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Regulating Digital Platforms Through Sanctions

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REGULATING DIGITAL PLATFORMS THROUGH SANCTIONS

Michelle Miao*

Abstract: This article, theoretically and empirically, articulates the rising role of criminal law as a regulatory tool of China's digital platform economy. This unique Chinese model of digital platform governance is described as "regulation through sanctions." Through a comprehensive survey of a wide range of digital platforms—e.g., financial fundraising platforms, e-commerce, taxi-hailing, and video-sharing platforms—and criminal cases involving such platforms, I reveal the logic of regulation through sanctions: It shifts state regulatory burden and accountability, redistributes risks and responsibility, and enhances political legitimacy. Compared to the direct regulatory model adopted by European countries and indirect, self-regulatory model employed in the U.S., China's hybridity of platform governance saw the merge between direct intervention and indirect control through threats and sanctions. The centrality of criminal law as a regulatory device in the governance of platform-derived risks has been achieved through the imposition of three types of positive duties: the duty to review, the duty to manage, and the duty to protect. This legal and regulatory ecology exerts pressure on digital platforms but also allows its power to extend upward to serve public management functions as well as downward to modify individual behavior.

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INTRODUCTION

What do Baidu, Google, Alibaba, Amazon, Weibo, Twitter, Didi, and Uber have in common? They provide technological infrastructures and networks through which individuals and society have been transformed in unprecedented ways. In recent years, digital platforms¹ play the role of primary engines of economic growth and key enablers for technological innovation worldwide in weathering challenges presented by the COVID pandemic.² With the United States being the first, countries such as China have followed in its footsteps and become a global frontier for the exponential growth of digital platforms. As of 2021, a 3.4 trillion-yuan (approximately 479 billion US dollars) platform economy attracted more than 830 million users in China alone.³ The pandemic has entrenched China's reliance on technological innovations to revive its virus-hit economy and stabilize its job markets.⁴

Meanwhile, the swift expansion of the digital platforms prompts a closer examination of their burgeoning social and ethical responsibilities. In addition to risks posed to the health, safety, and well-being of platform users, billions have their data harvested and monetized under surveillance capitalism across the globe, including in China.⁵ These tectonic shifts in how tech platforms interact with society put individuals and groups at risk. However, regulatory responses from national and local governments are at best erratic, sporadic, and belated.⁶ Selective and post facto toughening of regulatory disciplines—such as the 8 billion yuan fines imposed on Didi

¹ For the purpose of this research proposal, platform economy is defined as economy based on digitally enabled frameworks that match and facilitate the interaction and collaboration of users, peers, and providers of goods, services, and technology. *See, e.g.,* Martin Kenney & John Zysman, *The Rise of the Platform Economy*, 32 ISSUES SCI. & TECH. 61, 61 (2016) (defining digital platforms as “multisided digital frameworks that shape the terms on which participants interact with one another”); Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 135 (2017) (“[T]he platform is not simply a new business model, a new social technology, or a new infrastructural formation (although it is also all of those things). Rather, it is the core organizational form of the emerging informational economy.”)

² ORG. FOR ECON. COOP. & DEV., *The Role of Online Platforms in Weathering the COVID-19 Shock* (2021), <https://www.oecd.org/coronavirus/policy-responses/the-role-of-online-platforms-in-weathering-the-covid-19-shock-2a3b8434/> (observing that “economic transactions may have shifted to online marketplaces as people and businesses increasingly turned to online platforms to pursue economic and social activities”).

³ NAT'L DEV. & REFORM COMM'N, CHINA'S SHARING ECONOMY DEVELOPMENT REPORT (2021), https://www.ndrc.gov.cn/xxgk/jd/wsdwhfz/202102/t20210222_1267536_ext.html.

⁴ *China Announces Detailed Stimulus Measures to Support Virus-hit Economy*, REUTERS (May 31, 2022), <https://www.reuters.com/markets/commodities/china-unveils-detailed-stimulus-policies-support-virus-hit-economy-2022-05-31/>.

⁵ *See generally* Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (PublicAffairs, 1st ed. 2019).

⁶ Jacky Wong, *Beijing Goes Full Nanny State on Internet Tech*, WALL STREET J. (Dec. 1, 2021), <https://www.wsj.com/articles/beijing-goes-full-nanny-state-on-internet-tech-11638353061> (mentioning the lack of clear standards to enforce).

for its infringement of personal data and state cybersecurity⁷ as well as the last-minute intervention to block Ant Finance from listing in the Hong Kong Stock Exchange⁸—only fueled controversies and confusion on why these platforms are sanctioned and whether these initiatives are meant to nurture or stifle technological innovations.⁹

This study claims that criminalization is a prominent feature of how China regulates its platform economy. Criminal law has recently assumed center stage in the governance of China's platform economy. In the first section of this article, I explain that the critical role played by criminal law is to compensate for the inadequacy of regulatory capacity and resources. First, the selective criminalization of platform-derived conducts reflects the state's need to suppress rising risks to individual and community interests triggered by disruptive technologies. Second, I highlight a symbiosis of soft regulation and harsh penalties, which characterizes the regulatory-legal landscape in China's platform age in the aftermath of economic restructuring and social change.

Following this theoretical framework of criminalization-as-regulation, in the second section, I survey recent legislative changes and jurisprudence to selectively expand the criminal liability of digital platforms. These responsibilities have grown horizontally (new types of criminal offenses), and vertically (temporally and spatially). Based on these tendencies, I highlight the rise of positive duties imposed on digital platforms. Under omission liability, three types of positive duties are identified, namely, (1) the duty to review, (2) the duty to manage, and (3) the duty to protect. High-profile cases such as the criminal sanctions imposed on Chinese P2P

⁷ *China Fines Didi \$1.2 Billion After Wrapping Year-Long Probe*, BLOOMBERG (Jul. 21, 2022), <https://www.bloomberg.com/news/articles/2022-07-21/china-fines-didi-1-2-billion-after-wrapping-cybersecurity-probe>.

⁸ *China Issues Anti-Monopoly Guidelines on Platform Economy*, GLOBAL TIMES (Feb. 7, 2021), <https://www.globaltimes.cn/page/202102/1215210.shtml>; Xinmei She et al., *China's Big Tech Faces Wake-up Call as Country's Web of Data Protection Laws Becomes More Elaborate*, S. CHINA MORNING POST (Jul. 11, 2021), <https://www.scmp.com/tech/big-tech/article/3140573/chinas-big-tech-face-wake-call-countrys-web-data-protection-laws>.

⁹ Masha Borak, *Beijing's Big Tech Crackdown Stirs A Debate over whether It's Hurting or Helping the Sector Compete with US Rivals*, S. CHINA MORNING POST (Aug. 11, 2021), <https://www.scmp.com/tech/policy/article/3144563/beijings-big-tech-crackdown-stirs-debate-over-whether-its-hurting-or>; Arjun Kharpal, *China's Move to Regulate Its Tech Giants is Part of Its Bigger Push to Become a Tech 'Superpower'*, CONSUMER NEWS & BUS. CHANNEL (Jan. 12, 2021), <https://www.cnbc.com/2021/01/11/chinas-tech-regulation-part-of-bigger-push-to-become-a-superpower-.html>; Xinmei Shen et al., *China's Big Tech Faces Wake-up Call as Country's Web of Data Protection Laws Becomes More Elaborate*, S. CHINA MORNING POST (Jul. 11, 2021), <https://www.scmp.com/tech/big-tech/article/3140573/chinas-big-tech-face-wake-call-countrys-web-data-protection-laws>.

(peer-to-peer) lending platforms,¹⁰ death sentences imposed on Didi drivers following rape and murder cases,¹¹ and the imprisonment of senior executives of Shenzhen QVOD (Kuaibo) Technology for their failure to remove user-posted pornographic content,¹² are used to illustrate criminal sanctions facing digital platforms when they fail to fulfill their expected duties in China's rapidly evolving sociolegal environment.

In the next section, I articulate that regulation through criminalization caused a tripartite shift of regulatory burden, power, and accountability. I question the appropriateness of using criminal law as a regulatory response to disruptive technologies. Ideally, criminal law should be reserved as a last resort due to its intrusive impact on individual liberty and fundamental rights.¹³ In China, however, criminal law has taken on an active role to surveil and discipline "risky" interactions between the platforms and their users. The function and nature of criminal law have been redefined in this process. Filling the gap of regulatory deficiency, criminal law has been transformed into an administrative instrument compensating state agencies' lack of expertise and capacity. In an era of a platform economy, the central goal of criminal law is neither to censure blameworthy crimes nor rehabilitate criminals. Rather, the function of criminal law rests on its utility to prevent and redistribute risks stemming from digital platforms.

This fundamental departure of criminal law from its traditional roles is what I call a "regulatory" turn of its nature and purposes. Criminal law is increasingly reliant on to control the many "risks" of the platform economy, symbolically and substantively. The role played by criminal law to regulate platform-associated risks, I argue, is both excessive and insufficient. This is due to a mismatch between the goals—regulating the

¹⁰ *China's Peer-to-Peer Lenders Are Falling Like Dominoes as Panic Spreads*, BLOOMBERG NEWS (Jul. 19, 2018), <https://www.bloomberg.com/news/articles/2018-07-20/china-s-p2p-platform-failures-surge-as-panic-spreads-in-market>.

¹¹ *Didi Blames 'Ignorance and Pride' for Carpool Murder*, BBC NEWS (Aug. 28, 2018), <https://www.bbc.com/news/world-asia-china-45337860>.

¹² Josh Chin, *The Porn Trial That's Captivating China's Internet*, WALL STREET J. (Jan. 12, 2016), <https://www.wsj.com/articles/BL-CJB-28470>; Wu Ming deng zhizuo, fuzhi, chuban, fanmai, chuanbo yinhui wupin mouli zui yishen xingshi panjueshu(吴铭等制作、复制、出版、贩卖、传播淫秽物品牟利罪一审刑事判决书) [Haidian District People's Procuratorate v. Wu Ming Deng, the First Instance Criminal Judgment on the Crime of Producing, Reproducing, Publishing, Selling, and Disseminating Obscene Materials for Profit], ((2015) 海刑初字第 512 号) [(2015) Hai Xing Chuzei Number 512], Sep. 13, 2016 (China); Wu Ming deng zhizuo, fuzhi, chuban, fanmai, chuanbo yinhui wupin mouli zui ershen xingshi caidingshu(吴铭等制作、复制、出版、贩卖、传播淫秽物品牟利罪二审刑事裁定书) [Haidian District People's Procuratorate v. Wu Ming Deng, the Second Instance Criminal Judgment on the Crime of Producing, Reproducing, Publishing, Selling, and Disseminating Obscene Materials for Profit], (2016)京 01 刑终 592 号 [(2016) Jing 01 Xing Zhong Number 592] (China).

¹³ Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. OF LEGAL STUDIES 207, 208 (2004). See also ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 33 (Oxford University Press, 6th ed. 2009).

risks inherent in a “platformized” society—and the means—coercion and deterrence.

In the last section of the article, I view the crime regulation of digital platforms in China from a comparative perspective. I explain the main differences between four models of platform governance: (1) government direct regulation, (2) government-pressured platform self-regulation, (3) platform-led self-regulation, and (4) voluntary collaboration between all parties. I explain why the Chinese platform regulation paradigm combines the first two types of governance, through which the State imposes threats of discipline and punishment on digital platforms. In response, those platforms closely monitor and regulate individual behaviors and transactions. Platform regulation in the United States, however, is more appropriately described as containing characteristics of both a collaborative model and self-regulation primarily performed by the industry. As such, this research enriches the existing literature by bringing attention to the unique Chinese approach of governing digital platforms through discipline and punishment, which has been increasingly relied on in the past decade.

I. ADDRESSING PLATFORM-RELATED RISKS WITH CRIMINAL LAW

Criminal law is pivotal in governing disruptive technologies in China. As John Braithwaite warns, ignoring the regulatory role of criminal law “impoverishes our understanding of the bigger question of how regulation works and . . . the part state punishment plays in this process.”¹⁴ While much of the existing scholarship reveals that the criminal process is shaped by broad forces such as socioeconomic marginality and welfare,¹⁵ political

¹⁴ John Braithwaite, *What's Wrong with the Sociology of Punishment?*, 7 THEORETICAL CRIMINOLOGY, 5, 13 (2003).

