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KILLING A CHICKEN TO SCARE THE MONKEY: THE UNEQUAL ADMINISTRATION OF DEATH IN CHINA

Jessica J. Shen †

Abstract: China’s frequent usage of the death penalty in order to achieve deterrence of crime is well known to the international community; however, China also has a strong tradition of legal mercy stemming from imperial rule. In turn, imperial legal mercy originated from Confucian values of benevolence and humaneness. Although modern China emerged as a rejection of Imperial China’s Confucian hierarchal social structures, these cultural traditions have endured. For example, Confucianism’s humane influence can be seen in statutory and procedural mechanisms demonstrating benevolence towards criminals. However, only applying this benevolence to a select group of people betrays modern China’s statutory and political objectives of egalitarianism and is inconsistent with Imperial China’s use of legal mercy.

China creates a contradiction in its criminal justice system when it grants legal mercy for corrupt government officials but not for those convicted of other serious crimes. Although China has made great strides in curtailing death penalty sentences, only exercising benevolence toward a certain group of people contradicts the cultural, philosophical, and legal principles of benevolence and egalitarianism. As a result, if legal mercy is applied to anyone, it must be applied to all, not just those with political power. The current usage of legal mercy for corrupt officials should be instructive for moving towards a more merciful system for all.

I. INTRODUCTION

In July 2013, China’s former Railways Minister, Liu Zhijun, was given a suspended death sentence for corruption and abuse of power, including accepting bribes totaling more than USD 10 million over twenty-five years in exchange for government rail contracts. The high-speed railway network under Liu Zhijun’s purview experienced numerous safety scandals involving a series of accidents. In July 2011, a train crash in Wenzhou killed forty people due to design flaws and lax security standards. This scandal is merely one example in a pattern of corruption stemming from China’s transition into a market economy in the 1980s, which increased the typical citizen’s standard of living and granted local officials an

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2 Id.

enormous amount of power that many exploited for financial gain. Since then, China has been plagued with abuses of power by hundreds of officials at high levels of government, including provincial vice-governor and vice-minister. Between December 2012 and June 2013, almost 2,300 officials have been penalized for graft and wasteful spending. As the most high profile official to be found guilty of corruption under Xi Jinping’s administration, Liu’s conviction coincides with Xi Jinping’s pledge to crack down on corruption, taking on the “powerful ‘tigers’ at the top to the ‘flies’ at the bottom of the Communist Party.” Indeed, Liu Zhijun’s indictment alleged that his negligence led to huge losses of public assets as well as damage to state and citizen interests. Although the law permitted a death penalty sentence for extreme corruption, the court showed Liu Zhijun mercy in issuing a suspended death sentence because those are generally commuted to life imprisonment.

Liu Zhijun’s suspended death sentence is merely one example of a trend where Chinese courts take “a different approach” in sentencing corrupt government officials compared with the general population.

China’s leniency towards corrupt government officials stands in stark contrast with the vast amount of people executed in general. Although the Chinese government classifies the full scope of its death penalty usage as a state secret, even official statistics chronicle increasing numbers of executions throughout the 1990s. This trend has continued into the twenty-first century; since at least 2005, China has had the most confirmed executions in the world. Amnesty International reported that China likely executed between 1000 to 2000 people a year between 2005 and 2013, but
because death penalty figures are a state secret the total number may be much higher.\textsuperscript{14} In March 2004, Chinese media published an unofficial report finding that the courts sentence 10,000 people to death every year in China, not including people sentenced to death with two-year suspensions.\textsuperscript{15} The Dui Hua Foundation\textsuperscript{16} estimated that China executed as many as 12,000 people in 2002, 8000 people in 2005, 6500 people in 2007, 4000 people in 2012,\textsuperscript{17} and 3000 people in 2013.\textsuperscript{18} In contrast, Iran—the country with the second greatest number of executions between 2005 and 2013—executed at most around 388 people a year.\textsuperscript{19} Additionally, while the United States executed a total of 1373 people since 1976,\textsuperscript{20} official statistics reveal that China executed 6100 people in 1996 alone.\textsuperscript{21}

China continues to execute a large numbers of criminals because of the longstanding belief that the death penalty serves as an effective deterrent to crime.\textsuperscript{22} In fact, common sayings include “executing one deters one hundred”\textsuperscript{23} and “killing a chicken to scare the monkey.”\textsuperscript{24} Not only do most Chinese citizens believe that the death penalty carries strong educational value, but the government utilizes the death penalty as a matter of public policy.\textsuperscript{25} Judicial officials often defend China’s usage of the death penalty by stating that the “nation is at a stage of development where the death penalty is necessary as a deterrent.”\textsuperscript{26} For example, one Chinese high court official said that deterrence is the goal because “by killing one, we educate one hundred.”\textsuperscript{27} However, there is no convincing evidence that the death penalty is an effective deterrent.\textsuperscript{28}

\textsuperscript{14} See id.
\textsuperscript{15} JIANFU CHEN, CRIMINAL LAW AND CRIMINAL PROCEDURE LAW IN THE PEOPLE’S REPUBLIC OF CHINA: COMMENTARY AND LEGISLATION 49 (Gabi Duigu eds., 2013).
\textsuperscript{19} The Death Penalty: An International Perspective, supra note 13.
\textsuperscript{21} Nestor, supra note 12, at 535.
\textsuperscript{23} Shanhe Jiang et al., supra note 22, at 864.
\textsuperscript{24} Id.
\textsuperscript{25} See id.
\textsuperscript{26} Mimi Lau, supra note 9.
\textsuperscript{27} Id.
Based on known statistics, China executed about 1.5% of its 1.35 billion person population in 2012; however, this comment does not focus on China’s general usage of the death penalty. Rather, it addresses the contradiction created in the Chinese criminal justice system when China grants legal mercy for corrupt government officials but not for those convicted of other serious crimes. Information on the exact number of death penalty sentences and how many are imposed for particular crimes is “incomplete and unreliable” because the government considers it a state secret. However, reports from both within China and in the international community raise concerns about the link between China’s death penalty usage and social inequality. In particular, the news media have noted a judicial trend granting lighter punishments for government officials or politically connected individuals, but not for those without political power. Although China has recently made great strides in attempting to curtail the total number of death penalty sentences, only exercising benevolence toward a certain group of people contradicts China’s cultural, philosophical, and legal principles of benevolence and egalitarianism.

China’s extensive tradition of legal mercy balances out the belief that the death penalty deters crime. The Confucian principle of benevolence that encouraged humaneness in the criminal justice system was prominent in imperial China and survives today, despite attacks on Confucianism in recent Chinese history. In particular, Confucian benevolence manifests in the lenient features of Chinese criminal law, especially restorative practices such as mediation and community-based corrections, as well as the focus on balancing leniency and rigidity in criminal justice policies. Despite its

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30 Nestor, supra note 12, at 535.

31 See, e.g., Mimi Lau, supra note 9.

32 Id.

33 See infra Part IV.A.


35 Id. at 24.

36 See id.

37 Id. at 24.

38 Victim-offender mediation is often practiced to seek a settlement in less severe or misdemeanor cases. Id. at 25. It requires the voluntary participation of the offender and victim, compliance with the relevant laws and regulations, and that either party can suspend mediation to seek formal trial. Id.

39 Id. at 26.

40 Id. at 27.
extremely high number of executions, China recently made efforts to curb its use of the death penalty, to debatable effect. However, the general consensus that use of the death penalty deters crime still drives court convictions. Given that more executions likely do not achieve deterrence and the deep-rooted influence of Confucian legal mercy, it would better serve both Chinese cultural traditions and the goal of deterrence to apply benevolence to everyone, not just corrupt government officials.

