permissive environment to commit the crime, regardless of the severity of the penalty. The campaigns signal to potential criminals that robbery is a profitable crime once the campaign has concluded and authorities look the other way.

On the one hand, China’s leaders should not ignore the increase in robberies by sweeping them under the rug. On the other hand, they should not rely on a dramatic show of force through massive campaigns to deter

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<sup>148</sup> *Id.* at 356.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Kahan, *supra* note 14, at 2487.

<sup>152</sup> See discussion *supra* Part III.B.

crime. Rather, authorities should redirect their strike-hard campaign resources into other more effective means of deterrence.

One possible solution is order-maintenance policing, which social influence explains will better deter robbery. Order-maintenance policing, also known as the “broken windows” theory, holds that the prevalence of misdemeanor offenses in a community, such as panhandling, loitering, public drunkenness, and petty drug dealing, lead to a serious crime problem because of the effects of social influence.<sup>153</sup> The prevalence of disorder implies that the community tolerates disorder and is therefore more likely to tolerate crime. Otherwise stated, “[i]f a window in a building is broken *and is left unrepaired*, all the rest of the windows will soon be broken . . . . [O]ne unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing.”<sup>154</sup>

The primary indicator that crime is “tolerated or expected” in a community is the incidence of petty criminal activity and public disorder, such as unrepaired broken windows:<sup>155</sup>

“The unchecked panhandler is, in effect, the first broken window. Muggers and robbers . . . believe they reduce their chances of being caught or even identified if they operate on streets where potential victims are already intimidated by prevailing conditions. If the neighborhood cannot keep a bothersome panhandler from annoying passersby, the thief may reason, it is even less likely to call the police to identify a potential mugger or to interfere if the mugging actually takes place.”<sup>156</sup>

The policy response is thus to direct law enforcement initiatives toward preventing minor crime before it creates a permissive environment to foster more serious crime.<sup>157</sup>

New York City used order-maintenance policing widely throughout the 1990s.<sup>158</sup> New York’s implementation of the “broken windows” strategy focused on aggressive pursuit of misdemeanor crimes and public-order offenses.<sup>159</sup> During that time, the robbery rate dropped by thirty percent, and

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<sup>153</sup> GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* xv (1996); *see also* Kahan, *supra* note 14, at 2488.

<sup>154</sup> KELLING & COLES, *supra* note 153, at 19 (emphasis in original).

<sup>155</sup> Kahan, *supra* note 14, at 2488.

<sup>156</sup> KELLING & COLES, *supra* note 153, at 20.

<sup>157</sup> *Id.* at 21.

<sup>158</sup> Kahan, *supra* note 134, at 367.

<sup>159</sup> KELLING & COLES, *supra* note 153, at 26.

the burglary rate dropped twenty-five percent.<sup>160</sup> But the effect was not the same for all crimes. One study shows that while the effect on other crimes is low, a ten percent increase in misdemeanor arrests in New York decreased robbery by approximately three percent.<sup>161</sup> Even before New York adopted the “broken windows” strategy, studies showed a strong correlation between higher robbery rates and disorder across forty neighborhoods in the United States.<sup>162</sup>

Catching lawbreakers for minor crimes also turned out to have an unexpected effect on reducing more serious crime.<sup>163</sup> In many cases, the criminals jumping turnstiles in the subway or committing petty theft on the street corner turned out to be the same individuals who had already committed more serious offenses, or were more likely to commit serious offenses in the future.<sup>164</sup>

Now is an opportune time for China to implement order-maintenance policing strategies.<sup>165</sup> Public disorder of the type described above is prevalent in many urban neighborhoods. Officials recently stated that “public order disturbances” in China’s urban areas rose 6.6 percent between 2004 and 2005.<sup>166</sup> Order-maintenance policing is not inherently applicable only in the United States, and it will not be difficult for China’s leaders to link order-maintenance policing with rhetorical statements they have already made about improving public order.<sup>167</sup> Moreover, correcting policies for social influence effects and implementing order-maintenance strategies are fit for localization. The policies encourage China to weave into its

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<sup>160</sup> Kahan, *supra* note 134, at 367-68.

<sup>161</sup> Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J. L. & ECON. 235, 235, 262 (2005).

<sup>162</sup> WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* (1990) (controlling for varying crimes rates and demographic variables such as race and poverty).

<sup>163</sup> KELLING & COLES, *supra* note 153, at 21.

<sup>164</sup> *Id.* (quoting a former Chicago Police officer commenting on the broken windows theory saying that “[w]hen we stop kids from panhandling on the El [Chicago’s subway system] we are preventing robberies. . . . It’s a short step from intimidation [on the subway] to simply taking the money.” See also MALCOLM GLADWELL, *THE TIPPING POINT* 143-144 (2002) (attributing success of broken windows strategy in New York to targeting minor crimes even though serious crime was rising).