¹⁵ See generally Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95 (2001) (explaining, beyond penology, the role of the criminal justice system in overseeing and confining lower-income African American individuals); LOÏC WACQUANT, PUNISHING THE POOR (Duke University Press, 1st ed. 2009) (stating that neoliberalism leads to criminalizing the poor and post-industrial proletariat, rather than offering them social and economic protection); DAVID GARLAND, PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRATEGIES (Quid Pro Books, revised ed. 2018) (demonstrating how American penal policies in the early 20th century were influenced by the nation's social welfare practices).

manipulation of public fear,¹⁶ neoliberal and neo-conservative policies,¹⁷ and populism,¹⁸ relatively little attention has been paid to the role of criminal law in responding to social changes brought by the disruptive technological innovations. The intersection between criminal law and technology has garnered inadequate academic attention, with the notable exception of a valuable body of literature exploring how technological tools have been employed in the criminal process to detect, predict, and manage crimes and criminals—for example, through predictive policing and algorithm-based sentencing.¹⁹ How the reach and application of criminal law *per se* have been transformed, nonetheless, has rarely been addressed.

Using the regulation of digital platforms in contemporary China as an example, this study contributes to the existing literature by revealing, empirically and theoretically, a range of legislative and jurisprudential developments which I refer to as a “regulatory turn” of the criminal law. This regulatory role of criminal law is closely associated with three trends: (1) growing risks associated with the platformization of contemporary Chinese society, (2) the insufficiency of state and industrial regulatory responses to prevent and control such risks, and (3) social perceptions and political framing of such risks²⁰.

¹⁶ See generally DAVID GARLAND, *THE CULTURE OF CONTROL* (University of Chicago Press, 1st ed. 1995) (charting the process through which contemporary cultural meaning of crimes and criminals as well as crime control policies in Britain and America are shaped by penal politics and cultural sensibilities of the late 20th century); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (Oxford University Press, 1st ed. 2007) (tracing the historical expansion of governmental power by increasing the scope of criminalization, instilling fear of victimization, and employing the criminal justice system as a response to societal (rather than criminal) ills).

¹⁷ See Jamie Peck, *Geography and Public Policy: Mapping the Penal State*, 27 *PROGRESS HUM. GEOGRAPHY* 222, 230 (2003) (observing policy areas such as “social/penal frontier is an active zone of neoliberal statebuilding”); Imogen Tyler, *The Riots of the Underclass?: Stigmatisation, Mediation and the Government of Poverty and Disadvantage in Neoliberal Britain*, 18 *SOCIO. RSCH. ONLINE* 25 (2013) (framing of civil unrest as the riots of the underclass hides the shift from protective liberal welfarism to penal neoliberalism that controls poverty and deepening inequalities); Pat O'Malley, *Volatile and Contradictory Punishment* 3 *THEORETICAL CRIMINOLOGY* 175, 175 (1999).

¹⁸ See generally JULIAN V. ROBERTS ET AL., *PENAL POPULISM AND PUBLIC OPINION: LESSONS FROM FIVE COUNTRIES* (Oxford University Press, 1st ed. 2002); JOHN PRATT, *PENAL POPULISM* (Routledge, 1st ed. 2007); John Pratt & Michelle Miao, *The End of Penal Populism: The Rise of Populist Politics*, 2 *NOVA CRIMINIS* 15 (2018); John Pratt & Michelle Miao, *Risk, Populism and Criminal Law*, 22 *NEW CRIM. L. REV.* 391 (2019).

¹⁹ Roger Brownsword & Alon Harel, *Law, Liberty and Technology: Criminal Justice in the Context of Smart Machines*, 15 *INT'L J. L. CONTEXT* 107, 116 (2019).

²⁰ For discussions on perceptions of risk in criminology and criminal justice, see, e.g., John Pratt, *Dangerousness, Risk and Technologies of Power*, 28 *AUSTL. & N.Z. J. CRIMINOLOGY* 3 (1995); RICHARD ERICSON, *CRIME IN AN INSECURE WORLD* (Polity Press, 1st ed. 2007); Malcolm Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications* 30 *CRIMINOLOGY* 449 (1992); ANDREW ASHWORTH & LUCIA ZEDNER, *PREVENTIVE JUSTICE* (Oxford University Press, 1st ed. 2014).

A. A Risk-laden Platform Society

Recent years have seen a growing reliance on criminal law to compensate for regulatory insufficiency, including inadequate state-mandated interventions and the limited self-regulatory efforts made by the tech industry. Criminal law fills these regulatory gaps by taking on a new role to manage risks and redistribute responsibilities. The expansion of criminal law has and will continue to profoundly impact individual and societal interests.

1. From State to Platforms

A defining feature of China's pre-platform-era economy was a transition from state-run to market-run planning.²¹ A competitive market with global links was regarded as necessary and beneficial to build a vibrant Chinese economy. Since the late 1970s, state monopoly in numerous economic sectors such as labor and employment, public transportation, media, and communication—many of which are now run by digital platforms—gradually rolled back regulation to allow the market to take a front seat. The state no longer directly plans and oversees most economic activities; instead, it reasserted itself as the maker of market rules.²² The primary consequence of the withdraw of the state and the shift from state to market as the central organizer of economy activity was a rise of risk at the individual level. Rising risks accompanied a wide range of broader social changes including privatized employment, urbanization, the disintegration of local communities, and rising crime rates. In contrast to the old times, when the state was responsible for everything from cradle-to-grave, now precariousness permeates the everyday life of individuals. When risk became the new normal, a yearning for security, order, and accountability which protect individuals from uncertainty was also on the rise.²³

The state's regulatory endeavors to mitigate these risks, shackled by institutional and ideological constraints,²⁴ were hardly successful.²⁵ China's planning-economy regulatory mindset was ill-suited for the new

²¹ SUSAN L. SHIRK, *THE POLITICAL LOGIC OF ECONOMIC REFORM IN CHINA* 344 (University of California Press, 1st ed. 1993).

²² Donald C. Clarke, *Regulation and Its Discontents: Understanding Economic Law in China*, 28 STAN. J. INT'L L. 283, 322 (1991).

²³ See, e.g., HAROLD M. TANNER, *STRIKE HARD! ANTI-CRIME CAMPAIGNS AND CHINESE CRIMINAL JUSTICE, 1979–1985* 176 (Cornell East Asia Series 1st ed. 2010).

²⁴ Margaret M. Pearson, *The Business of Governing Business in China: Institutions and Norms of the Emerging Regulatory State*, 57 WORLD POL. 296, 320 (2011).

²⁵ Franklin Allen et al., *Law, Finance, and Economic Growth in China*, 77 J. FIN. ECON. 57, 73 (2005).

economic model, culminating in widespread “bureaucratic failures.”²⁶ In the absence of effective state regulations, rule by the criminal law—with its coercive and invasive mechanisms—stepped in to crack down on illegal activities which threatened individual and collective interests such as corruption, fraud, tax evasion, intellectual property infringement, stock market manipulation, poisonous and harmful goods, and pollution.²⁷ The enactment of the 1997 Criminal Law, which incorporated a variety of new crimes unseen in the pre-reform era,²⁸ was a legislative testament to the criminal law’s enlarged role in suppressing these risks when state regulation was inadequate.

Following these legislative changes, the last two decades of the 20th century saw large-scale crackdowns (known as Strike Hard Campaigns) on illegal conduct that threatened to derail China’s socioeconomic stability.²⁹ The linkage between unsuccessful regulation and stand-in criminalization was seen, for instance, when decades of flimsy environmental regulations³⁰ were replaced by a desperate resort to criminal sanctions in deterring pollution and disciplining related illegal activities which endangered the preservation of China’s environment and natural resources.³¹

2. *Two Generations of Platform-derived Risks*

The rise of the platform economy around the turn of the century, once again, aroused social concerns toward technology-associated risk. Squeezing out the already “shrunk” state after the market transformation, digital platforms nowadays play a quasi-public role in multiple critical socioeconomic sectors which were previously exclusive state territories. Not merely providing commercial goods and services in everyday business

²⁶ Max Boisot & John Child, *The Iron Law of Fiefs: Bureaucratic Failure and the Problem of Governance in the Chinese Economic Reforms*, 33 ADMIN. SCI. Q. 507, 507 (1988).

²⁷ See generally BØRGE BAKKEN, CRIME AND THE CHINESE DREAM (Hong Kong University Press, 1st ed. 2018); Tanner, *supra* note 23; SARAH BIDDULPH, THE STABILITY IMPERATIVE HUMAN RIGHTS AND LAW IN CHINA (UBC Press, 1st ed. 2015); MICHAEL ROBERT DUTTON, POLICING AND PUNISHMENT IN CHINA: FROM PATRIARCHY TO “THE PEOPLE” (Cambridge Univ. Press, 1st ed. 1992).

²⁸ Zhonghua renmin gongheguo xingfa, 中华人民共和国刑法 [Criminal Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina).

²⁹ Tanner, *supra* note 23; Ling Zhang & Lin Zhao, *The Punishment of Corporate Crime in China*, in INTERNATIONAL HANDBOOK OF WHITE-COLLAR AND CORPORATE CRIME (Henry N. Pontell & Gilbert Geis eds., 2007).

³⁰ Petra Christmann & Glen Taylor, *Globalization and the Environment: Determinants of Firm Self-Regulation in China*, 32 J. INT’L BUS. STUD. 439, 446 (2001); Michael Palmer, *Environmental Regulation in the People’s Republic of China: The Face of Domestic Law*, 156 THE CHINA Q. 788, 788 (2009).

³¹ Benjamin Van Rooij & Carlos Wing-Hung Lo, *Fragile Convergence: Understanding Variation in the Enforcement of China’s Industrial Pollution Law*, 32 LAW & POL’Y (2010); Vincent Cheng Yang, *Punishing for Environmental Protection?—Enforcement Issues in China*, 44 INT’L & COMPAR. L. Q. 671, 671 (2008).

retails, they have also gained control over public transportation³², travel³³, rental,³⁴ food³⁵, banking and finance,³⁶ retail,³⁷ and social media.³⁸ Instead of relying on the state as the insurer of socioeconomic risks, individuals must individually assess and manage omnipresent uncertainties in an age of digital platforms which could substantially affect their health, safety, and property.

Examples of platform-derived risks are abundant. In 2021, with the collapse of the online rental platform Danke Apartment, thousands of young renters became homeless overnight.³⁹ In 2020, the online bicycle-sharing platform, Ofo, unable to repay its two billion yuan of debt, ceased its operation and did not return deposits for tens of millions of users.⁴⁰ After a four year crackdown on Peer-to-Peer (P2P) financing platforms, many of which were criminalized as Ponzi schemes, only 29 of the more than 6,000 P2P platforms across China remain operating and millions of lenders lost their life-time savings.⁴¹ Online food delivery platforms pose health and safety risks to consumers by harboring unlicensed businesses and tolerating unhygienic food handling, storage, transport, and preparation.⁴² Counterfeited goods are commonplace in China's \$30

³² In the field of public transportation, Didi and other ride-sharing platforms replaced the state-regulated taxi industry.

³³ Trips.com, among other platforms, took over state-controlled ticket sale offices in the travel sector.

³⁴ Rental platforms in China, including Danke Apartment, have replaced housing provided by state-owned enterprises and institutions.

³⁵ Meituan and Eleme are two top-ranked digital platforms that have taken over the national market from offline restaurants and communal canteens.

³⁶ Ant Finance and WeChat Pay have become competitive alternatives to banks and thus rendered many ATMs redundant.

³⁷ Taobao and JD.com took the place of shopping malls run by private and public entities.

³⁸ Notably, Weibo, Bilibili and WeChat have become main sources of information and entertainment instead of the printing press and traditional media.

³⁹ *Danke Polie: Wanqian Zhongguo Nianqingren Weihe Yiye Zhijian "Wujia Kegui" (蛋壳破裂：万千中国年轻人为何一夜之间“无家可归”)* [*Cracked Eggshell: Why Thousands of Young Chinese Became "Homeless" Overnight*], BBC NEWS (Dec. 15, 2020), <https://www.bbc.com/zhongwen/trad/chinese-news-55271783>.

⁴⁰ *Ofo "Renjian Zhengfa" Le! Youren Shuo: "Tuiyajin Yaodeng 500 Nian!" 20 Yi Qiankuan Zhuizhai Wumen* (ofo “人间蒸发”了！有人说：“退押金要等 500 年！”20 亿欠款追债无门) [*ofo "Evaporated"! Some People Say: "It Will Take 500 Years for the Deposit to Be Refunded!"*], DONGFANG CAIFUWANG (东方财富网) [EASTMONEY] (Aug. 3, 2020), <https://finance.eastmoney.com/a2/202008021578198521.html>, 3, 2020), <https://finance.eastmoney.com/a2/202008021578198521.html>.