Part II of this comment explains why deterrence cannot justify harsh death penalty policies. Part III describes the endurance of the traditional Confucian value of benevolence through balancing severity and mercy. In particular, this demonstrates the importance of preserving legal mercy in modern Chinese law. Part IV argues that failing to apply legal mercy to all criminals creates a philosophical and legal contradiction. This inequality betrays both Communist China’s goal of an egalitarian society and Confucian benevolence. Finally, Part V posits the following solutions to resolve this inequality: 1) publishing Supreme People’s Court (“SPC”) guidance cases so lower courts may better determine which cases are severe enough to warrant the death penalty, 2) mandating greater usage of mitigation factors when considering a potential death penalty case, and 3) establishing a formal clemency procedure.

II. THE DEATH PENALTY DOES NOT DETER CRIMES

Crimes rates over the past twenty-five years reveal the ineffectiveness of China’s current deterrence strategy, even official statistics reveal that crime rates have risen dramatically since the early 1980s. The Government initiated a national “Strike Hard” campaign as a response to this increase in crime, which led to widespread and extreme applications of the death penalty. This campaign encompassed mass arrests, rapid and harsh sentencing, mass rallies, and propaganda. Though it began with the strong

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43 See infra Part III.
44 See supra text accompanying note 28.
45 Nestor, supra note 12, at 525-26.
46 Id. at 526.
48 Nestor, supra note 12, at 539.
49 Id.
Legalist belief that harsh punishments deter crime, this strategy failed.\footnote{Id. at 527.} The government attempted nationwide “Strike Hard” campaigns from 1983 to 1987, as well as in 1996,\footnote{Id. at 539.} but each campaign failed to reduce the crime rate.\footnote{Id. at 539, 540-41.} In fact, the largest spikes in crime between 1981 and 2001 occurred soon after “Strike Hard” campaigns.\footnote{Id. at 541.} Chinese scholars note that focusing solely on severe punishments was a “futile strategy” to deter crime that resulted in a waste of law enforcement resources and prevented police from implementing crime prevention tactics.\footnote{Id.} In particular, preventive social order management activities such as patrolling, strengthening neighborhood resident groups, and managing guns “slip by the wayside” because local police are under “terrific pressure from above to show statistical results.”\footnote{Id.} Instead, law enforcement personnel focus their energy “almost exclusively” on investigation, attacks, and arrests in order to adhere to the “Strike Hard” campaign’s mandate.\footnote{Id.} In hindsight, the “Strike Hard” campaigns significantly increased the number of capital sentences.

Although there is much debate over whether the death penalty actually deters crime,\footnote{NAT’L RESEARCH COUNCIL, supra note 28, at 2.} research examining homicide rates in the United States demonstrates that factors other than the death penalty explain the rise and fall of crime rates.\footnote{See EDITORIALS: Evidence Does Not Support Death Penalty as Deterrent, supra note 28.} California, New York, and Texas all experienced a rise in homicides in the late 1970s and late 1980s, before the rates declined dramatically.\footnote{Id.} From 1974 to 2009, all three states’ homicide rates “tracked virtually identically.”\footnote{Id.} However, while Texas executed 447 people during that period, California only executed thirteen people and New York executed no one.\footnote{Id.}

Like the United States, China witnessed an increase in crime in the late 1980s.\footnote{Nestor, supra note 12, at 526.} The parallel data can be attributed to the demographics of juveniles at the time: as China’s juvenile delinquency rate rose, baby-boomers entered the age range of fourteen to twenty-five, the age range in which people are statistically most likely to commit crimes.\footnote{Bakken, supra note 47, at 68-69.} Not only did
the population of fourteen to twenty-five year-olds rise dramatically from 120 million to 272 million between 1965 and 1987, but the juvenile crime rate decreased from seventy-six percent in 1988 to forty-two percent in 2001. The decline in juvenile crime correlates with the baby-boomer generation aging out of that fourteen to twenty-five year-old range. As a result, the passage of time is the probable explanation for the rise and fall of crime rates in China, not the frequency with which the government invoked the death penalty.

The absence of correlation between the increased usage of the death penalty and a decrease in crime demonstrates that, at the very least, officials should not use the death penalty specifically to deter crime. If the Chinese government is willing to attempt reforms for the economic crimes of corrupt public officials, then it must also improve sentencing procedures to properly exercise the principle of benevolence for everyone else. Otherwise, punishing ordinary citizens without political power under the guise of deterring serious violent crime betrays China’s philosophical, political, and legal traditions.

III. THE REEMERGENCE OF TRADITIONAL CONFUCIAN VALUES OF DETERRENCE THROUGH SEVERITY AND MERCY IN MODERN CHINA

The current Chinese criminal justice system focuses heavily on deterrence through punitive measures. From 2006 to 2012, forty million nightly viewers watched the Chinese television series “Interviews Before Execution,” where controversial death row inmates such as a couple who killed the boyfriend’s grandmother spoke with “in-your-face” host Ding Yu about their crimes. During these interviews, Ding Yu propagated the show’s mission to deter crime by insulting inmates, informing them that they were dangers to society, and telling one man that his family had no interest in seeing him before he died. The government approved the show as a potential crime deterrent because it showed the “misery that awaits” those

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64 Id. at 69.
65 Id.
67 See Lewis, supra note 41, at 304.
69 Id.
who face the death penalty. The head of the television channel stated that it was good for society because the government “want[s] the audience to be warned . . . if they are warned, tragedies might be averted.”

Although the current attitude toward the use of the death penalty is changing, the majority of Chinese citizens still believe it effectively deters crime.

Since the overthrow of the monarchy in 1911, the Chinese government’s ideological goals and values have been in flux, often adjusting depending on the current political, social, and economic context. Communist China initially rejected Confucianism, but since the late 1970s, traditional Chinese teachings have resurfaced, ironically, to generate loyalty and preserve Party structures. Although modern China rejected imperial traditions, the “umbilical cord between the Confucian tradition and modern China . . . cannot be easily severed.” Due to its status as China’s official ideology from the second century AD to the early twentieth century, Confucianism functioned as the dominant source of Chinese cultural principles. Confucian principles are so incorporated in Chinese society that even anti-Confucian movements such as the May Fourth Movement and the Cultural Revolution did not “radically alter” these internalized elements. In fact, lawmakers ratified benevolent principles, such as mitigating factors, into the Criminal Law of the People’s Republic of China (hereinafter “Criminal Law”). Confucian principles of mercy and

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70 Mark McDonald, On a New TV Show in China, Cue the Firing Squad, N.Y. TIMES (Mar. 6, 2012), http://rendezvous.blogs.nytimes.com/2012/03/06/on-a-new-tv-show-in-china-cue-the-firing-squad/?_r=0.
71 Id.
72 See Shanhe Jiang et al., supra note 22, at 866.
74 Bin Liang et al., supra note 22, at 120.
79 Id.
80 See Zhonghua Renmin Gongheguo Xingfa (中华人民共和国刑法) [Criminal Law of the People’s Republic of China] (promulgated by Order No. 83 of the President of the People’s Republic of China, Mar.
benevolence also exist in various legal provisions and criminal justice system practices such as mediation\(^\text{81}\) and community correction.\(^\text{82}\) Although initially thrown out as a source of social inequality, traditional Confucian values and ideology “remain a driving force in Communist China even without official recognition.”\(^\text{83}\) Not only did A) Imperial China utilize a balance of severity and legal mercy as an essential component of its criminal justice system, but B) this tradition of legal mercy endures despite recent attempts to eradicate all traces of Confucianism from modern China.