<sup>165</sup> Local Chinese officials, recognizing the failure of the strike-hard campaigns, have suggested that resources be diverted for purposes that are more useful. Liaoning Public Security Bureau Chief Guo Dawei argued in 1993 that the “concentrated attack operations” (strike-hard campaigns) should be suspended so that the bureau can focus on regular police work. Tanner, *supra* note 112 at 182.

<sup>166</sup> *China Confronts Public Disorder*, REUTERS, Jan. 19, 2006 <http://taiwansecurity.org/Reu/2006/Reuters-190106.htm>.

<sup>167</sup> See, e.g., KEITH & LIN, *supra* note 1, at 147-48 (quoting from a speech by Jiang Zemin in 2000: “Doing a good job in public order is a major social issue, and a major political issue as well. It has bearing on the fundamental interests of the masses of the people the prolonged political stability of the state, the governing status of our party, and the implementation of our party’s basic line.”).

deterrence strategy endogenous social norms, conditions, history, and culture instead of simply cross applying a U.S.-focused criminal law policy.<sup>168</sup> In terms of cost, China already allocates massive law enforcement resources for the strike-hard campaigns. Order-maintenance policing is much cheaper than imprisoning more criminals.<sup>169</sup> But until China recognizes the effects of social influence, the arguments for reforming the strike-hard campaigns in favor of order-maintenance policing will be less persuasive.

*B. China Should Discontinue Using the Death Penalty for Robbery Based on "Marginal Deterrence" Effects*

China should recognize the effects of "marginal deterrence" and the concept of "substitution effects" and abolish the use of the death penalty for robbery. This will provide a deterrent to committing murder during the robbery, and it will discourage the commission of robbery and robbery-related crimes.

Marginal deterrence theory holds that imposing the same penalty for two unequal crimes provides an incentive for a criminal to commit the more dangerous crime.<sup>170</sup> As George Stigler explained in his famous essay on marginal deterrence, "[i]f the thief has his hand cut off for taking five dollars, he had just as well take \$5,000."<sup>171</sup> By imposing the death penalty for two related but unequal crimes, such as robbery and murder,<sup>172</sup> China inadvertently provides an incentive for those who commit robbery to further commit murder because the criminal's chances of escape or identification increase by killing witnesses.<sup>173</sup> But the price that the criminal must pay is the same whether he commits robbery or murder.

Thus, there was little incentive for the four migrants from Beijing, the prostitute and the boss, and the robber in Sichuan to refrain from killing their victims.<sup>174</sup> If the penalty for robbery had been ten to twenty years in prison,

<sup>168</sup> See Peerenboom, *supra* note 16, at 231 (noting failure of policies that are simply cross applied from the United States).

<sup>169</sup> Kahan, *supra* note 134, at 373.

<sup>170</sup> Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2389-2390. Cesare Beccaria and Jeremy Bentham were the first to recognize the effects of marginal deterrence. Beccaria argued that "[i]f an equal punishment is laid down for two crimes which damage society unequally, men will not have a stronger deterrent against committing the greater crime if they find it more advantageous to do so." *Id.* at 2390. Bentham added that the goal of a criminal penalty is "to induce a man to choose always the least mischievous of two offences; therefore where two offenses come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less." *Id.*

<sup>171</sup> George J. Stigler, *The Optimum Enforcement of the Laws*, 78 J. POL. ECON. 526, 527 (1970).

<sup>172</sup> Homicide is subject to the death penalty in China. 1997 Criminal Law, *supra* note 3, art. 232.

<sup>173</sup> Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law As a Preference-Shaping Policy*, 1990 DUKE L. J. 1, 14 (1990).

<sup>174</sup> See discussion *supra* Part II.A.2.



but murder was punishable by death, perhaps they would have thought twice about killing their victims.

Substitution effects, an economic theory used to describe how consumers respond to price changes, explains another unintended consequence of imposing the death penalty on robbery. One result of a high penalty on a particular crime is that there may be an increase in criminal activity after the core crime has been committed.<sup>175</sup> In economics, the concept of substitution effects holds that at high costs, consumers will substitute one product altogether in favor of another.<sup>176</sup> In criminal law, substitution effects holds criminals may substitute one crime for another crime when facing high penalties.<sup>177</sup> The assumption is that individuals do not view the costs and benefits of a particular crime in a vacuum, but rather examine crimes in light of the costs and benefits of committing other crimes.<sup>178</sup>

The robber who is not deterred by the high penalty of death will likely find the cost of committing other crimes during the robbery to be negligible. The individual may therefore first commit the robbery, then kill the victim, assault two witnesses, and perhaps assault, rob, or kill others.<sup>179</sup> At the high price of robbery, the criminal is essentially substituting the commission of robbery for the commission of other crimes along the way, and consequently causing more harm to society. If the penalty for committing robbery is lower, the individual could still commit the robbery, but may forego commission of the other crimes because the marginal cost of committing additional crimes is much higher.<sup>180</sup> In the 2005 Jiangxi Province robbery-murder case,<sup>181</sup> the two individuals who did not want to kill the victims of the robbery would have at least had a legal rationale to attempt to prevent the killing if the penalty had been lower.