⁴¹ Daniel Ren, *China's Financial Clean-up Whittles Thousands of Peer-to-peer Lenders Down to Just 29, with US \$115 Billion in Outstanding Debt*, S. CHINA MORNING POST (Aug. 14, 2020), <https://www.scmp.com/business/banking-finance/article/3097445/chinas-top-banking-regulator-vows-track-down-errant-p2p>.

⁴² 2021 Nian "618" Xiaofei Weiquan Yuqing Fenxi Baogao (2021 年“618”消费维权舆情分析报告) [2021 "618" Consumer Rights Protection Public Opinion Analysis Report], ZHONGGUO XIAOFEIZHE XIEHUI (中国消费者协会) [CHINA CONSUMERS' ASS'N] (Jun. 25, 2021),

billion e-commerce live-streaming business which accounts for eighty percent of all consumer product complaints in 2020.⁴³

Risk runs in all the capillaries of individual life and social transactions in an era of platform economies, ranging from financial security to food safety, and from personal safety to data privacy.⁴⁴ Chinese society is simmering with public discontent with big tech platforms.⁴⁵ Worse still, many have come to realize the absence of feasible alternatives to the products and services provided by platforms that have achieved monopoly market status. In some Chinese cities, if a consumer refuses to use Didi to hail a ride home late in the night, it is difficult to find alternative services. Similarly, “opting out” of Taobao and JD.com means consumers no longer have access to a wide range of products that have an online presence only on those major e-commerce platforms. While rating and reputational systems are generally believed to be capable of mitigating the risks associated with platform-mediated transactions,⁴⁶ these mechanisms are often easily manipulated.⁴⁷

The first-generation risks emanate from digital platforms’ status as

<http://m.cca.cn/zxsd/detail/30085.html>; Wangluo Canyin Xiaofei Weiquan Yuqing Shuju Xianshi Qida Wenti (网络餐饮消费维权舆情数据显示七大问题) [Online Catering Consumer Rights Protection Public Opinion Data Shows Seven Major Problems], ZHONGGUOWANG (中国网) [CHINA.COM.CN] (Jun. 20, 2019), http://union.china.com.cn/jjmq/txt/2019-06/20/content_40792783.html.

⁴³ Xijia Qi, *Efforts Made to Regulate the Livestreaming Market in China*, GLOB. TIMES (Jun. 8, 2021), <https://www.globaltimes.cn/page/202106/1225696.shtml>; Ma Hui (马慧), *Wo Canyu de 1000 Chang Zhibo Li Sanfenzhiyi Zai Mai Jiahua* (我参与的 1000 场直播里 三分之一在卖假货) [One-third of the 1,000 Live Broadcasts that I Have Been in Are Selling Fakes], XINLANG (新浪) [SINA] (Jun. 22, 2021), <https://finance.sina.com.cn/china/2021-06-22/doc-ikqciyzk1176840.shtml>.

⁴⁴ Gaojishusi (高技术司) [High Technology Division], Gunayu Tuidong Pingtai Jingji Guifan Jiankang Chixu Fazhan de Ruogan Yijian (关于推动平台经济规范健康持续发展的若干意见) [Several Opinions on Promoting the Healthy and Sustainable Development of the Platform Economy], GUOJIA FAZHAN GAIGE WEIYUANHUI (国家发展改革委员会) [NAT’L DEV. & REFORM COMM’N] (Jan. 8, 2022), https://www.ndrc.gov.cn/xwdt/tzgg/202201/t20220119_1312327.html?code=&state=123.

⁴⁵ Wan Zhe (万喆), Meiti Pinglun: Fanlongduan Yu Shequ Tuangou Tianxia Ku Hulianwang Jutou Jiuyi (媒体评论：反垄断与社区团购 天下苦互联网巨头久矣) [Media Commentary: Anti-monopoly and Community Group Buying, the World Has Been Suffering from Internet Giants for a Long Time], XINLANG (新浪) [SINA] (Dec. 16, 2020), <https://finance.sina.com.cn/chanjing/cyxw/2020-12-16/doc-iiznezxs7181722.shtml>.

⁴⁶ See, e.g., Apostolos Filippas et al., *Owning, Using, and Renting: Some Simple Economics of the “Sharing Economy”*, 66 MGMT. SCI. 4152, 4152 (2020); ARUN SUNDARARAJAN, *THE SHARING ECONOMY: THE END OF EMPLOYMENT AND THE RISE OF CROWD-BASED CAPITALISM* 97 (Koen Frenken & Juliet Schor, *Putting the Sharing Economy into Perspective*, 23 ENV’T INNOVATION & SOCIETAL TRANSITIONS, 1st ed. 2016).

⁴⁷ See, e.g., Georgios Zervas et al., *A First Look at Online Reputation on Airbnb, Where Every Stay Is Above Average*, 32 MKTG. LETTERS 1, 15–6 (2021); Koen Frenken & Juliet Schor, *Putting the Sharing Economy into Perspective*, 23 ENV’T INNOVATION & SOCIETAL TRANSITIONS 3, 126–130 (2017); Lirong Chen et al., *Detection of Fake Reviews: Analysis of Sellers’ Manipulation Behavior*, 11 SUSTAINABILITY 4802, 4802 (2019); Ling Peng et al., *What Do Seller Manipulations of Online Product Reviews Mean to Consumers?*, HONG KONG INST. BUS. STUD. WORKING PAPERS 070–1314 (2014), <https://commons.ln.edu.hk/cgi/viewcontent.cgi?article=1069&context=hkibswp>.

important market matchmakers that connect demand and supply: borrowers with lenders, purchasers with sellers, riders with drivers, and readers with content generators. Platforms either abuse or fail to fulfill the obligations expected of these intermediary roles. For example, the failure of platforms to scrutinize the credentials of goods sellers and service providers listed on platforms and their actions to defraud and exploit platform users.⁴⁸ If these first-generation hazards still have tangible impacts on everyday users of platforms, a more recent wave of risks affects individuals in subtler, more mundane but intrusive ways.

This second generation of platform-derived risk, based on the platforms' new business model, thrives on user data surveillance and monetization. As Shoshana Zuboff argues, this new variant of digital platforms, in contrast with its predecessors, is predicated on harvesting and profiting from individual behavioral data.⁴⁹ The interests of digital platforms have shifted from bridging market exchanges to predicting and capitalizing on human behavior, often without data subjects' knowledge or informed consent. The role of platforms has shifted from market matchmakers to data brokers and individual behavioral modifiers. Put simply, while first-generation platform users need to actively engage with the platform economy (such as purchasing relevant products or services) to be exposed to risks, second-generation consumers can be involved without active individual engagement. Take search engines as an example. Baidu's advertising mechanisms are intertwined closely with user profiling and behavior monitoring. In an internal speech, Baidu's CEO admitted that China's top search engine platform has "a strong advantage" over its competitors due to "years of accumulated expertise in artificial intelligence, and a wealth of user behavior and data."⁵⁰ Thus, individual users are subject to algorithmic surveillance and behavioral manipulation.

Today, many digital platforms design advertising strategies based on the multifold dimensions of user data they harvest to induce, influence, and remold consumer behaviors. China's Ministry of Industry and Information Technology recently ordered thirty-eight apps, including a news and music

⁴⁸ See, *infra* section III B: The Rise of Three Positive Criminal Duties.

⁴⁹ Zuboff, *supra* note 5 (defining surveillance capitalism as "[a] new economic order that claims human experience as free raw material for hidden commercial practices of extraction, prediction, and sales").

⁵⁰ Li Yanhong *Xinchun 6000 Zi Neibu Jianghua: Dasao Menting, Gunaliceng Nengshangnengxia* (李彦宏新春 6000 字内部讲话：打扫门庭，管理层能上能下) [*Robin Lee's 6000-word Internal Speech on the Spring Festival: Clean the Door, and the Management Can Rise and Fall*], PENGPAI XINWEN (澎湃新闻) [THE PAPER] (Feb. 7, 2017), https://m.thepaper.cn/wifiKey_detail.jsp?contid=1613451&from=wifiKey#.

streaming app from Tencent, to stop excessively collecting user data.⁵¹ These apps retrieved user information beyond the scope that was necessary for their business operations; required access to restricted data with high frequency (such as the photo albums and location files on users' mobiles); and misled users into downloading and using these apps.⁵² Digital platforms' invasive and excessive harvests of user data enable them to obtain a realistic overall understanding of the individual preferences and lifestyles of their users: what music they listen to, where they eat, their health conditions, and with whom they socialize. Based on this data, platforms predict the future behaviors of users and target them with personalized advertisements. A past web search for health concerns (e.g., overweight treatments) coupled with relevant album photos may lead to the display of ads about weight-loss pills, inducing consumer purchasing behaviors. Behavior data surveillance, prediction, and commodification could also facilitate identity theft and fraud. How effective are such regulatory interventions? The number of apps ordered by state regulators to cease their personal-data-infringing practices grew to over 300 within one year, with 92.97% of them posing medium-to-high levels of risks to user data security.⁵³

To a certain extent, the risk is a genetic marker of the digital platform society. Risk-taking and risk exposure are everyday routines for platform users. They are double-edged swords: On the one hand, digital platforms provide new spaces and opportunities for individuals to engage in and reap rewards for risk-taking behaviors. On the other, these rich potentials can only be enjoyed with the costs of increasing vulnerability and exploitation. Risks are so closely intertwined with everyday life in an era of the digital economy that even the savviest individual users would find risks too abundant, too omnipresent, and too unpredictable to avoid. A significant asymmetry of power exists between big tech platforms and individual consumers in terms of market power, financial capacity, media influences, access to information, and human resources.⁵⁴ In a platform society, how

⁵¹ *China Ministry Orders 38 Apps to Rectify Excessive Collection of Personal Data*, REUTERS (Nov. 4, 2021), <https://www.reuters.com/world/asia-pacific/china-ministry-orders-38-apps-rectify-excessive-collection-personal-data-2021-11-03/>; Xiaohongshu Deng 38 Kuan APP Bei Tongbao She "Guodu Shouji Yonghu Sinxi" (小红书等 38 款 APP 被通报 涉"过度收集用户信息") [38 Apps Including Xiaohongshu have been Notified of "Excessive Collection of User Information"], DEUTSCHE WELLE (DW) (Nov. 3, 2021), <https://p.dw.com/p/42XX7>.

⁵² *Id.*

⁵³ Pinfan Diaogu Geren Shuju Ruanjian Houtai Zai Gansha (频繁调取个人数据 软件后台在干啥) [*Frequent Access to Personal Data, What Are APPs Doing in the Background?*], ZHONGGUO KEJIWANG (中国科技网) [SCI. & TECH. DAILY] (Nov. 3, 2021), http://www.stdaily.com/index/kejixinwen/2021-1/03/content_1229662.shtml.

⁵⁴ Aofei Lü & Ting Luo, *Asymmetrical Power Between Internet Giants and Users in China*, 12 INT'L J. COMM'C'N 3877, 3877–3878 (2018).

can vulnerable and privacy-less individuals be protected against such precariousness and insecurity?

B. From Regulation to Criminalisation

Besides concerns about how AI algorithms and mass data surveillance dictate our lifestyles and restructure our job markets and employability, an equivalently important issue in digital and technology ethics is *how* the state governs the digital space by intervening to regulate the technology. This section explains that the regulatory turn of criminal law is the outcome of insufficient regulation. It traces the development of the regulatory regime in China over the past decades, explaining that the lack of regulatory capacity, experience, resources, and insight eventually led to its reliance on criminal punishment as a cheap but tough tool to cope with overwhelming social issues stemming from the fast-evolving digital economy and associated profound social transformations.

1. What Caused Regulatory Deficiency?

What are the underlying causes of the failure of regulation to control such risks? Compared to traditional economic entities, regulators encounter daunting challenges when regulating digital giants for three reasons: (1) the contrast between tech platforms' sheer scales and power (individually or industry-wide) and the limited resources of state regulators; (2) the difficulty of *ex ante*, as opposed to *ex post*, regulation; and (3) the policy paradox of suppressing vis-à-vis promoting innovations. Digital giants in China—such as BATJ⁵⁵—are considered “too big to fail,” similar to their American counterparts. They are well positioned to dominate this nascent industry and outmaneuver regulators. Tech giants gain an upper hand over national and local regulators in terms of market power, media influences, and access to information. Alibaba, China's forerunner e-commerce platform, was able to manipulate media content concerning an ethical scandal⁵⁶ and an alleged sexual assault⁵⁷ posted on the nation's largest social media platform, Sina Weibo, of which it owns a

⁵⁵ An acronym standing for Baidu, Alibaba, Tencent, and JD, the four biggest tech firms in China, often compared to GAMA (Google, Amazon, Meta (Facebook), Apple) in the United States. Alternatives of this term include BATX (which substitutes JD with Xiaomi) and BATH (which substitutes JD with Huawei).