A. Imperial China Utilized a Balance of Legalist Severity and Confucian Humaneness in Its Criminal Justice System to Achieve Deterrence

Criminal law formed the basis of China’s ancient legal system.\(^\text{84}\) Since Imperial Chinese law intended to “control undesirable social behavior as well as change people’s hearts,”\(^\text{85}\) lawmakers sought to deter crime.\(^\text{86}\) The emphasis on deterrence in Imperial China’s criminal justice system stems from the combined influence of Confucianism and Legalism on Imperial China’s customary legal thought.\(^\text{87}\) Confucianism advocates legal humanism,\(^\text{88}\) believing that the social order could be maintained with “exemplary conduct” by the emperor\(^\text{89}\) and “willingness to compromise” by the people.\(^\text{90}\) Even when people broke the law, Confucianism dictated that the punishment be appropriate to the educational reform of the individual.\(^\text{91}\) On the other hand, the Legalist school of thought contends that only extreme brutality and torture deters crime.\(^\text{92}\) Although Chinese emperors ostensibly acted on their beliefs that harsh punishments deter crime,\(^\text{93}\) Confucianism’s


\(^{81}\) Jianhong Liu et al., supra note 34, at 24.

\(^{82}\) Id. at 26.


\(^{85}\) Xin Ren, supra note 83, at 42.

\(^{86}\) Confucius advocated education as a means of preventing crime. Jianhong Liu et al., supra note 34, at 21.

\(^{87}\) LiYing Li & Yue Ma, Adjudication and Legal Reforms in Contemporary China, 26 J. Contemp. Crim. Just. 36, 37 (2010).


\(^{89}\) Id. at 368.

\(^{90}\) Id.

\(^{91}\) Id.


\(^{93}\) Bin Liang et al., supra note 22, at 120.
emphasis on benevolence and humanism often led to mitigation of the punishment’s severity, as well as amnesties.\footnote{Bakken, supra note 92, at 38.} As a result, throughout its long history, Imperial China did not rely on the rule of law to maintain order. Instead, it utilized Confucianism and Legalism as a “double source of authority” in which the former’s focus on self-regulated morality and behavior was thought to provide enough incentive to avoid the latter’s ruthless punishments.\footnote{LiYing Li & Yue Ma, supra note 87, at 37.} Thus, Imperial Chinese law only applied to individuals who did not adhere to Confucianism’s code of ethics, which emphasized social harmony above all else.\footnote{Id. at 39.} The law did not protect civil liberties, because individual rights were not as important as harmony.\footnote{Id. at 38.}

Even though deterrence remained the ultimate goal,\footnote{Bakken, supra note 92, at 38.} there was also a strong tradition of mercy, flexibility, and compassion in Imperial China.\footnote{Id.} Authorities’ methods of achieving deterrence were more varied.\footnote{Id.} Officials in Imperial China extensively exercised legal mercy, which stemmed from Confucian principles.\footnote{Id. at 37.} Official records document thousands of amnesties granted to “the whole empire,”\footnote{Id. at 38.} including pardoning criminals, commuting their sentences, and extending “special benefits to reabsorb [them] back into the society.”\footnote{SRI NI SITARAMAN, STATE PARTICIPATION IN INTERNATIONAL TREATY REGIMES 222 (2013).} Not only did this practice enable emperors to represent themselves as merciful and just, but it also “demonstrated the redemptive power of the Confucian morality and humanitarianism.”\footnote{Id.} As a result, legal mercy mitigated Legalism’s harsh punishments to create a balanced use of the double source of authority\footnote{See LiYing Li & Yue Ma, supra note 87, at 37.} in order to deter crime.\footnote{See Bakken, supra note 92, at 38.} In fact, some analysts contend that early modern Western Europe used the death penalty and torture more frequently and publically than Imperial China.\footnote{Id. at 36, 37.} Additionally, a Tang Dynasty emperor briefly abolished the death penalty from 747 to 759 AD.\footnote{Id.} The regularity of granting ordinary amnesties that reduced criminal penalties as well as “great acts of mercy”\footnote{“Great acts of mercy” completely forgave an individual for their crime. Id. at 38.} varied
depending on the dynasty, but Imperial China consistently practiced each until the end of imperial rule in 1911.

Imperial law generally ignored the offender’s mental condition, but officials utilized mitigating factors such as the offender’s pregnancy, age, or disability in granting mercy or remission of the penalty. The application of mercy depended on the Confucian tradition of moral self-internalization. In other words, if a criminal voluntarily surrendered, admitted guilt, and demonstrated repentance, authorities would grant him mercy. Imperial China’s criminal justice system emphasized waiting a reasonable period of time for repentance or confession so people could reflect on the nature and consequences of their actions. This principle even allowed criminals to be tried for fleeing from the authorities rather than for their original crime if they were captured by authorities before the time limit for reflection expired.

Confucianism’s “profound impact on the ancient Chinese legal system” as a source of Imperial China’s tradition of mercy can be seen in the gradual adoption of more lenient means of dealing with criminal cases after the Western Han Dynasty. Emperor Han Wen Di (180-157 BC) abolished corporeal punishment during his reign after the case of “Ti Ying saving her father.” When Ti Ying’s father committed a crime deserving the punishment of having his nose cut off, Ti Ying appealed to the emperor by arguing that a person could not recover from such a punishment and offered herself as a slave in exchange for mercy. Ti Ying’s filial piety compelled the emperor to abolish all corporal punishment. Deterrence “was always the goal of punishment,” but Imperial China also utilized “more elaborate means to supplement such deterrence by benevolence.” Thus, although deterrence remained the main priority in determining

110 Id.
112 XIN REN, supra note 83, at 41.
113 Id. at 42.
114 Id.
115 Id.
116 Id.
117 Jianhong Liu et al., supra note 34, at 23.
118 Id.
119 See id. at 21 (explaining that Ti Ying argued such a permanent punishment would not be conducive to education and reform, which are integral to Confucianism: because if her father committed the same crime in the future, then he would have no nose to cut off).
120 Id. at 23.
121 Filial piety is an ethic of Confucianism. Id.
122 Bakken, supra note 92, at 38.
123 Id.
punishments, the frequent use of legal mercy in Imperial China demonstrates that the Chinese legal tradition never advocated for only granting the harshest punishments in order to achieve deterrence.

B. Confucianism’s Influence Remains Embedded in Chinese Law and Culture Despite Prior Anti-Confucian Movements

Some scholars contend that Confucianism’s benevolence and Imperial China’s exercise of legal mercy have been lost in modern society. In 1949, the Communist Party’s victory in the Chinese Civil War initiated a philosophical severance with Confucianism. In spite of this severance, Confucianism has “a profound influence in shaping Chinese legal thinking and criminal justice practices,” which is reflected in the current trend of handling a large portion of minor criminal cases through extra-legal means, such as mediation. Therefore, the main themes of Legalist severity and Confucian benevolence still resonate in current Chinese criminal law.

1. The Communist Party of China Explicitly and Violently Rejects Confucian Principles

After the Communists came into power in 1949, “the old legal machinery was officially abolished and condemned as a political accessory of the . . . regime that had suppressed and exploited the working class.” The Communist Party attempted to sever China’s “innate connection” with Confucianism by emphasizing the philosophy’s elitism and political hierarchy. Initially, Marxism exerted a humanizing influence on China’s criminal justice system because Marxism viewed the death penalty as a cruel punishment that should be abolished. The Communist Party even formally suggested that the death penalty be abolished in 1922. However, this view lost influence during the subsequent periods of war and revolution. Criminal law became an “important weapon for class struggle,” particularly through severe punishments for those people

\[\text{id.}\]
\[\text{Id. at 37.}\]
\[\text{Id. at 34, at 20.}\]
\[\text{Id. at 28.}\]
\[\text{See id.}\]
\[\text{Id. at 24; see also Lewis, supra note 41, at 317.}\]
\[\text{XIN REN, supra note 83 at 47.}\]
\[\text{Id. at 48.}\]
\[\text{Bakken, supra note 92, at 39.}\]
\[\text{Id.}\]
\[\text{Id.}\]
considered enemies of the state. The Communist Party had no incentive to use legal mercy because China’s penal law primarily sought to “suppress the enemies and protect the people.” Although Chinese-Marxist discourse frowned upon the use of the death penalty, the new regime continued to use it, claiming that it was necessary “at this stage of development.”