While there is no official data on the increase or decrease of crime sprees in China, the general rise in crime and the fact patterns in cases suggest that China failed to deter additional crime after the robbery because the cost of additional crime to the criminal was negligible. The “three robberies and you’re out” interpretation of the Criminal Law by the Supreme People’s Court has similar unintended consequences.<sup>182</sup> The interpretation

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<sup>175</sup> Katyal, *supra* note 170, at 2394.

<sup>176</sup> *Id.* at 2391.

<sup>177</sup> *Id.* at 2394.

<sup>178</sup> *Id.* at 2464.

<sup>179</sup> *Id.* at 2394.

<sup>180</sup> *Id.*

<sup>181</sup> See Xie, *supra* note 52.

<sup>182</sup> See *supra* note 40.

may deter the reformed criminal from committing the third robbery, but if the individual commits the third robbery it will likely cause more social harm than if the penalty were kept the same as it was for the other two robberies.<sup>183</sup>

Abolishing the death penalty for robbery may not appear to deter robbery initially because the penalty is lower, but over the long run it should deter more potential robbers. The reason is because the price of escape—killing witnesses—will have been raised compared the price of committing a robbery. An individual will be less likely to commit a robbery in the first place if the cost of escape is much higher. However, even if the robbery is committed, the incentive not to commit murder after the robbery is higher, which reduces harm to society. Combined with the “broken windows” policing strategy discussed above, the result should be more effective deterrence for robbery and robbery-murder.

High public support for the death penalty in China means the death penalty will probably remain for some crimes. However, the government has enacted incremental changes and revisions to the death penalty, and the legal hooks for arguing that the punishment does not fit the crime are in place.<sup>184</sup> Asking the government to argue from a moral standpoint is unlikely to succeed, at least in the short-run. But once China's leaders recognize the significance of marginal deterrence effects, abolishing the death penalty for robbery becomes a gradual and pragmatically justifiable policy. Pragmatic arguments have carried the day in China,<sup>185</sup> and will perhaps have a greater impact on popular understanding and willingness to reform.

## V. CONCLUSION

China has failed to deter robbery since embarking on economic reforms in the early 1980s. The government pursued a two-pronged strategy to deter crime: China's Criminal Law stipulates that robbery will receive the death penalty in most cases, and the government has implemented strike-hard campaigns to exert swift and severe penalties on robbers. However, both of these strategies have failed.

Instead of maintaining an ineffective deterrence strategy, China should reform its Criminal Law and strike-hard campaigns in an effort to better deter robbery. First, China ignores the effect of social influence on the

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<sup>183</sup> Katyal, *supra* note 170, at 2394.

<sup>184</sup> See discussion *supra* Part II.C.

<sup>185</sup> Peerenboom, *supra* note 16, at 232.

decisions of criminals to commit crimes. China should recognize these effects and should reform or abolish its use of the strike-hard campaigns in favor of order-maintenance policing. Second, Chinese lawmakers disregard the effects of marginal deterrence and substitution effects. The severe penalty for robbery may be responsible for the amount of robberies and murders committed. Abolishing the death penalty for robbery may lower the rates of both of these crimes.

Successful reforms in China will not come overnight. Public support for criminal law reform is generally low, because most citizens view reform as softening the system rather than strengthening it.<sup>186</sup> Policy changes require a long-term shift in the way that China conceives of and practices criminal justice. As such, immediate results should not be expected as changes in the law “trickle down” to street-level criminals.<sup>187</sup> Successful reforms to China’s criminal law have been inconsistent.<sup>188</sup> But gradual shifts in policy couched in pragmatic terms are likely to gain public support and alleviate fear of criminal law reform.<sup>189</sup>

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<sup>186</sup> *Id.* at 228-229. See also LUO, *supra* note 19, at 12.

<sup>187</sup> See Katyal, *supra* note 170, at 2447-55 (arguing that information about criminal penalties “trickles down” to street level criminals and thus shapes their future preferences and criminal activity).

<sup>188</sup> KEITH & LIN, *supra* note 1, at 160 (noting that reforms have often produced either “extraordinary success or failure”).

<sup>189</sup> Peerenboom, *supra* note 136, at 997.