⁵⁶ Ryan McMorro & Yuan Yang, *High-flying Alibaba Executive Demoted over Personal Scandal*, FIN. TIMES (Apr. 27, 2020), <https://www.ft.com/content/58e22e04-6aa2-440d-af0e-511bb61a077c>.

⁵⁷ Sui-Lee Wee & Raymond Zhong, *After Proudly Celebrating Women, Alibaba Faces Reckoning Over Harassment*, N.Y. TIMES (Sep. 7, 2021), <https://www.nytimes.com/2021/09/01/technology/china-alibaba-rape-metoo.html>.

thirty percent share.⁵⁸ Platforms' capacity to influence national media discourse in the heat of the moment of unprecedented state regulatory attention⁵⁹ is extremely telling. When state regulatory agencies impose astronomic fines on digital giants, such fines may only account for a tiny share of their annual revenues. Consequently, regulatory sanctions become *affordable* and insignificant.

Timely intervention through state regulation is also a thorny issue. Widespread "regulatory disconnection"⁶⁰ refers to the challenges facing regulators to keep up with the development of technology. Effective regulation depends on the regulators' capacity to make predictions about the nature, growth, and social impact of disruptive innovations, which is rarely achieved in China or elsewhere around the globe. In many countries, regulators will intervene only when risks materialize into harm.⁶¹ As Cortez explains, regulatory inertia is difficult to rein in without external shocks in the form of "a tragedy or some other massive failure that reignites interest in regulation."⁶² But even if regulators are capable to predict risks *ex ante*, they might not be able to preclude these platforms from entering new markets. This is because platform regulators skate on thin ice to balance social demands for economic growth and technological advances on the one hand and to protect public and individual rights on the other.⁶³ As Ranchordás states, a central challenge facing regulators is to steer clear away from both excessive and premature regulation to avoid stifling innovation from which society might benefit.⁶⁴ Inadequate regulation that fails to tame risky platform-related activities may adversely impact individual and social interests, but so does untimely and imprudent regulation.

From within digital platforms, deficient self-regulation is the product of a fundamental mismatch between their business goals and expected social responsibilities. As the platformization of the Chinese economy blurs the

⁵⁸ Rita Liao, *China Roundup: Alibaba's Sexual Assault Scandal and More Delayed IPOs*, TECHCRUNCH (Aug. 15, 2021), <https://techcrunch.com/2021/08/14/alibaba-rape-allegation/>.

⁵⁹ *Id.*

⁶⁰ See e.g., ROGER BROWNSWORD, *RIGHTS, REGULATION AND THE TECHNOLOGICAL REVOLUTION* 166–7 (Oxford University Press, 1st ed. 2008); ROGER BROWNSWORD & MORAG GOODWIN, *LAW AND THE TECHNOLOGIES OF THE TWENTY-FIRST CENTURY: TEXT AND MATERIALS* 67 (Cambridge University Press, 1st ed. 2012).

⁶¹ Marta Katarzyna Kołacz et al., *Who Should Regulate Disruptive Technology?*, 10 EUR. J. RISK REGUL. 4, 20 (2019).

⁶² Nathan Cortez, *Regulating Disruptive Innovation*, 29 BERKELEY TECH. L. J. 174, 227 (2014).

⁶³ Tim Wu, *Agency Threats*, 60 DUKE L. J. 1841, 1848–1854 (2011) (stressing the importance of avoiding regulation that is mis-calibrated or premature and recommending replying to "threats" packaged in guidance documents, warning letters, and the like).

⁶⁴ Sofia Ranchordas, *Does Sharing Mean Caring: Regulating Innovation in the Sharing Economy*, 16 MINN. J. L. SCI. & TECH. 413, 414 (2015).

boundaries between private and public spheres,⁶⁵ platforms are expected to live up to a range of new ethical and social obligations which match their newly acquired public functions and social roles. Unfortunately, the business priority of digital platforms does not always align with larger social goods. Private platforms are reluctant to take on the roles of public entities such as protecting the personal data of platform users, checking the credentials of listed merchants, and shielding individual consumers from risks such as financial fraud and physical injuries. These failures could be related to both capacity and willingness.

At the whims of a highly competitive market, start-ups are often driven by aggressive pursuits of profit for survival and growth. They possess little *capacity* or resources to conduct rigorous self-regulation. As digital platforms scale up to a monopolistic or quasi-monopolistic position over the market, nevertheless, they lack the motivation to regulate risk. Although big tech's market influences vis-à-vis individual users determine that they are best suited to play some of these roles, in reality, driven by goals of capital appreciation, they often do not only tolerate but also actively pursue risks themselves. To a certain extent, the risk is inherent in the business model of the digital platform economy. Without exposing platform users to risks, digital platforms would not be able to amass large amounts of data and gain power and wealth. As a consequence of their limited capacity and willingness, platforms often do not engage in effective self-regulation—which leads to regulatory deficiency.

In essence, the era of the platform economy sees a symbiosis between soft regulation and harsh punishment. Digital platforms are difficult to regulate by governmental agencies due to practical concerns about resource asymmetry and policy paradox. Also, platforms often fail to effectively self-regulate due to their lack of capacity or willingness. State regulators have little weaponry at their disposal to effectively deter harmful conduct without jeopardizing competing goals.

With this vacuum of regulatory competence, criminal law, backed by coercion and moral censure, seems a convenient choice. And in fact, it has become a convenient tool to fill in this regulatory deficiency and responsibility vacuum. After all, criminal law is a fundamental social institution to address moral blameworthiness and accountability. Consequently, the governance of digital platforms is often vested in the hands of courts and other law enforcement agencies as a proxy for ex post penal treatment. Digital platforms are increasingly held responsible for not

⁶⁵ Luca Belli & Nicolo Zingales, *Preview of the 2017 DCPR Outcome: Platform Regulations (Dynamic Coalition on Platform Responsibility)*, INTERNET GOVERNANCE FORUM OF THE U.N. 4, <https://www.intgovforum.org/en/content/preview-of-the-2017-dcpr-outcome-platform-regulations-dc-on-platform-responsibility>.

only actively infringing the property, safety, and privacy of their users but also their mere failure to predict and prevent vulnerable users from being victimized.

2. *Soft Regulation, Harsh Penalties*

Consequently, the growing expectations that governments would take swift and effective actions against risks stemming from platforms have rarely been met. Food security, for instance, presents one of the top public concerns in China. Rampant scandals such as fake baby formula milk and ditch oil fueled public resentment toward insufficient regulatory control⁶⁶ over illegal additives and food contamination by toxic industrial wastes.⁶⁷ The regulatory failure has been caused by a multitude of factors, including a disintegrated monitoring system that lacked a clear chain of demand and division of labor.⁶⁸ The platformization of the food industry exacerbated these food safety concerns. The already fragmented pre-platform regulatory system faced new challenges to (1) indirectly pressure digital platforms to self-regulate and (2) deter platforms from hosting unlicensed and unhygienic food vendors, and (3) rectify their passivity in preventing, monitoring, and disciplining harmful food establishments.⁶⁹

Self-regulation, however, is hard to enforce given that it goes against the business interests of platforms to attract new food vendors and compete with similar platforms for larger market shares.⁷⁰ Amidst collapsed public faith in regulatory efficacy and political assurance of “zero tolerance” for food hazards, criminal interventions have been deployed.⁷¹ To appease public grievances, the Eighth Amendment of the Criminal Law introduced

⁶⁶ Hongyi Wang, *Food Safety Tops Public's Concerns*, ZHONGGUO RIBAO (中国日报) [CHINA DAILY] (Aug. 21, 2013), http://europe.chinadaily.com.cn/china/2013-08/21/content_16909022.htm.

⁶⁷ Hon-Ming Lam et al., *Food Supply and Food Safety Issues in China*, 381 LANCET 2044, 2044 (2013).

⁶⁸ *Id.*

⁶⁹ Chen Cong (陈聪) & Mao Weihao (毛伟豪), Wangluo Dingcan Guimo Chao 3500 Yiyuan, Ruhe Pojie “Heizuofang” Jisheng Xianxiang (网络订餐规模超 3500 亿元 如何破解 “黑作坊” 寄生乱象) [*The Scale of Online Food Ordering Exceeds 350 Billion Yuan. How to Solve the Parasitic Chaos of “Black Workshops”*], ZHONGZHENGWANG (中证网) [CHINA SEC. J.] (Mar. 15, 2017), https://www.cs.com.cn/xwzx/msxf/201703/t201703_15_5208452.html.

⁷⁰ Wang Fujiao (王付娇), [Shendu] Weishenme “Eleme” Shang de Heizuofang Lujinbuzhi? ([深度] 为什么 “饿了么” 上的黑作坊屡禁不止?) [*In-depth*] *Why Do the Black Workshops on “Eleme” Continue Despite Repeated Prohibition?*], JIEMIAN (界面) [JIEMIAN] (Mar. 17, 2016), <https://www.jiemian.com/article/576545.html>.

⁷¹ Tuancan Wanyi Shichang Canzao Zhongchui, Nengfou Jitui Jutou Jinchang Jiaobu? (团餐万亿市场惨遭重锤，能否击退巨头进场脚步?) [*The Trillion-dollar Group Meal Market Has Been Severely Hammered. Can the Giants Enter the Market?*], TENGXUN (腾讯) [TENCENT] (Jul. 22, 2020), <https://new.qq.com/rain/a/20200722A0TP2U00>.

a crime by punishing failures in the regulation of food safety.⁷² A regulator who “abuses his powers or neglects his duties” is punishable with a maximum sentence of five years’ imprisonment.⁷³ A similar legislative change was introduced nine years later to criminalize the unsuccessful regulation of drugs in China.⁷⁴ Criminal charges have been filed against Meituan and Eleme for their failures to review the licenses of platform-listed food vendors.⁷⁵

Power shifts from government regulators to criminal law agents as the main enforcers of private market rules have, symbolically and substantively, reshaped the landscape of digital platform governance. The impact of these changes on platform liability, however, varies across socioeconomic sectors. A significant contrast can be found between two cases—Wei Zexi and QVOD—which have defined the historical development of China’s platform liability.

In 2016, Wei, a college student, died after receiving fraudulent treatments for a rare cancer condition. Before his death, Wei posted a reply to the question “What do you believe is the greatest evil to humanity?” on Zhihu.com, stating that he was deceived by a hospital advertisement ranked top on Baidu.com.⁷⁶ Misbelieving in the credibility of such highly-ranked information provided by China’s top search platform, he received what was claimed as scientifically verified immunotherapy treatment that was promised as a cure by the unlicensed hospital.⁷⁷ His death sparked public indignation nationwide as it turns out that Baidu’s algorithms rank

⁷² See *Zhonghua Renmin Gongheguo Xingfa Di Ba Xiuzheng'an* (中华人民共和国刑法第八修正案) [Eighth Amendment to the Criminal Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 25, 2011, effective May 1, 2011), art. 49, CLI.1.145719 (EN) (Lawinfochina); Shu Hongshui (舒洪水), *Shipin Anquan Fanzui Xingshi Zhengce de Shuli Fansi Yu Chonggou* () [*Sorting, Reflection, and Reconstruction of Criminal Policy of Food Safety Crime*], 35 FAXUE PINGLUN 72, 72 (法学评论) [LAW REV.] (2017) (charting the legislative purposes of introducing harsh penal sanctions).

⁷³ *Id.*

⁷⁴ *Zhonghua Renmin Gongheguo Xingfa Di Shiyi Xiuzheng'an* (中华人民共和国刑法第十一修正案) [Eleventh Amendment to the Criminal Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 26, 2020, effective Mar. 1, 2021), art. 45, CLI.1.349388 (EN) (Lawinfochina).

⁷⁵ *Jilin Juxing Yanli Daji Shipin Weifa Xingwei Xinwen Fabuhui* (吉林举行严厉打击食品违法行为新闻发布会) [Jilin Held A Press Conference on Cracking Down on Food Safety Violations], ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN XINWEN BANGONGSHI (中华人民共和国国务院新闻办公室) [THE STATE COUNCIL INFORMATION OFFICE OF THE PEOPLE’S REPUBLIC OF CHINA] (Dec. 15, 2016), <http://www.scio.gov.cn/m/xfwbh/gssxwfbh/xfwbh/jilin/Document/1536309/1536309.htm>.