Mao Zedong’s political and societal sway during the Cultural Revolution, from 1966 to 1976, also contributed to the declining influence of Confucian legal mercy in modern Chinese criminal law. Although Mao Zedong viewed the death penalty as a limited tool to be used against counter-revolutionaries, he nevertheless advocated that the people take revenge upon their former oppressors through executions. Mao Zedong justified this position by citing the death penalty’s deterrent and punitive effects, asserting that, “it is necessary to create terror for a while in every rural area” to constrain the landlords’ exercise of power, as well as to “assuage the people’s anger.” During this period, mercy acquired a negative connotation; one Cultural Revolution slogan stated that “to show mercy to the enemy is to show cruelty to the masses.” Mao Zedong’s framing of the Cultural Revolution as a battle between friends and enemies of the people transformed the revolution’s understanding of crime from something merely prohibited by the state to something deviant and evil.

Even after the Cultural Revolution, the government had little use for Confucian mercy, because the death penalty became a “visible means of social control” largely driven by political, social, and economic conditions. The government framed the 1983 “Strike Hard” campaign as a response to increased criminal activity. However, it was truly meant to suppress unruly youth and reinforce the party’s legitimacy by proving that the government was in control of the negative social consequences of its economic reforms. During this period, more crimes became punishable by death and provincial courts obtained the power of the Supreme People’s
Court to reevaluate death penalty sentences.\(^{147}\) Many have been troubled by “wrongful convictions and inconsistent imposition” of the death penalty by provincial courts.\(^ {148}\) Thus, allowing provincial courts to review these sentences resulted in an increased number of executions.\(^ {149}\) Additionally, authorities played up the inflated crime rates, but in actuality, China’s crime rates in 1983 were the lowest since 1979 and among the lowest in the world.\(^ {150}\) Simultaneously, judicial corruption and the ambiguous wording in the Criminal Law led to a rash of inconsistent and unjust sentences, frequently including executions for petty crimes, such as car theft, purse snatching, and infamously, pinching a woman’s buttocks.\(^ {151}\)

The absence of legal mercy also caused the government to focus its usage of the death penalty on portions of the population without political power. Although officials exaggerated the overall crime rate, juvenile crime rates did rise, making juvenile gangs the primary targets.\(^ {152}\) Authorities executed gang members as young as sixteen, but these sentences did not deter crime because gang networks multiplied.\(^ {153}\) The government also worried about increases in economic crime, but anti-crime campaigns particularly targeted juvenile gang leaders rather than corrupt officials or businessmen.\(^ {154}\) This reaction can be attributed to “moral panic about disorderly youth in a rapidly changing society,”\(^ {155}\) a moral panic brought about by the destruction wrought by Mao Zedong’s teenage Red Guards during the Cultural Revolution that ended in 1976.\(^ {156}\) With his fears exacerbated by the rise in juvenile crime, Party Leader Deng Xiaoping concluded that public executions would be the “indispensable means” through which the public would be educated on the consequences of not following party policy.\(^ {157}\) However, instead of deterring crime, China’s crime rate rose dramatically after the early 1980s, right when the “Strike Hard” campaign began, and the number of death sentences carried out peaked at 6100 in 1996.\(^ {158}\) By initiating national “Strike Hard” campaigns that primarily targeted youths, the government rejected Confucianism and

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148 Id. at 75-76.
149 Id. at 65.
150 Bakken, supra note 47, at 68.
151 Id. at 80.
152 Bakken, supra note 47, at 67; Nestor, supra note 12, at 539.
153 Bakken, supra note 47, at 68.
154 Id. at 67.
155 Id.
157 Bakken, supra note 47, at 79.
158 Nestor, supra note 12, at 526, 535.
embraced the death penalty as the primary means of deterrence and social control, a strategy that ultimately did not achieve the desired results.\footnote{159}{See supra Part II.}

2. **Confucianism’s Influence Endures in Current Mechanisms of Legal Mercy and Political Principles, Despite Attempts to Eradicate It**

Although the rehabilitation of Confucianism has been slow within the Communist Party,\footnote{160}{Confucius Makes a Comeback, ECONOMIST (May 17, 2007), http://www.economist.com/node/9202957.} the Chinese government recently “provided qualified support for the Confucius revival.”\footnote{161}{Dexter Roberts, Confucius Makes a Comeback in China, BLOOMBERG BUS. WEEK (Nov. 1, 2012), http://www.businessweek.com/articles/2012-11-01/confucius-makes-a-comeback-in-china.} In 2007, former President Hu Jintao promoted a series of official slogans with Confucian undertones, such as “harmonious development.”\footnote{162}{Id.; Confucius Makes a Comeback, supra note 160.} Additionally, more people study Confucius’ works, and the Party publicly supports Confucius’ philosophy by sponsoring commemorations of Confucius and embracing Confucian values even at the Party’s administrative levels.\footnote{163}{See Maureen Fan, Confucius Making a Comeback in Money-Driven Modern China, WASH. POST (July 24, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/07/23/AR2007072301859.html (noting that in one county of Henan Province, officials seeking promotions are evaluated by friends, relatives, co-workers, and members of the public on how well they care for their parents. Thus, whether or not they get a promotion depends on how well they embody the Confucian values of filial piety and family responsibility).} This resurgence can be attributed to people seeking “ways to adapt to a culture in which corruption has spread and materialism has become a driving value”\footnote{164}{Id.}—two issues President Xi Jinping pledged to tackle in his current campaign against corruption.\footnote{165}{See China Ex-Rail Minister Given the Suspended Death Sentence, supra note 1.} Political corruption greatly contributed to the widening income gap and was the “root cause of its disintegrating social safety net and the prevailing political apathy.”\footnote{166}{Ying Zhu, supra note 78.} In other words, the Chinese people seek a body of ethical principles that will, as President Xi Jinping puts it, “promot[e]…morality across society . . . [and stress] the importance of cultural prosperity.”\footnote{167}{Xinhua Insight: China Sees Renewed Enthusiasm for Confucius, XINHUA (Dec. 7, 2013), http://news.xinhuanet.com/english/china/2013-12/07/c_132949742.htm (last visited Apr. 23, 2014).} These principles include an emphasis on order, balance and harmony, as well as respect for authority and concern for others.\footnote{168}{Confucius Makes a Comeback, supra note 160.}
Although the rise of Communism eradicated the social and political structure of traditional Confucianism, its principles “remain inherent in Chinese psychology and underline East Asian people’s attitude and behavior.”\(^{169}\) Marxism’s status as a new political ideology necessitated a pre-existing foundation upon which its principles could be successfully absorbed into Chinese culture.\(^{170}\) Confucianism’s “long inculcation” allowed for an easier adoption of Marxism-Leninism, particularly since the Marxist atheist tradition focusing on changing the present world “is analogous to the Confucian secular thinking of world harmony.”\(^{171}\)

Elements of Confucianism still exist in present Communist doctrines and principles, or implicitly in the underlying structure of society.\(^{172}\) For example, Confucian benevolent principles can be seen in the Criminal Law’s prohibition against executing children under eighteen and women who are pregnant at the time of trial.\(^{173}\) Article 67 of the Criminal Law reflects the Confucian practice of exercising mercy to those who confess and repent,\(^{174}\) which provides that someone who voluntarily surrenders and truthfully confesses to their crime “may be given a lighter or mitigated punishment.”\(^{175}\) A “relatively minor” crime may also be exempted from punishment completely.\(^{176}\)

Additionally, Confucian legal mercy endures in formal mechanisms emphasizing education through benevolence rather than severity. Confucianism advocates education as a means of deterrence.\(^{177}\) Likewise, mediation stems from Confucian principles because the process seeks to restore a broken relationship by respecting the feelings and humanity of both the victim and the offender.\(^{178}\) Additionally, in 2003 the Chinese government officially adopted community correction and initiated pilot

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\(^{169}\) Hang Lin, *supra* note 77, at 6-7.

\(^{170}\) XIN REN, *supra* note 83, at 48.

\(^{171}\) Id.

\(^{172}\) Hang Lin, *supra* note 77, at 7.


\(^{174}\) XIN REN, *supra* note 83, at 42.


\(^{176}\) Id.

\(^{177}\) Jianhong Liu et al., *supra* note 34, at 21.

\(^{178}\) See id. at 24-25.
programs in six provinces and municipalities. After prisons release criminals on parole, they can serve out the rest of their sentence through community service. Similarly, community correction centers provide temporary accommodation and skills training for people who leave prison with little support system. The Sunshine Midway House in Beijing, designed to accommodate 5000 people, refers to attendants as “trainees” to “ensure their human dignity.” Since then, the successful practice of community corrections, which “reflects the restorative values of . . . traditional Confucianism in building a harmonious society,” continues to expand. Community correction programs expanded to all thirty-one Chinese provinces in 2009.

Finally, just as Imperial China balanced Legalist severity and Confucian mercy, the current “integration of leniency and rigidity” acts as the “basic criminal justice policy in China.” Members of the October 2006 Sixth Plenary Session of the Sixteenth Central Committee of the Communist Party of China clearly advocated this stance by suggesting reforms of the juvenile justice system and expansion of the community correction mechanisms. Even the Sunshine Halfway House recognizes that they must provide both warmth and seriousness towards their trainees because “community correction is still a form of penalty.” The Chinese Criminal Law frequently uses terms such as minor, relatively minor, relatively serious, and particularly serious to denote mitigation and aggravation factors. This all indicates that Chinese criminal law does include Confucian principles of benevolence.

IV. APPLYING LEGAL MERCY TO A SELECT GROUP OF PEOPLE CREATES A PHILOSOPHICAL CONTRADICTION AND PRACTICAL INCONSISTENCIES

Given the fundamental Confucian principle of benevolence and the frequent use of legal mercy for all types of crimes in Imperial China, the
Confucian principles inherent to Chinese society connect to the Chinese government’s goal of egalitarianism.\textsuperscript{190} Egalitarianism “accompanied China’s Communist revolution,” even if it did not apply in practice.\textsuperscript{191} In particular, Mao Zedong was “obsessed with trying to create a more egalitarian social order,” even in comparison with the Soviet Union.\textsuperscript{192} Although Deng Xiaoping’s economic reforms largely eroded Mao Zedong’s socialist ideals after the Cultural Revolution, current President Xi Jinping demonstrated an “egalitarian streak” in addressing concerns over the growing wealth gap in China.\textsuperscript{193} This includes his clampdown against lavish spending by the government, excessive waste of food, and political corruption.\textsuperscript{194} Similarly, although a “clear tension” exists between the elitist and egalitarian principles in Confucianism,\textsuperscript{195} the philosophy does place a “very high priority on the welfare of the citizenry.”\textsuperscript{196} As a result, the current application of benevolent Confucian principles in China should be extended to all criminals potentially facing the death penalty, not just those with power or money.

Equality before the law is both an international human rights norm\textsuperscript{197} and an important feature in the Criminal Law. Article 4 states that the “law shall be applied equally to anyone who commits a crime,”\textsuperscript{198} stressing that “no one shall have the privilege of transcending the law.”\textsuperscript{199} Ideally, this would prevent individuals from evading negative repercussions by exploiting their high social or political privileges.


\textsuperscript{191} Yu Xingzhong, Citizenship, Ideology, and the PRC Constitution, in CHANGING MEANINGS OF CITIZENSHIP IN MODERN CHINA 288, 303 (Merle Goldman & Elizabeth J. Perry, eds., 2002).


\textsuperscript{193} O’Reilly, supra note 190.

\textsuperscript{194} Id.

\textsuperscript{195} DANIEL A. BELL, CONFUCIAN POLITICAL ETHICS 34 (2010).

\textsuperscript{196} Mark Setton, Confucian Populism and Egalitarian Tendencies in Tonghak Thought, 20 E. ASIAN HIST. 121, 122 (2000).


\textsuperscript{199} Id.
Under the Chinese Criminal Law, both economic and violent crimes can merit the death penalty.\(^{200}\) Article 48 of the Criminal Law states that the death penalty “shall only be applied to criminals who have committed extremely serious crimes.”\(^{201}\) Courts can grant death penalty sentences for economic crimes like embezzling more than 100,000 yuan,\(^{202}\) as well as violent crimes such as homicide\(^{203}\) or rape\(^{204}\) in certain circumstances. The Criminal Law does not distinguish between violent and economic crimes in capital cases, allowing a two-year suspension of execution if the court does not deem immediate execution necessary, and mandating that all death sentences be submitted to the SPC for verification and approval.\(^{205}\) In a 2006 opinion, the SPC emphasized the need to differentiate treatment of convicted criminals, requiring courts to look at “both the offense’s harm to society and the individual characteristics of the defendant.”\(^{206}\) However, this recommendation appears to benefit only corrupt government officials for whom the death penalty is a possibility, but almost never a reality.\(^{207}\)

Judges’ use of benevolent principles in death penalty cases for corrupt government officials but not for others, in spite of the identical legal frameworks that govern both, violates the right of equality before the law. Although Communist China initially rejected Confucianism as propagating elitism and hierarchal authoritative structures,\(^{208}\) Confucian principles of benevolence and humaneness remain a strong influence on modern Chinese law.\(^{209}\) Recently, China attempted to balance severity with leniency by decreasing death penalty application.\(^{210}\) However, the failure to apply benevolent principles to all those who commit crimes that may result in the death penalty\(^{211}\) betrays both the Chinese legal traditions of leniency and the Communist goal of equality under the law.\(^{212}\) Despite A) China’s recent attempts to curb its usage of the death penalty, B) courts do not apply benevolent principles in all cases of violent crime, C) resulting in an unequal

\(^{200}\) See, e.g., id. at Art. 236, 239, 383(1).
\(^{201}\) Id. at Art. 48.
\(^{202}\) Id. at Art. 383(1).
\(^{204}\) Id. at Art. 236.
\(^{205}\) Id. at Art. 48.
\(^{206}\) Lewis, supra note 41, at 318.
\(^{207}\) See Ji Zhebu, supra note 66.
\(^{208}\) See Xin REN, supra note 83, at 47.
\(^{209}\) See Hang Lin, supra note 77, at 6-7.
\(^{210}\) See infra Part IV.A.
\(^{211}\) See infra Part IV.B.
\(^{212}\) See infra Part IV.C.
application of the death penalty that proves inconsistent with the Chinese legal and cultural tradition.

A. China’s Attempts to Decrease the Use of the Death Penalty in Recent Years Indicates Mindfulness of the Balance of Severity and Leniency

Although scholars and lawmakers continue to debate how to properly balance leniency with severity, the Chinese government’s recent measures “aimed at reducing the number of capital sentences” evidences its efforts to implement this balance. The SPC issued a 2010 report directing lower-level courts to “ensure the death penalty only applies to a very small number of criminals who have committed extremely serious crimes,” and to limit sentences mandating immediate execution. In 2011, China reduced the number of offenses punishable by death from sixty-eight to fifty-five. This reduction mainly eliminated the death penalty for certain economic and non-violent offenses, such as smuggling cultural relics, and gave provincial courts the option of granting two-year suspended death sentences if the courts do not deem immediate execution necessary. If an inmate behaves well during the two years, his or her sentence can be commuted to life, which generally amounts to a twenty-five year sentence. In addition, the SPC aimed to strengthen and limit the application of the death penalty by reforming the trial procedures for death penalty appeal cases, as well as detailing rules on conducting death penalty review and specific evidence rules.