⁷⁶ Wei Zexi (魏则西), Ni Renwei Renxing Zuida De “E” Shi Shenme?—Wei Zexi De Huida (你认为人性最大的「恶」是什么？—魏则西的回答) [*What Do You Think Is the Greatest "Evil" of Human Nature—Wei Zexi's Answer*], ZHIHU (知乎) (Feb. 26, 2016, 2:33 PM), <https://www.zhihu.com/question/26792975/answer/88170767>.

⁷⁷ *China's Baidu Must Cut Paid-for Adverts after Death, Regulators Say*, BBC (May 9, 2016), <https://www.bbc.com/news/world-asia-china-36248193>.

medical-treatment relevant results from the highest bidders without reasonable scrutiny about the certifications and credentials of medical practitioners.⁷⁸

The notorious private hospital chain from which Wei received his treatment had a heinous reputation for fabricating patients' testimonies and fake medical practitioner credentials.⁷⁹ Yet Baidu relied on the paid-for advertising mechanism for its profit by acquiescing to these illegal practices: Its partnership with this hospital network alone earned it an annual revenue of \$1.8 billion (approximately 13 billion Chinese yuan).⁸⁰ Following this incident, many Chinese realized that misleading info, just a click away, could expose them to grave health risks. Baidu, although morally condemned by the public, was not held legally accountable. This stood in stark contrast with the criminal case of Shenzhen QVOD (Kuaibo)⁸¹ a few months later in 2016, a case which fundamentally reshaped the legal-regulatory landscape of digital content providers in China.⁸²

3. Regulation Through Penalty

Criminal law takes on a regulatory role in the governance of digital platforms as power shifts from government agencies to prosecutorial offices, courts, and prisons. The logic of platform regulation, correspondingly, has been transformed: Its focus has shifted from *technological* expertise in economic and technology policymaking to *penal* expertise in discerning and measuring wrongs. The judiciary has become the new governor of the tech industry. This transition, which I refer to as “regulation through criminalization” substantially affects the targeted digital platforms as well as the criminal process itself.

The state regulates the digital economy by punishing risk-taking that fails to meet regulatory aims. Actions and omissions which were previously considered regulation infractions and disciplined by administrative penalties are now likely to be subject to criminal

⁷⁸ *China Investigates Search Engine Baidu after Student's Death*, BBC (May 3, 2016), <https://www.bbc.com/news/business-36189252>.

⁷⁹ Sui-lee Wee, *Scandals Catch Up to Private Chinese Hospitals, After Fortunes Are Made*, N.Y. TIMES (Nov. 15, 2018), <https://www.nytimes.com/2018/11/15/business/china-private-hospitals-putian.html>.

⁸⁰ *Id.*

⁸¹ Wu Ming deng zhizuo, fuzhi, chuban, fanmai, chuanbo yinhui wupin mouli zui yishen xingshi panjueshu(吴铭等制作、复制、出版、贩卖、传播淫秽物品牟利罪一审刑事判决书) [Haidian District People's Procuratorate v. Wu Ming Deng, the First Instance Criminal Judgment on the Crime of Producing, Reproducing, Publishing, Selling, and Disseminating Obscene Materials for Profit], ((2015) 海刑初字第 512 号) [(2015) Hai Xing Chuze Number 512], Sep. 13, 2016 (China)

⁸² See *infra* “Criminalizing the Failure to Take Down Illegal Online Content: The Case of QVOD” under section IIIB2 (“The Duty to Manage”).

punishment. Correspondingly, digital platforms adapt their policies and practices to these newly enacted legal standards by proactively monitoring, screening, and managing user activities and transactions mediated through the platforms. In this way, regulation by criminalization is often a form of proxy responsibility: It threatens platforms with punishment if they fail to comply with relevant regulatory and legal standards, redefining not only digital platforms themselves but also what their users can and cannot do. Platforms may be punished for failing to supervise and correct their users' behaviors.

Importantly, the burden of preventing and controlling platform-derived risks has shifted from the state to platforms. What was previously a state liability is now laid on the shoulders of digital platforms. The state retires from its function as a welfare provider and economic planner and, instead, becomes the indirect dispenser and allocator of punishment through the judiciary. The political logic of penalty is, at its heart, closely intertwined with that of risk management. The boundary of social responsibility is redrawn between the state and the private sector, through a threat of criminal responsibility. Regulation through criminalization, therefore, could be understood as regulation by criminalizing failed platform self-regulation. A wide range of controversial cases that have emerged in the past decade, discussed in Section Two, reflects tensions and controversies arising from the renegotiation of public and private responsibilities.

Meanwhile, the function and nature of criminal law have also been reshaped during this transition. Following a regulatory turn of Chinese criminal law, the state entrusted the power to oversee the economic and tech sectors—which were previously withheld by state regulatory functionaries—to prosecutors, courts, and law enforcement authorities. These agents and institutions possess different expertise. State and local regulators are subject-matter experts in identifying and managing *ex ante* risks in specific areas of technological and governmental affairs. In contrast, criminal law experts are traditionally trained in deterring and disciplining serious legal harm, retroactively: They impose *ex post* censure and coercion on blameworthy persons and entities. Given these major differences, the criminal law has now been transformed from a retributive, backward-looking punisher to a predictive, forward-looking discipliner. It directly imposes on targeted technological gatekeepers mainly to indirectly regulate risky market behaviors of platform users.

II. GOVERNING DIGITAL PLATFORMS WITH CRIMINAL LAW: LEGISLATIVE AND JUDICIAL DEVELOPMENTS

In China's main criminal statute, the 1997 Criminal Law, criminal

offenses applicable to digital platforms are scattered throughout its chapters.⁸³ Table One, below, summarizes twenty-seven types of criminal offenses that involve digital platforms. In essence, there are five categories of criminal liability for platforms: (1) when a platform *commits* a specific criminal action; (2) when a platform *facilitates* the commission of an offense by others, including platform users and employees; (3) when the platform *fails to prevent* someone else—primarily a platform user or employee—from committing an offense; (4) when a platform *fails* to live up to relevant regulatory duties; and (5) when an *employee* commits a crime that is imputable to the platform. In this section, I will focus on the first four types of criminal offenses which are directly related to digital platforms rather than those committed by people associated with digital platforms. Despite potential overlaps, this classification method is intended only as a rule of thumb to distinguish the rich variations of criminal offenses.

In Table One, these offenses are labeled by (1) the nature of the conduct (commission or omission) and (2) the nature of the liability (specific or generic). First, offenses are differentiated according to whether the defendant actively engages in a wrongful act or fails to act in the prevention of one. For instance, the offense of aiding criminal activities through information networks⁸⁴ is an act committed in furtherance of criminal acts undertaken by others. And the offense of evading cybersecurity obligations⁸⁵ represents the failure to live up to the obligation of managing the security of information networks as provided by relevant administrative regulations. Both offenses are generic in nature, according to the second standard of classification, because they concern a general liability imposed on digital platforms, rather than a specific type of criminal offense.

A. Piercing Platform Immunity: A Roadmap of Legislative Progress

The legislature enacted supermajority of these offenses in the past two decades, representing up-to-date legislative efforts to cope with social changes brought by socioeconomic platformization. Criminal law grew to cover new territories of social life in two major ways: horizontally and

⁸³ Zhonghua renmin gongheguo xingfa, 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina).

⁸⁴ Zhonghua renmin gongheguo xingfa, 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 287(2).

⁸⁵ Zhonghua renmin gongheguo xingfa, 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 286-1.

vertically. First, new offenses were introduced into the statutes to govern unlawful conduct relating to digital platforms. An example of this horizontal expansion of criminalization is the crime of Infringing on Citizens' Personal Information.⁸⁶ Second, new liabilities were attached to conducts that were previously unpenalized because of restrictions placed on criminal liability, such as mere preparation (inchoate criminal liability); omission; and accessorial liability (often unconditioned on convicting the principal).⁸⁷ This vertical expansion in the depth of criminal law built on existing offenses by adding layers of criminal responsibility, rather than introducing new crimes to the existing statutes.⁸⁸ This approach of vertical expansion can be further divided into three subcategories: (1) temporal expansion (from substantive to inchoate offenses); (2) expansion of behavioral patterns (from commission to omission); and (3) interpersonal expansion (from principals to accomplices). Both behavioral patterns and interpersonal expansion may be seen as the extension of criminal law spatially.

The vertical expansion of criminal law, both temporal and spatial, warrants closer attention as these legislative developments override traditional principles of penal moderation and minimalism.⁸⁹ A pertinent example of the temporal extension of the criminal law is the offense of Illegally Utilizing Information Networks, which imposes penal sanctions for setting up websites and virtual chat groups or exchanging information

⁸⁶ Zhonghua renmin gongheguo xingfa, 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 253-1.

⁸⁷ Article A285(3) of the CL provides preparatory actions, such as furnishing programs or tools Intended for Intrusion into Computer Information Systems, were established as an independent criminal offense in 2009, separate from the actual intrusion itself. An instance of criminalizing omission can be seen in the incorporation of evading cyber security obligations within Article A 286-1 of the CL in 2015, wherein internet service providers can face criminal liability for failing their obligations to manage the safety of information networks. Additionally, Article 287-2 of the CL mandates that individuals providing technical aid or support to the principal offender using the internet to perpetrate crimes are also liable for the criminal conduct. 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 the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at arts. 253-3, 286-1 and 287(2).

⁸⁸ For instance, both the newer offense of illegally obtaining data in computer information systems or exercising illegal control over computer information systems (article 285 (2)) and Providing Programs or Tools Used for Intruding into or illegally controlling computer information systems (article 285 (3)) were added to the same existing article providing for the offense of illegally intruding into computer information systems (article 285 (1)). Similarly, in 2015, an offense of evading cyber security obligations (article 286-1) was introduced into the existing provisions concerning the offense on Destructing Computer Information Systems (article 286).

⁸⁹ See generally Jonathan Simon, *Do These Prisons Make Me Look Fat? Moderating the US's Consumption of Punishment*, 14 THEORETICAL CRIMINOLOGY 257 (2010); Sonja Snacken, *Resisting Punitiveness in Europe?*, 14 THEORETICAL CRIMINOLOGY 273 (2010); Ian Loader, *For Penal Moderation: Notes towards a Public Philosophy of Punishment*, 14 THEORETICAL CRIMINOLOGY 349 (2010).

online in furtherance of other criminal activities.⁹⁰ There, the preparatory conduct is a standalone criminal offense. For instance, a digital platform set up for users to exchange information regarding cannabis cultivation and consumption would fall within the ambit of this offense.⁹¹ So would the preparatory act of the platform in facilitating the electronic transmission of fraudulent information,⁹² which, by itself, traditionally would not be subject to criminal liability if the actual fraud were called off. Under this new offense, preparatory offenses alone may be punished regardless of whether the substantive offenses actually took place.⁹³ The temporal extension of criminal liability ahead of the actual commission of the substantive conduct, which previously was regarded as too remote to be held accountable, is now captured by the widened net of criminal law. The criminal law can be seen as “moving” its focus temporally from the assessment of *ex post* culpability to preventing *ex ante* danger and risk.

The offense of Assisting Information Network-related Criminal Activities illustrates the spatial expansion of criminal responsibility. Under that crime, the liability normally reserved for the principal has been applied to those who provide assistance using digital platforms. Traditionally, accessories that lacked the requisite *mens rea* could not be held accountable for acts committed by the principal. To impute the act of a principal to the accessory, it was generally necessary that the latter acceded to the common purpose with the main perpetrator, or at least had been aware of the nature and consequences of the former’s conduct. This offense eliminated that legal barrier to facilitate the prosecution of digitally mediated and often disparate conduct committed by multiple offenders without a shared *mens rea*. Accessorial conduct either “before the fact” or “after the fact” can now be convicted on its own even when the principal is

⁹⁰ Zhonghua renmin gongheguo xingfa, 中华人民共和国刑法 [Criminal Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 287-1.

⁹¹ Bian Chencheng Deng Fanmai Dupin, Feifa Liyong Xinxi Wangzuo An (卞晨晨等贩卖毒品、非法利用信息网络案) [Zhuji City People’s Procuratorate v. Bian Chencheng, etc., Crimes of Selling Drugs and Illegally Utilizing Information Network], (2019) Zhe 0681 Xing Chu 944 Hao ((2019) 浙 0681 刑初 944 号), Oct. 12, 2019 (China).