However, critics point out the rarity of an appeals court overturning a lower court’s death penalty sentence. Furthermore, economic crimes such as tax fraud, smuggling of cultural relics, and tomb robbing rarely results in

213 Jianhong Liu et al., supra note 34 at 28.
215 Id.
216 Hogg, supra note 42.
217 Richburg, supra note 214.
219 Id.
220 JIANFU CHEN, supra note 15, at 52-53.
the death penalty.\footnote{222} Amnesty International criticized the reduction in crimes punishable by death as “legal housekeeping,”\footnote{223} although it is possible that legislators concluded that these crimes involve less harm than violent crimes and thus do not merit the death penalty.\footnote{224} Yet, the fact that China’s executions still number in the thousands demonstrates that China may not have succeeded in substantially lowering the number of executions each year.\footnote{225}

B. Courts Do Not Apply Benevolent Principles to All Persons Accused of Violent Crimes, Including Non-Public Officials Who Allegedly Killed in Self-Defense

Hou Qinzhi became the first person to benefit from the provincial courts’ ability to sentence people to a two-year suspended execution.\footnote{226} A court convicted him of stabbing an inspector during a brawl.\footnote{227} Courts have not applied the same benevolence, however, in all cases involving violent crimes. For example, in September 2013, the SPC upheld the death penalty for Xia Junfeng, a street vendor who claimed that he had stabbed two local officials to death in self-defense after they repeatedly beat him.\footnote{228} Although the Court ruled that there was no evidence of self-defense,\footnote{229} Xia Junfeng’s case sparked backlash from thousands of people, including human rights lawyers in China who stated that the uncertainty in the case should have prevented the SPC from approving an immediate execution.\footnote{230} Although legal experts identified holes in the prosecution’s case, including a lack of credible witnesses and contradictory statements, the state executed Xia Junfeng.\footnote{231}

\footnote{222} Hogg, supra note 42.  
\footnote{223} Id.  
\footnote{224} In recent years, National People’s Congress members have advocated for the abolition of the death penalty for corruption related crimes using this reasoning. Zhang Guifeng, Multiple Paradoxes on “Abolishing the Death Penalty for Corrupt Officials”, 41 CHINESE SOC. & ANTHROPOLOGY 45, 45 (2009).  
\footnote{225} See The Death Penalty: An International Perspective, supra note 13.  
\footnote{226} Richburg, supra note 214.  
\footnote{227} Id.  
\footnote{230} Chinese Father Who Stabbed Two Officials to Death in ‘Self-Defence’ is Executed despite Public Outcry, supra note 228.  
\footnote{231} Id.
In addition, in 2012 the government executed Li Yan for murdering her husband who frequently beat her and inflicted other abuse, such as cutting off one of her fingers, stubbing cigarettes out on her face, and locking her outside in the freezing Sichuan winter for hours.\textsuperscript{232} Li Yan sought help several times from the police who took photographs of her injuries, but otherwise did nothing.\textsuperscript{233} When Li Yan asked local justice department officials about a divorce, they told her that she would be left destitute unless her husband agreed to one, so “she was better off tolerating the abuse.”\textsuperscript{234} The local women’s federation and neighborhood committees merely informed her that they could not intervene in family disputes.\textsuperscript{235} Three months after her final failed attempt to get help, Li Yan killed her husband after he drunkenly threatened to shoot her and subsequently beat and kicked her.\textsuperscript{236} Li Yan claimed the accidental killing occurred when she hit him over the head with the gun barrel to stop his abuse.\textsuperscript{237} In 2013, the SPC approved Li Yan’s death sentence\textsuperscript{238} despite outrage\textsuperscript{239} from tens of thousands of people both within and outside China who called for the halt of her execution.\textsuperscript{240}

Li Yan’s case is one of many whereas Hou Qinzhi’s good fortune is rare. Chinese courts have perpetrated a troubling trend of executing or jailing thousands of domestic violence victims who killed or injured their

\begin{itemize}
\item \textsuperscript{233} Id.
\item \textsuperscript{236} Id.
\item \textsuperscript{237} Id.
\item \textsuperscript{238} Id.
\item \textsuperscript{239} China recognizes self-defense as a justified defense absolving an individual of criminal responsibility. Zhonghua Renmin Gongheguo Xingfa (中华人民共和国刑法) [Criminal Law of the People’s Republic of China] (promulgated by Order No. 83 of the President of the People’s Republic of China, Mar. 14, 1997, effective Oct. 1, 1997), art. 20 (China), translated in http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm. Even if the self-defensive act results in death, absent an “undue defense” no criminal liability applies. Id. Furthermore, even if a justifiable defense exceeds the limits of necessity and causes serious damage, the defendant should still be given a mitigated punishment or exempted completely. Id.
\item \textsuperscript{240} \textit{China: Halt Imminent Execution of Woman Who Killed Violent Husband}, supra note 232. While much has been made over the power of public opinion in pushing Chinese judges towards harsher punishments, public opinion’s influence appears to generally wane when calling for the reversal of a capital sentence. Zuo Jianwei, \textit{The Influence of Public Opinion on the Application of the Death Penalty}, 41 CHINESE SOC. & ANTHROPOLOGY 80, 83 (2009).
\end{itemize}
abusive husbands.\textsuperscript{241} Approximately eighty percent of the female prisoners in Fuzhou, Fujian province and sixty percent of female prisoners in Anshan, Liaoning province convicted of killing or injuring their husbands were domestic violence victims.\textsuperscript{242} Out of the 121 women in Sichuan prison convicted of killing or injuring their husbands, seventy-one were given suspended death sentences or life imprisonment and twenty-eight were jailed for at least ten years.\textsuperscript{243} Li Yan’s situation is illustrative of a disturbing tendency by the courts to punish victims without taking into account the circumstances of the crime.

C. Unequal Application of Confucian Benevolence and Humanness Proves Inconsistent with Chinese Legal and Cultural Values

Modern China utilizes Confucian principles of benevolence in its criminal justice system.\textsuperscript{244} However, an inherent dissonance exists between exercising Confucian mercy and humanism for government officials by handing down mitigated punishments, but not doing so for others. Although many public officials’ crimes involve bribery, embezzlement, or collaboration scams with other officials,\textsuperscript{245} many public officials and other politically-connected individuals are treated more leniently even after committing murder.\textsuperscript{246} Not only does this betray the Chinese legal tradition of balancing severity with mercy, but only applying benevolence to those in power completely undermines the Communist Party’s current attempts to remedy growing social inequality.\textsuperscript{247}

Leniency for public officials is codified into law. For example, the 2011 Criminal Law amendment introduced a stipulation that criminals found guilty of murder, rape, or kidnapping who had their death sentences commuted must serve at least twenty-seven years in prison.\textsuperscript{248} In contrast, public officials convicted of embezzlement or bribery and given suspended death sentences are not included in the scope of the amendment.\textsuperscript{249} According to the Criminal Law, public officials with suspended death

\textsuperscript{241} Verna Yu, supra note 235.
\textsuperscript{242} Id.
\textsuperscript{243} Id.
\textsuperscript{244} Jianhong Liu et al., supra note 34, at 24, 26; XIN REN, supra note 83.
\textsuperscript{245} Professor Tian Guoliang from the Communist Party of China’s Central Party School conducted a recent study finding that high-level officials in charge of huge public resources, such as officials in the financial, railway, and safety sectors, “are more likely to be corrupt.” Tang Yue, supra note 5.
\textsuperscript{246} China Executes Street Vendor Xia Junfeng for Murder, Sparking Cries of Double-Standards of Justice, supra note 229.
\textsuperscript{247} O’Reilly, supra note 190.
\textsuperscript{248} Ji Zhebu, supra note 66.
\textsuperscript{249} Id.
sentences will only serve thirteen years in prison; however, they may be released even earlier.\textsuperscript{250} Similarly, many Chinese scholars share the view that the death penalty is “an inappropriate form of punishment for economic crimes.”\textsuperscript{251} Statistics from one province indicate that ninety percent of death penalties are imposed for crimes such as murder, robbery, rape, serious bodily injuries, and major thefts.\textsuperscript{252} However, scholars also acknowledge that, while abolition of the death penalty may be politically unrealistic, “the problem . . . is not just that it is too common; its application lacks strict control.”\textsuperscript{253}