⁹² Zhangmou, Tanmou Deng Feifa Liyong Xinxi Wangluo Zui Ershen Yi’an (张某、谭某等非法利用信息网络罪二审一案) [Suqian Municipal People’s Procuratorate v. Zhang, Tan, etc., the Second Instance of Crime of Illegally Utilizing Information Network], (2018) Su 13 Xing Zhong 203 Hao ((2018) 苏 13 刑终 203 号), Feb. 12, 2019 (China).

⁹³ See generally Chen Xingliang (陈兴良), Wangluo Fanzui de Leixing Jiqi Sifa Rending (网络犯罪的类型及其司法认定) [Types of Cyber Crimes and Its Judicial Identification], 3 FAZHI YANJIU (法治研究) [RESEARCH ON RULE OF LAW] 3 (2021); Yu Haisong (喻海松), Wangluo Fanzui de Lifa Kuozhang Yu Sifa Shiyong (网络犯罪的立法扩张与司法适用) [Legislative Expansion and Judicial Application of Cyber Crimes], 9 FALÜ SHIYONG (法律适用) [J. OF L. APPLICATION] 2 (2016).

exempted from criminal liability or yet to be apprehended.⁹⁴ Digital platforms, along with all persons and entities involved in providing auxiliary support can be presumed guilty for assisting regulatory crimes as accomplices.⁹⁵ As a result, criminal responsibility has widened from the main culprits who commit the actual base offenses to those who are marginally involved without intention or knowledge, shifting the purview of criminal law from main sources of risk to secondary and supporting roles.

Finally, criminal liability has “scaled up” from commission to omission. Neatly characterized as punishing “what others do and they fail to prevent,”⁹⁶ omission-based liability was rare in the pre-platform era but has become increasingly common. There are two ways in which this extension has taken place. The first has been to criminalize omissions by digital platforms under substantive offenses. In the Shenzhen QVOD (Kuaibo) case⁹⁷, discussed below, a live-streaming platform was criminalized for its failure to censor obscene videos posted by its users. Prosecutors based the conviction on the offense of Producing, Reproducing,

⁹⁴ Guanyu Banli Feifa Liyong Xinxi Wangluo, Bangzhu Xinxi Wangluo Fanzui Huodong Deng Xingshi Anjian Shiyong Falv Ruogan Wenti de Jieshi (关于办理非法利用信息网络、帮助信息网络犯罪活动等刑事案件适用法律若干问题的解释) [Interpretations on Several Issues concerning the Application of Law in Handling Criminal Cases Involving Crimes of Illegally Utilizing Information Network or Aiding Criminal Activities through Information Network], Interpretation No. 15 (promulgated by the Sup. People’s Ct. and the Sup. People’s Procuratorate, Oct. 21, 2019, effective Nov. 1, 2019), art. 13, CLI.3.336835 (EN) (Lawinfochina) (That the principal has not been apprehended, convicted, or exempted from criminal liability shall not affect holding the defendant liable under the offense of aiding criminal activities through information networks); Guanyu Banli Dianxin Wangluo Zhapian Deng Xingshi Anjian Shiyong Falv Ruogan Wenti de Yijian (Er) (关于办理电信网络诈骗等刑事案件适用法律若干问题的解释(二)) [Opinions on Several Issues Concerning the Application of Law in the Handling of Telecommunications Network Fraud and other Criminal Cases (II)], Interpretation No. 22 (promulgated by the Sup. People’s Ct., the Sup. People’s Procuratorate and the Ministry of Public Security, Jun. 17, 2021, effective Jun. 17, 2021), art. 11, CLI.3.5015799 (EN) (Lawinfochina).

⁹⁵ Na Chao Gu Xian Bangzhu Xinxi Wangluo Fanzui Huodong An (纳超顾贤帮助信息网络犯罪活动案) [Yuecheng District People’s Procuratorate v. Na Chao and Gu Xian, the Crime of Aiding Criminal Activities through Information Network], (2020) Zhe 0602 Xing Chu 624 Hao ((2020) 浙 0602 刑初 624 号), Oct. 12, 2020 (China).

⁹⁶ A.P. SIMESTER ET AL., SIMESTER AND SULLIVAN’S CRIMINAL LAW 15 (Hart Publishing, 6th ed. 2016).

⁹⁷ Wu Ming deng zhizuo, fuzhi, chuban, fanmai, chuanbo yinhui wupin mouli zui yishen xingshi panjueshu(吴铭等制作、复制、出版、贩卖、传播淫秽物品牟利罪一审刑事判决书) [Haidian District People’s Procuratorate v. Wu Ming Deng, the First Instance Criminal Judgment on the Crime of Producing, Reproducing, Publishing, Selling, and Disseminating Obscene Materials for Profit], ((2015) 海刑初字第 512 号) [(2015) Hai Xing Chu Number 512], Sep. 13, 2016 (China); Wu Ming deng zhizuo, fuzhi, chuban, fanmai, chuanbo yinhui wupin mouli zui ershen xingshi caidingshu(吴铭等制作、复制、出版、贩卖、传播淫秽物品牟利罪二审刑事裁定书) [Haidian District People’s Procuratorate v. Wu Ming Deng, the Second Instance Criminal Judgment on the Crime of Producing, Reproducing, Publishing, Selling, and Disseminating Obscene Materials for Profit], (2016)京 01 刑终 592 号 [(2016) Jing 01 Xing Zhong Number 592] (China).

Publishing, Selling, or Disseminating Obscene Materials for Profit.⁹⁸ Similarly, a video-sharing platform was criminalized for its failure to monitor and remove terrorism-related content.⁹⁹ The criminal liability imposed on P2P financing platforms provides another example of omission liability for failing to abide by state regulatory efforts. Sometimes these fast-evolving regulatory requirements can even be retroactively applied to platforms, practically demanding a form of risk-aversion foresight.¹⁰⁰

Digital platforms can be penalized for omission under generic, rather than substantive, offenses for their failure to fulfill certain “positive duties”.¹⁰¹ This generic liability is piggybacked onto base offenses as a layer of blanket responsibility. A classic example of this approach is the offense of Evading Cyber Security Obligations.¹⁰² Any network service provider who fails to safeguard information networks, as provided by relevant regulations, is subject to fixed-term imprisonment and may be concurrently or separately fined.¹⁰³ Thus, a digital platform operator who provided internet users with Virtual Private Network (VPN) services to bypass internet censorship (i.e. the “Great Firewall”) to access foreign web sites was punished for the failure to perform cybersecurity obligations.¹⁰⁴

⁹⁸ Zhonghua renmin gongheguo xingfa, 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 363-1.

⁹⁹ Xie Chen, Li Tao Fan Xuanyang Kongbu Zhuyi, Jiduan Zhuyi Yishen Xingshi Panjueshu (谢忱、李运涛犯宣扬恐怖主义、极端主义罪一审刑事判决书) [Beijing No. 3 Municipal People's Procuratorate v. Xie Chen and Li Tao, the First Instance Criminal Judgment on the Crime of Advocating Terrorism or Extremism or Instigating Terrorist Activities], (2017) Jing 03 Xing Chu 15 Hao ((2017) 京 03 刑初 15 号) (China); Xie Chen, Li Tao Fan Xuanyang Kongbu Zhuyi, Jiduan Zhuyi Ershen Xingshi Caidingshu (谢忱、李运涛犯宣扬恐怖主义、极端主义罪二审刑事裁定书) [Beijing No. 3 Municipal People's Procuratorate v. Xie Chen and Li Tao, the Second Instance Criminal Judgment on the Crime of Advocating Terrorism or Extremism or Instigating Terrorist Activities], (2017) Jing Xing Zhong 196 Hao ((2017) 京刑终 196 号) (China).

¹⁰⁰ Chen Jianxin, Lin Guicheng Feifa Xishou Gongzhong Cunkuan Zui Yishen Xingshi Panjueshu (陈建新、林桂成非法吸收公众存款罪一审刑事判决书) [Qingxiu District People's Procuratorate v. Chen Jianxin and Lin Guicheng, Illegally Collecting Funds from the Public], (2019) Gui 0103 Xing Chu 74 Hao ((2019) 桂 0103 刑初 74 号), May 20, 2020 (China).

¹⁰¹ For the rise of positive duties in a non-digital-platform context in English Criminal law, see Andrew Ashworth, *Positive Duties, Regulation and the Criminal Sanction*, 133 LAW Q. REV. 610, 610 (2017).

¹⁰² Zhonghua renmin gongheguo xingfa, 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 286-1.

¹⁰³ *Id.*

¹⁰⁴ Humou Jubu Luxing Xinxi Wangluo Anquan Guanli Yiwu Yishen Xingshi Panjueshu (胡某拒不履行信息网络安全管理义务一审刑事判决书) [Pudong District People's Procuratorate v. Humou, Evading Cyber Security Obligations], (2018) Hu 0115 Xing Chu 2974 Hao ((2018) 沪 0115 刑初 2974 号), Sep. 11, 2018 (China). There, the defense attorney argued that Mr Chen should not be convicted for illegally taking in public funds because, when the defendant was involved in the P2P business in 2016, state regulatory provisions were non-existent, and no licensing requirements were established for platforms to control financial risks.

In essence, the ambit of criminal law stretches out from its previous fixed attention on positive acts to failures to perform certain regulatory duties as supplementary sources of risks.

In sum, in an age of platform economies, China's criminal law has transformed to meet the growing social demands of risk prevention and control. This legislative gesture alone has significant implications, apart from the fact that these developments can ameliorate the exposure of platform users to prevalent risks. The reach and depth of the criminal law have been stretched out significantly both horizontally and vertically. The horizontal widening of the criminal net captures individual and platform behaviors that were not on the menu of criminal acts in the pre-platform era. Taking on new regulatory roles, criminal law also imposes, under existing criminal offenses, new liabilities for conduct previously exempted under conventional legal principles and jurisprudence. This latter *vertical* trend of extension takes three forms: (1) criminal liability is extended temporally from the substantial act to preparatory conducts, incitement, and information exchange that are mediated through digital platforms; (2) criminal liability is broadened interpersonally from principals and ringleaders to accessories even when the principals are not yet apprehended or convicted; and (3) the behavioral patterns attracting criminal liability spread from commission to a wide range of omission offenses. Traditional restrictions placed on omission liability have been lifted. In a nutshell, the intervention of criminal law in the governance of digital platforms has become earlier, broader, tougher, and more penetrative and elastic.

B. The Rise of Three Positive Criminal Duties

The focus of this subsection is to further explore the expansion of criminal liability vertically to enable the shift from commission to omission. This change in the modality of criminalization imposes positive duties on digital platforms. As a result, criminal law now seeks to prevent and control risks by demanding platforms to *act* instead of simply *refraining* from prohibitions. Sometimes criminal statutes provide that an offense can only be committed by omission. Andrew Ashworth refers to this new form of legal obligation as “a secondary duty.”¹⁰⁵ An example of this offense-specific omission includes the crime of evading cyber security obligations.¹⁰⁶ Alternatively, omission liability applies to digital platforms for offenses that are typically committed by positive acts. Whether

¹⁰⁵ Andrew Ashworth, *A New Generation of Omissions Offences?*, 5 CRIM. L. REV. 354, 362 (2018).

¹⁰⁶ Zhonghua renmin gongheguo xingfa, 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 287(2).

criminal liability can be attributable to digital platforms through omission is a matter of statutory interpretation by courts on a case-by-case basis. The past years saw a broader trend toward imposing omissions liability for an ever-greater range of conduct concerning and mediated by digital platforms. In the absence of general guiding rules, I have identified and cataloged three positive duties based on statutory provisions and caselaw, namely: (1) the duty to review, (2) the duty to manage, and (3) the duty to protect. A summary of these positive obligations and a list of corresponding criminal offenses are contained in Table One.¹⁰⁷

Digital intermediaries, under the duty to review, are mandated to exercise due diligence in monitoring and evaluating digital content on platforms. Additionally, they are required to verify the credentials and licenses of businesses and individuals engaged in selling products or offering services. The duty to manage imposes a higher requirement on digital platforms, not only to review, but also to take appropriate actions to manage problematic and illegal content and activities. The duty to protect obliges the platform to ensure the safety and interests of its users. This outcome-oriented obligation goes beyond the precautionary actions that platforms take in the form of reviews, monitoring, or management. In broader terms, the duty to protect criminalizes—and in some cases even retroactively criminalizes—any failure to comply with state and local regulatory mandates. An analysis of legislative provisions and case studies will follow to review the diverging patterns of these three positive duties.

1. The Duty to Review

The duty to review is the basic type of omission-based platform obligation. This duty to review requires digital platforms to monitor, inspect, and evaluate. It can be used either alone to censure omission which involves risky behaviors in legitimate platform business operations or as a gateway duty introduced in tandem with thicker, higher forms of positive duties—such as the duty to review¹⁰⁸ and protect¹⁰⁹—to form a net of omission-based obligations. In this section, I will focus on the former. Relevant criminal offenses include, for instance, false advertising,¹¹⁰

¹⁰⁷ See *infra*, Table One.

¹⁰⁸ See e.g., *infra* pp. 25–25 (discussing the QVOD case and “The Duty to Manage”).

¹⁰⁹ See e.g., *infra* pp. 30–45 (discussing the Didi cases and “The Duty to Protect”).

¹¹⁰ *Zhonghua renmin gongheguo xingfa*, 中华人民共和国刑法 [Criminal Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 222.

traffic accidents,¹¹¹ and smuggling goods.¹¹² In a false advertising case, Chinese courts found both the ultimate controlling owner and frontline employees of the advertising platforms criminally liable for failing to identify the absence of credentials and fake licenses of pharmaceutical advertisers.¹¹³ In another traffic accident case, a ride-hailing platform was held jointly accountable with the actual driver under the offense of causing a traffic accident for its failure to review the licenses, insurance, and registrations of the driver and the vehicle.¹¹⁴ Last but not least, in a goods smuggling case, a cross-border e-commerce platform and its senior executives were found guilty of smuggling goods for failure to monitor and review the discrepancy between actual order management and documents submitted to customs.¹¹⁵

In all three cases, the defendants, expressively or implicitly, vented varying degrees of skepticism toward the respective regulatory regimes. In *Cao Moujia*, the defendant admitted that he was unaware of state regulations regarding pharmaceutical advertisement and had no relevant review credentials even after working in the industry for seven years.¹¹⁶ In

¹¹¹ *Zhonghua renmin gongheguo xingfa*, 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 133.

¹¹² *Zhonghua renmin gongheguo xingfa*, 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 153.

¹¹³ *Cao Moujia Xujia Guanggao Yishen Xingshi Panjueshu* (曹某甲虚假广告一审刑事判决书) [Wolong District People's Procuratorate v. Cao Moujia, Crime of False Advertising], (2016) Yu 1303 Xing Chu 420 Hao ((2016) 豫 1303 刑初字第 420 号), Jul. 21, 2016 (China); *Cao Moujia Xujia Guanggao Yishen Xingshi Panjueshu* (曹某甲虚假广告一审刑事判决书) [Hubin District People's Procuratorate v. Cao Moujia, Crime of False Advertising], (2016) Yu 1202 Xing Chu 211 Hao ((2016) 豫 1202 刑初 211 号), Sep. 30, 2016 (China).

¹¹⁴ *Wei Haibo yu Zheng Weizhen Jiaotong Zhaoshi Zui Yishen Xingshi Panjueshu* (魏海波与郑卫珍交通肇事罪一审刑事判决书) [Gaoping City People's Procuratorate v. Wei Haibo and Zheng Weizhen, Crime of Causing a Traffic Accident], (2019) Jin Xing Chu 35 Hao ((2019) 晋 0581 刑初 35 号), Apr. 22, 2019 (China); *Wei Haibo yu Zheng Weizhen Jiaotong Zhaoshi Zui Ershen Xingshi Panjueshu* (魏海波与郑卫珍交通肇事罪二审刑事判决书) [Gaoping City People's Procuratorate v. Wei Haibo and Zheng Weizhen, Crime of Causing a Traffic Accident], (2019) Jin 05 Xing Zhong 173 Hao ((2019) 晋 05 刑终 173 号), Jul. 11, 2019 (China).

¹¹⁵ *Guangzhou Shunyuanzheng Wangluo Keji Youxian Gongsi, Guantong (Guangzhou) Guoji Gongyinglian Keji Youxian Gongsi Deng Zousi Putong Huowu, Wupin Zui Xingshi Yishen Panjueshu* (广州顺原正网络科技有限公司、关通(广州)国际供应链科技有限公司等走私普通货物、物品罪刑事一审刑事判决书) [Foshan Municipal People's Procuratorate v. Guangzhou Shunyuanzheng Network Technology Co., Ltd. Et al., Crime of Smuggling General Goods or Articles], (2020) Yue 06 Xing Chu 76 Hao ((2020) 粤 06 刑初 76 号), Jun. 26, 2021 (China).

¹¹⁶ *Cao Moujia Xujia Guanggao Yishen Xingshi Panjueshu* (曹某甲虚假广告一审刑事判决书) [Wolong District People's Procuratorate v. Cao Moujia, Crime of False Advertising], (2016) Yu 1303 Xing Chu 420 Hao ((2016) 豫 1303 刑初字第 420 号), Jul. 21, 2016 (China); *Cao Moujia Xujia Guanggao Yishen Xingshi Panjueshu* (曹某甲虚假广告一审刑事判决书) [Hubin District People's Procuratorate v. Cao Moujia, Crime of False Advertising], (2016) Yu 1202 Xing Chu 211 Hao ((2016) 豫 1202 刑初 211 号), Sep. 30, 2016 (China).

Guangzhou Shunyuanzheng Network Technology Co., Ltd. et al., the defendant explained that the platform's transfer of consumer orders from domestic stores to cross-border e-commerce platforms for customs filing was "a response to complex commercial environment of cross-border e-commerce," blamed the local customs for their "longstanding acquiescence" to this common business practice, and expressed discontent about the insufficient and belated regulatory responses to the emerging industry.¹¹⁷ Even the court handing down the verdict recognized regulatory insufficiency, echoing widespread ethical ambivalence for the shift of responsibility from regulatory agencies to courts and for using criminal punishments to address innovative regulatory issues.¹¹⁸

2. *The Duty to Manage*

The duty to manage, unlike the duty to review, involves data processors actively monitoring and evaluating online content. It also encompasses taking proactive measures to regulate and supervise information and activities. Neglecting the obligation of cybersecurity management could lead to offenses such as Evading Cyber Security Obligations.¹¹⁹ Yet, what constitutes "the obligation of cybersecurity management" has yet to be clarified by judicial interpretations¹²⁰ and, most importantly, is a fast-growing body of case law. Cybersecurity management obligations are unfulfilled when digital platforms fail to keep user logs, perform user authentication, or grant data access to law enforcement, cyber administration, and telecommunication authorities

¹¹⁷ *Guangzhou Shunyuanzheng Wangluo Keji Youxian Gongsi, Guantong (Guangzhou) Guoji Gongyinglian Keji Youxian Gongsi Deng Zousi Putong Huowu, Wupin Zui Xingshi Yishen Panjueshu* (广州顺原正网络科技有限公司、关通(广州)国际供应链科技有限公司等走私普通货物、物品罪刑事一审刑事判决书) [*Foshan Municipal People's Procuratorate v. Guangzhou Shunyuanzheng Network Technology Co., Ltd. Et al., Crime of Smuggling General Goods or Articles*], (2020) Yue 06 Xing Chu 76 Hao ((2020) 粤 06 刑初 76 号), Jun. 26, 2021 (China).

¹¹⁸ Feng Xiaopeng (冯晓鹏) & Liu Yihan (刘艺涵), *Kuajing Dianshang Zousi? Daigou Zhuanxing Zhong de "Tuidan" Zhi Tong* (跨境电商走私? 代购转型中的"推单"之痛) [*Cross Border E-commerce Smuggling? The Pain of "Pushing Orders" in the Transformation of Agency Purchase*], XINLANG (新浪) [SINA] (Jun. 23, 2020), <https://lvdao.sina.com.cn/news/2020-06-23/doc-iirczymk8589413.shtml>.

¹¹⁹ *Zhonghua renmin gongheguo xingfa, 中华人民共和国刑法* [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 287(2).

¹²⁰ *Gunayu Banli Feifa Liyong Xinxi Wangluo, Bangzhu Xinxi Wangluo Fanzui Huodong Deng Xingshi Anjian Shiyong Falv Ruogan Wenti de Jieshi* (关于办理非法利用信息网络、帮助信息网络犯罪活动等刑事案件适用法律若干问题的解释) [Interpretations on Several Issues concerning the Application of Law in Handling Criminal Cases Involving Crimes of Illegally Using an Information Network or Providing Aid for Criminal Activities in Relation to Information Network], Interpretation No. 15 (promulgated by the Sup. People's Ct. and the Sup. People's Procuratorate, Oct. 21, 2019, effective Nov. 1, 2019), art. 2(1), CLI.3.336835 (EN) (Lawinfochina).

when ordered to do so.¹²¹ In essence, digital platforms are required to suppress risks of cyber activities which contravene regulatory requirements by collaborating with state authorities. Existing case law confirms this interpretation of “cybersecurity management obligations.” Digital platforms are deemed of failing their positive obligations, for instance, when they fall short of following the instructions by telecommunication administrative authorities to protect personal information,¹²² to comply with orders issued by police departments to cease providing VPN¹²³ and VPS Hosting (Virtual Private Server)¹²⁴ services, and to observe rules set by cyber security administration authorities about internet censorship.¹²⁵

Aiding criminal activities through information networks is a notable criminal offense.¹²⁶ Although this offense was only recently introduced into the 1997 criminal law,¹²⁷ it has ascended to the top of criminal offenses, resulting in the third highest number of convictions.¹²⁸ Judicial

¹²¹ *Id.*

¹²² Li Xiaoquan Jubu Lüxing Xinxi Wangluo Anquan Guanli Yiwu Yishen Xingshi Panjueshu (李小全拒不履行信息网络安全管理义务一审刑事判决书) [Panlong District People’s Procuratorate v. Li Xiaoquan, Evading Cyber Security Obligations], (2020) Yun 0103 Xing Chu 1206 Hao ((2020) 云 0103 刑初 1206 号), Dec. 26, 2020 (China).

¹²³ Humou Jubu Lüxing Xinxi Wangluo Anquan Guanli Yiwu Yishen Xingshi Panjueshu (胡某拒不履行信息网络安全管理义务一审刑事判决书) [Pudong District People’s Procuratorate v. Humou, Evading Cyber Security Obligations], (2018) Hu 0115 Xing Chu 2974 Hao ((2018) 沪 0115 刑初 2974 号), Sep. 11, 2018 (China).

¹²⁴ Anhui Moumou Hulian Jishu Keji Youxian Gongsi, Wang Moumou Deng Jubu Lüxing Xinxi Wangluo Anquan Guanli Yiwu An (安徽某某互联技术科技发展有限公司、王某某等拒不履行信息网络安全管理义务案) [Liuhe District People’s Procuratorate v. Anhui Moumou Hulian Jishu Keji Youxian Gongsi and Wang Moumou, etc., Evading Cyber Security Obligations], Liu Jian Xing Su (2021) 250 Hao (六检刑诉 (2021) 250 号), Nov. 23, 2021 (China); Sun Moumou Jubu Lüxing Xinxi Wangluo Anquan Guanli Yiwu An (孙某某拒不履行信息网络安全管理义务案) [Shuyang County People’s Procuratorate v. Sun Moumou, Evading Cyber Security Obligations], Shu Jian Yi Bu Xing Su (2020) 827 Hao (流检一部刑诉 (2020) 827 号), Sep. 27, 2020 (China).

¹²⁵ Xu Hua Jubu Lüxing Xinxi Wangluo Anquan Guanli Yiwu Zui Xingshi Shensu Zaishen Shenchaxingshi Tongzhishu (许华拒不履行信息网络安全管理义务罪刑事申诉再审审查刑事通知书) [Criminal Notice of Retrial Review of Criminal Appeal of Xu Hua’s Charge on Evading Cyber Security Obligations], (2021) Chuan XX Xing Shen X Hao ((2021) 川 XX 刑申 X 号), Aug. 18, 2021 (China).

¹²⁶ Zhonghua renmin gongheguo xingfa, 中华人民共和国刑法 [Criminal Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 287(2).

¹²⁷ Zhonghua renmin gongheguo xingfa xiuzhengan (jiu) ((中华人民共和国刑法修正案(九))) [Amendment (IX) to the Criminal Law of the People’s Republic of China] (promulgated by Standing Committee of the National People’s Congress, Aug. 29, 2015, effective Nov. 1, 2015), CLI.1.256286(EN) (Lawinfochina).] (promulgated by Standing Committee of the National People’s Congress, Aug. 29, 2015.)