Concerns about a lack of strict control manifest in the unequal application of sentencing procedures in embezzlement and bribery crimes. Although a court can sentence an individual who embezzles more than 100,000 yuan\textsuperscript{254} to death if the crime is deemed “especially serious,”\textsuperscript{255} courts often do not invoke this option in cases concerning public officials.\textsuperscript{256} Song Chenguang, a senior political advisor, and Han Guizhi, the former head of the advisory body of Heilongjiang province, were both convicted of accepting bribes and received the suspended death sentence.\textsuperscript{257} Former chairman of the state-run oil company, Sinopec Chen Tonghai, was also given a suspended death sentence in 2009 for accepting bribes totaling about 195.73 million yuan.\textsuperscript{258} Zheng Ziansheng, head of the Mingzhen Management Committee, was sentenced to a suspended death sentence for embezzling over one hundred million yuan and accepting over twenty million yuan in bribes.\textsuperscript{259} Suspended death sentences are normally commuted to life imprisonment; therefore, officials receiving this sentence are not expected to face execution.\textsuperscript{260} Furthermore, public officials with suspended death sentences will only serve thirteen years in prison, perhaps

\textsuperscript{250}Id.
\textsuperscript{251}Jianfu Chen, supra note 15, at 50.
\textsuperscript{252}Id.
\textsuperscript{253}Id. at 51.
\textsuperscript{254}100,000 yuan amounts to USD 16,340. Ji Zhebu, supra note 66.
\textsuperscript{256}See, e.g., China Ex-Rail Minister Given the Suspended Death Sentence, supra note 1; Tang Yue et al., supra note 5.
\textsuperscript{257}Ji Zhebu, supra note 4.
\textsuperscript{258}Tang Yue et al., supra note 5.
\textsuperscript{260}See China Ex-Rail Minister Given the Suspended Death Sentence, supra note 1.
less. In contrast, courts appear willing to execute private citizens under the same law. For example, former senior trader at a Chinese securities company, Yang Yanming, was executed for embezzling and misappropriating 94.5 million yuan in 2009, and former CEO of a state-owned gold and silver refinery, Song Wendai, was executed in 2012 for embezzling eighty-seven million yuan. Currently, the average sum of money involved in corruption cases involving high-ranking officials is 10 million yuan, or USD 1.6 million. Although many public officials’ embezzlement and bribery convictions surpass the death penalty’s statutory threshold, their crimes often do not result in a death penalty sentence. Given the fact that private citizens have been executed for embezzlement but many officials have not, Chinese courts appear to be utilizing Confucian principles of benevolence in their choice not to execute these officials.

The predominant group sentenced to death is composed of people with little education and social standing. Chinese lawyers note that “capital punishment is linked to social inequality.” Of note is the fact that courts impose the death penalty most often for violent crimes when civilians clashed with government or law enforcement officials. This difference appears gendered as well, since most women convicted of killing their husbands serve life sentences whereas most men who beat their wives serve only several years. In 2009, for example, police in the Dong Shanshan case dismissed all eight reports of domestic violence as “family

261 Ji Zhebu, supra note 66.
262 See, e.g., Mimi Lau, supra note 9.
265 Tang Yue et al., supra note 5.
266 See, e.g., China Ex-Rail Minister Given the Suspended Death Sentence, supra note 1; Tang Yue et al., supra note 5.
267 See, e.g., Badkar, supra note 259; Clifford Coonan, Two Executed as China Fraud Crackdown Continues, THE NAT’L (Aug. 6, 2009), http://www.thenational.ae/business/banking/two-executed-as-china-fraud-crackdown-continues (last visited May 6, 2014) (discussing how a businesswoman was executed for defrauding her investors of 167 million yuan in 2009).
268 See, e.g., China Ex-Rail Minister Given the Suspended Death Sentence, supra note 1; Tang Yue et al., supra note 5.
270 Mimi Lau, supra note 9.
271 Id.
problems.” After beating his wife to death, the husband merely received a jail sentence of six and a half years for “maltreatment.” Compared with Li Yan, who murdered her husband in self-defense after enduring extreme abuse, this treatment is just one instance in a trend where men and women who kill their spouses do not receive similar sentences.

Courts unequally apply Confucian benevolence in cases comparing the treatment of public officials or people of influence who commit murder and “lowly” common people who commit murder. Food vendor Xia Junfeng, convicted of “intentional homicide,” was executed for killing two officials allegedly in self-defense. In contrast, local officials who killed watermelon vendor Deng Zhengia during a violent dispute received sentences ranging from 3.5 to 11 years in prison for “intentional injury.” Parallel to Xia Junfeng’s situation, a fight escalated from Deng Zhengia’s resistance of the local officials’ enforcement of an urban code and eyewitnesses observed the entire proceeding. Although witnesses assert that an official struck Deng Zhengia on the head with a weight from his hand-held scale, police stated that Deng Zhengia merely “unexpectedly fell to the ground and died.” Just as the courts discounted holes in the case against Xia Junfeng that may have indicated his acts of self-defense were justified, the facts and surrounding circumstances were ignored here.

Comparatively, Gu Kailai, the wife of a former high-ranking Communist Party leader and daughter of a “celebrated revolutionary,” committed premeditated murder over a commercial disagreement.
Kailai killed a British businessman by pouring rat poison and cyanide mixed with water down his throat. Gu Kailai, whose mental state was taken into account by the court, was given the suspended death sentence, which will be commuted to life in prison. However, Gu Kailai could be released from jail after serving nine years on medical parole grounds. In contrast, despite the fact that the officials Xia Junfeng killed have a “reputation for heavy-handed enforcement of city ordinances,” the SPC found no evidence of self-defense in his case. Although both Xia Junfeng and Gu Kailai expressed remorse and cited self-defense, only Xia Junfeng received the death penalty.

Not executing Gu Kailai for an admittedly premeditated murder but executing Xia Junfeng in a case where the facts are in dispute can be attributed to Gu Kailai’s class background of hailing “from China’s elite” whereas Xia Junfeng comes “from the nation’s masses.”

The Chinese legal tradition consists of both severe punishment and mercy. Chinese citizens founded modern China because they were not content with societal structures that oppressed the less privileged. Although the government touts deterrence as a primary goal of China’s criminal justice system, the justification that death penalty deters crime appears to only apply to those who lack a certain social, economic, or political status. Although Xia Junfeng and Gu Kailai both killed a person, allegedly in self-defense, only the politically connected criminal still lives today. "Contrary to Chinese legal traditions of benevolence and equality under the law, the courts only applied legal mercy to one of “China’s elite.” Furthermore, given the circumstances surrounding Li Yan’s crime, executing domestic violence victims would not likely deter this particular crime."
crime. Exercising Confucian principles of benevolence and humaneness in crimes for public officials, but not for those without political or financial power, contradicts both China’s strong cultural values and the goal of equality under the law.

V. SOLUTIONS TO RESOLVING THE INCONSISTENCY BETWEEN CHINA’S UNEQUAL DEATH PENALTY POLICY AND LEGAL TRADITION

The law does not exist in a vacuum; China’s death penalty policy reflects both the social and political climate of the time. Even Chinese scholars now admit that “you cannot prove [the death penalty’s] effectiveness.” Furthermore, since deterrence does not conclusively deter crime, the Chinese government should not punish non-government officials more severely. Since the courts apply Confucian principles of benevolence to crimes committed by those in power, the courts should also extend these principles to everyone else.

Since this inequality in the administration of the death penalty often occurs at the policymaking and lower court levels, there are several steps that could rectify this problem. The Chinese government could balance severity and humanness by A) increasing transparency in court decisions in death penalty review cases, B) mandating a wider amount of mitigating factors for each individual case to ensure an appropriate sentence, and C) establishing a formal clemency process where those sentenced to death can seek pardon or commutation of their sentence after all judicial appeals are exhausted.

A. Greater Transparency Regarding SPC Decisions in Death Penalty Cases Would Improve Consistency and Fairness in Sentencing

The SPC should increase the transparency of their decisions so that lawyers, defendants, the media, and the general public understand the basis of their decision to strike down or uphold a capital sentence. The judicial system is “famously opaque, and details of the court proceedings remain impossible to verify.”

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303 Feng Yuan of the Anti-Domestic Violence Network, when commenting on the Li Yan case, stated that “[w]hen power cannot deliver justice, abused women will find their own ways of achieving justice, sadly and wrongly.” Tatlow, supra note 234.
304 Hong Lu & Lening Zhang, supra note 88, at 370.
305 Bakken, supra note 92, at 41.
review process led to uncertainty regarding the fairness and suitability of the review process.\footnote{307}

Nevertheless, the SPC should release their deliberations and reasoning for many types of capital sentence review cases, including both economic and non-economic crimes. Releasing this information would be useful for the lower courts so that they could effectively guard against unjust or overly punitive capital sentences, and it would allow parties concerned with China’s death penalty policy to examine any discrepancies in sentencing procedures.\footnote{308} Given the ambiguity in some of the statutory language, examples of what exactly constitutes a minor, relatively minor, severe, or relatively severe mitigating factor\footnote{309} would aid lower courts in properly taking those factors into consideration. Perhaps the court in Li Yan’s case considered an unknown factor that lead to the decision to uphold her sentence in the face of seemingly apparent mitigating factors. Without any way to determine the basis of the SPC’s decision, all that is left is a sense that an injustice occurred, which demonstrates a greater, troubling trend.

B. Greater Usage of Mitigation Factors in Any Individual Case Ensures Appropriate Punishment and Crime Deterrence

Amnesty International noted in a 1998 report that Chinese courts do not take mitigating circumstances into account when sentencing criminals.\footnote{310} In particular, legal experts state that judges tend to overlook the mental state of the defendants during the commission of the crime.\footnote{311} For example, Xie Shuigui received the death penalty after arranging the murder of her older brother, who used to rape and beat her, while Zhang Hanbin was executed for killing his son.\footnote{312} Zhang Hanbin tried to kill himself and his son after a series of tragic events left them unable to survive much longer.\footnote{313} The Criminal Law includes statutory mitigating factors such as age, pregnancy, mental capacity, or physical disability.\footnote{314} Additionally, an SPC 2006 opinion

\begin{thebibliography}{9}
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\item \footnote{308} Ji Zhebu, *supra* note 66.
\item \footnote{309} JIANFU CHEN, *supra* note 15, at 19.
\item \footnote{310} AMNESTY INTERNATIONAL, *supra* note 269.
\item \footnote{311} Verna Yu, *supra* note 235.
\item \footnote{312} AMNESTY INTERNATIONAL, *supra* note 269.
\item \footnote{313} Id.
\item \footnote{314} Zhonghua Renmin Gongheguo Xingfa (中华人民共和国刑法) [Criminal Law of the People’s Republic of China] (promulgated by Order No. 83 of the President of the People’s Republic of China, Mar.}
directed courts to consider both the crime’s harm to society and the particularized characteristics of the defendant during sentencing. While this mandate from China’s highest court calls for the use of mitigation factors, they may not be utilized in practice. Judges have a tendency not to consider mitigating factors such as the mental state of the defendant, particularly in non-economic crimes.

However, judges should be able to identify “crime[s] of a particularly severe nature” in order to properly calculate mitigating factors in sentencing. Certain scholars propose that the severity of economic crimes should be determined by examining the enormity of the crime, severity of personal injury and death, damaged caused to property, and the degree of subjective evil character. In order to remain true to the spirit of Article 4 in the Criminal Law, courts should also carefully consider evidentiary factors in non-economic crimes. Since the death penalty appears to exercise no conclusive deterrent effect on the commission of future crimes, the courts have no excuse to punish non-economic crimes much more harshly. Instead, the courts must ensure that the ultimate sentence is punitive to the appropriate degree.

C. Establish a Clemency Process to Seek Pardon or Commutation of a Death Sentence Consistent with International Humanitarian Norms

Many international instruments mandate the right to seek clemency through pardon or commutation of sentence after the exhaustion of judicial appeals, including the International Covenant on Civil and Political Rights, to which China is a signatory, but not a party. This respected right is so widespread that it is considered a rule of customary international law. Imperial China frequently utilized the practice of widespread

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315 Lewis, supra note 41, at 318.
316 Verna Yu, supra note 235.
318 Id.
319 See supra Part IV.
320 See supra text accompanying note 28.
323 AMNESTY INTERNATIONAL, supra note 321, at 9.
amnesties absolving criminals for all crimes, and at least had an informal means to petition the emperor in its history. However, no procedure currently exists under Chinese criminal law for those sentenced to the death penalty to seek pardon or commutation of their sentence.

Concerns such as the commonplace usage of forced confessions that lead to miscarriages of justice and potential lack of access to defense attorneys at all stages of the process necessitates a meaningful clemency process. This clemency process should not “become a meaningless formality without genuine consideration for the case.” Achieving a fair and substantive review of an applicant’s case by the courts requires allowing the applicant to raise any considerations that they find relevant, including issues that may not have been raised in the original court proceedings. Furthermore, the applicant should remain informed about their case and the execution must not take place before the clemency proceedings conclude.

VI. CONCLUSION

An inconsistency exists with the Chinese Communist Party’s campaign to address societal inequality and the legal tradition of balancing Confucian humanness and Legalist severity when the courts fail to exercise leniency for people who are not government officials or part of “China’s elite.” Article 4 of the Criminal Law of the People’s Republic of China created a statutory requirement that the law apply equally to all, regardless of privilege. Studies cannot conclusively prove that the death penalty actually deters crime. Furthermore, Confucian principles have endured in spite of Communist China’s initial rejection of the philosophy, manifesting in statutory and procedural mechanisms that promote benevolence in the criminal justice system. Imperial China granted Confucian legal mercy included all citizens. This benevolence works in conjunction with Communist China’s foundational goal of working to cease the exploitation of the many by the few in power because it extends the privilege of legal mercy to all citizens.

Only applying legal mercy for the most final of punishments—death—to people with power encompasses exactly the inequality modern China was...
founded to counteract.\textsuperscript{332} Public officials or well-connected individuals with political power receive the suspended death sentence for corruption and receive lighter penalties for acts of premeditated murder. On the other hand, an abused wife and a man who murdered his assailant after being repeatedly beaten were executed. This inequality encompasses neither the balance of humanness and severity utilized in imperial China, nor the egalitarianism sought by those who founded modern China. Since the Chinese criminal justice system primarily aims to deter crime,\textsuperscript{333} the fact that more death penalty sentences has not been proven to deter crime means that no justification exists in executing people without considering mitigation factors. Otherwise, the courts focus solely on punitive harshness, rather than actual reform and deterrence.

While the Chinese criminal justice system introduced several procedural and substantive reforms that aim to improve accountability and appropriate sentencing, an inequality still remains as to whom these reforms are applied. China can take several measures to improve equitable sentencing procedures: 1) increasing transparency by releasing SPC guidance cases concerning the death penalty so it is clear what constitute especially egregious crimes judicially interpreted to be worthy of the death penalty, 2) mandate the utilization of mitigation factors and examine the context of the crime as a whole for all cases, and 3) establish a formal clemency process to seek a pardon after exhausting all judicial appeals.

\textsuperscript{332} See supra Part IV.
\textsuperscript{333} See Shanhe Jiang et al., supra note 22, at 864; Bin Liang et al., supra note 22, at 121-22.