¹²⁸ Wang Lina (王丽娜), Jiancha Jiguan Shangbannian Qisu Bangxinzui 6.4 Wan Ren, Sanlei Renyuan She’an Wenti Zhide Gaodu Guanzhu (检察机关上半年起诉帮信罪 6.4 万人，三类人员涉案问题值得高度关注) [In the first half of the year, the prosecutorial organs prosecuted 64,000 people for the crime of assisting in information network-related criminal activities, and three types of people involved in the case deserve great attention], CAIJING (财经网) [CAIJING] (Jun. 25, 2022), <http://m.caijing.com.cn/api/show?contentid=4877653>.

interpretation specifies seven circumstances where internet service providers are presumed to be guilty of assisting cyber criminality, including the failure to efficiently remove or block suspicious content, shut down the servers, or report to law enforcement after receiving reports about illegal activities or illicit content.¹²⁹ These guilt-presumption clauses impose positive duties on platforms to maintain substantial digital infrastructures and manpower to nip illicit activities in the bud. Such a resource-demanding regulatory approach presents significant challenges to big tech corporations and is virtually insurmountable for fledgling platforms. To be held criminally liable, digital platforms need not contradict the requirements or evade the instructions issued by relevant regulatory departments; a simple failure to cease, prevent, or report risks will suffice. As disclosed by the Supreme People's Procuratorate, criminalization in this area was intended to "strike hard early and on all petty offenses" that can be linked to cybercrimes.¹³⁰

The criminal act of aiding criminal activities through information networks constitutes a generic-duty offense.¹³¹ This mandates comprehensive cyber management responsibilities for digital platforms, backed by the imposition of criminal penalties. This approach of regulation through criminalization also affects non-cybercriminal offenses¹³² that are generally known as "illicit market offenses" or "vice

¹²⁹ Gunayu Banli Feifa Liyong Xinxi Wangluo, Bangzhu Xinxi Wangluo Fanzui Huodong Deng Xingshi Anjian Shiyong Falv Ruogan Wenti de Jieshi (关于办理非法利用信息网络、帮助信息网络犯罪活动等刑事案件适用法律若干问题的解释) [Interpretations on Several Issues concerning the Application of Law in Handling Criminal Cases Involving Crimes of Illegally Using an Information Network or Providing Aid for Criminal Activities in Relation to Information Network], Interpretation No. 15 (promulgated by the Sup. People's Ct. and the Sup. People's Procuratorate, Oct. 21, 2019, effective Nov. 1, 2019), art. 2(1), CLI.3.336835 (EN) (Lawinfochina), art. 11.

¹³⁰ Xian Jie (线杰) & Wu Qiaobin (吴峭滨), Guanyu Banli Feifa Liyong Xinxi Wangluo, Bangzhu Xinxi Wangluo Fanzui Huodong Deng Xingshianjian Shiyong Falu Ruogan Wenti de Jieshi Zhongdian Nandina Wenti Jiedu (《关于办理非法利用信息网络、帮助信息网络犯罪活动等刑事案件适用法律若干问题的解释》重点难点问题解读) [Interpretation of Key and Difficult Issues in Interpretation of Several Issues Concerning the Application of Laws to Criminal Cases such as Handling Illegal Use of Information Networks and Helping Information Network Crimes], ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN JIANCHAYUAN (中华人民共和国最高人民检察院) [THE SUPREME PEOPLE'S PROCURATORATE OF THE PEOPLE'S REPUBLIC OF CHINA] (Oct. 27, 2019), https://www.spp.gov.cn/spp/zd gz/201910/t20191027_436313.shtml.

¹³¹ This group of offenses includes, but is not limited to the following: (1) Infringing on Citizens' Personal Information (Article 253-1, the Criminal Law); (2) Illegally Obtaining Data in Computer Information Systems or Exercising Illegal Control over Computer Information Systems (Article 285(2), the Criminal Law); (3) Providing Programs or Tools Used for Intruding into or Illegally Controlling Computer Information Systems (Article 285(3), the Criminal Law); and (4) and Evading Cyber Security Obligations (Article 286-1, the Criminal Law).

¹³² These include the following provisions in the Criminal Law: art. 363(1) ("[Crime of Producing, Reproducing, Publishing, Selling, or Disseminating Obscene Materials—] Those producing,

offenses” and include pornography, gambling, drug offenses, and terrorism-related conduct. The offense of disseminating obscene materials, notably, led to the high-profile convictions of a major video-streaming platform, Shenzhen QVOD (Kuaibo), for pornographic content distributed by its users.¹³³ The QVOD case stood out as one of the most controversial cases in the Chinese legal history of digital platform regulation.¹³⁴

reproducing, publishing, selling, or disseminating obscene materials with the purpose of making profits are to be sentenced to three years or fewer in prison or put under limited incarceration or probation, in addition to paying a fine. If the case is serious, they are to be sentenced to three to ten years in prison in addition to having to pay a fine. If the case is especially serious, they are to be sentenced to ten years or more in prison or given life sentence, in addition to a fine or confiscation of property”); art. 303 (2) (“[Crime of Running a Gambling House—]Whoever runs a gambling house shall be sentenced to imprisonment of not more than five years, limited incarceration, or probation and a fine; or if the circumstances are serious, be sentenced to imprisonment of not less than five years nor more than ten years and a fine.”); 120-3 (“[Crime of Advocating Terrorism, Extremism or Instigating Terrorist Activities—]Whoever advocates terrorism or extremism or instigates terrorist activities by way of preparing or distributing any book, audio or video materials or any other article advocating terrorism or extremism or by instructing or issuing information shall be sentenced to imprisonment of not more than five years, limited incarceration, surveillance or deprivation of political rights in addition to a fine; or if the circumstances are serious, be sentenced to imprisonment of not less than five years in addition to a fine or forfeiture of property”).

¹³³ See e.g., He Shaoyue Chen Junxian Zhizuo Fuzhi Chuban Fanmai Chuanbo Yinhui Wupin Mouli Yishen Xingshi Panjueshu (何少岳陈俊先制作复制出版贩卖传播淫秽物品牟利一审刑事判决书) [Zhongshan City No. 1 People’s Procuratorate v. He Shaoyue and Chen Junxian, the First Instance Criminal Judgment on the Crime of Producing, Reproducing, Publishing, Selling, and Disseminating Obscene Materials for Profit], (2017) Yue 2071 Xing Chu 1507 Hao ((2017) 粤 2071 刑初 1507 号), Jun. 8, 2018 (China); Gao Hao Zhizuo, Fuzhi, Chuban, Fanmai, Chuanbo Yinhui Wupin Mouli Yishen Xingshi Panjueshu (高浩制作、复制、出版、贩卖、传播淫秽物品牟利一审刑事判决书) [Shangshui County People’s Procuratorate v. Gao Hao, the First Instance Criminal Judgment on the Crime of Producing, Reproducing, Publishing, Selling, and Disseminating Obscene Materials for Profit], (2018) Yu 1623 Xing Chu 224 Hao ((2018) 豫 1623 刑初 224 号), Aug. 13, 2018 (China); Chen Hua, Ye Xiangfeng Zhizuo, Fuzhi, Chuban, Fanmai, Chuanbo Yinhui Wupin Mouli Yishen Xingshi Panjueshu (陈华、叶翔峰制作、复制、出版、贩卖、传播淫秽物品牟利一审刑事判决书) [Yiyuan County People’s Procuratorate v. Chen Hua, Ye Xiangfeng, the First Instance Criminal Judgment on the Crime of Producing, Reproducing, Publishing, Selling, and Disseminating Obscene Materials for Profit], (2017) Lu 0323 Xing Chu 46 Hao ((2017) 鲁 0323 刑初 46 号), Feb. 9, 2018 (China); Zheng Jingui, Lu Yanfeng, Du Yonggen Deng Zhizuo, Fuzhi, Chuban, Fanmai, Chuanbo Yinhui Wupin Mouli Zui Ershen Xingshi Caidingshu (郑进贵、陆燕峰、杜勇根等制作、复制、出版、贩卖、传播淫秽物品牟利罪二审刑事裁定书) [Lishui City People’s Procuratorate v. Zheng Jingui, Lu Yanfeng and Du Yonggen, etc., the Second Instance Criminal Judgment on the Crime of Producing, Reproducing, Publishing, Selling, and Disseminating Obscene Materials for Profit], (2019) Zhe 11 Xing Zhong 240 Hao ((2019) 浙 11 刑终 240 号), Dec. 30, 2019 (China).

¹³⁴ Wu Ming deng zhizuo, fuzhi, chuban, fanmai, chuanbo yinhui wupin mouli zui yishen xingshi panjueshu(吴铭等制作、复制、出版、贩卖、传播淫秽物品牟利罪一审刑事判决书) [Haidian District People’s Procuratorate v. Wu Ming Deng, the First Instance Criminal Judgment on the Crime of Producing, Reproducing, Publishing, Selling, and Disseminating Obscene Materials for Profit], ((2015) 海刑初字第 512 号) [(2015) Hai Xing Chu Number 512], Sep. 13, 2016 (China); Wu Ming deng zhizuo, fuzhi, chuban, fanmai, chuanbo yinhui wupin mouli zui ershen xingshi caidingshu(吴铭等制作、复制、出版、贩卖、传播淫秽物品牟利罪二审刑事裁定书) [Haidian District People’s Procuratorate v. Wu Ming Deng, the Second Instance Criminal Judgment on the Crime of Producing, Reproducing, Publishing, Selling, and Disseminating Obscene Materials for Profit], (2016)京 01 刑终 592 号 [(2016) Jing 01 Xing Zhong Number 592] (China).

(1) Criminalizing the Failure to Take Down Illegal Online Content:
The Case of QVOD

Should a digital platform be held criminally liable for obscene materials transmitted by its users? Two Beijing courts gave a clear message: Digital platforms owe a legal duty to diligently manage illicit content mediated through them; failures to vigilantly surveil, filter, block, and take down illegal content constitute a violation of such obligations and thus give rise to criminal liabilities.¹³⁵ QVOD was a popular Chinese online platform that provided P2P streaming services for its users to publish, distribute, and watch videos. Among a plethora of concerns encompassing factual, legal, and procedural aspects, the pivotal ground leading to QVOD's charge and conviction for profiting from disseminating obscene materials was primarily rooted in its positive obligation for cyber security management.¹³⁶ Both parties vigorously debated the nature and boundary of this obligation. QVOD argued that charges based on omission were inappropriate on three grounds: First, it had no obligation to manage, prevent, and control illegal content under the law.¹³⁷ Second, even if QVOD had such an obligation, it had already exercised reasonable care and due diligence to fulfill that obligation.¹³⁸ And third, QVOD lacked the resources and capacity to fulfill such an obligation.¹³⁹

The courts, at the first trial and on appeal, dismissed all three claims.¹⁴⁰ First, they held that QVOD, as an internet information service provider, had the obligation to manage, filter, and block illegal content.¹⁴¹ Importantly, the trial court found that QVOD had played a key part in facilitating its users' storage and distribution of pornographic videos through the company's cache servers. Those servers, the court concluded,

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Wu Ming deng zhizuo, fuzhi, chuban, fanmai, chuanbo yinhui wupin mouli zui yishen xingshi panjueshu(吴铭等制作、复制、出版、贩卖、传播淫秽物品牟利罪一审刑事判决书) [Haidian District People's Procuratorate v. Wu Ming Deng, the First Instance Criminal Judgment on the Crime of Producing, Reproducing, Publishing, Selling, and Disseminating Obscene Materials for Profit], ((2015)海刑初字第 512 号) [(2015) Hai Xing Chuze Number 512], Sep. 13, 2016 (China); Wu Ming deng zhizuo, fuzhi, chuban, fanmai, chuanbo yinhui wupin mouli zui ershen xingshi caidingshu(吴铭等制作、复制、出版、贩卖、传播淫秽物品牟利罪二审刑事裁定书) [Haidian District People's Procuratorate v. Wu Ming Deng, the Second Instance Criminal Judgment on the Crime of Producing, Reproducing, Publishing, Selling, and Disseminating Obscene Materials for Profit], (2016)京 01 刑终 592 号 [(2016) Jing 01 Xing Zhong Number 592] (China).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

accelerated the rate at which users downloaded and played the videos.¹⁴² By proxy, QVOD was regarded as the *de facto* publisher and distributor of illicit content.

The courts also refuted QVOD's claim that it exercised reasonable due diligence by taking proper actions in response to the regulatory demands. By failing to adopt industry-standard technologies—such as key frame extraction and image recognition—to detect pornography, QVOD, the court determined, failed to block videos with titles containing explicit keywords and linked to domain names known for illicit conduct.¹⁴³ The courts, therefore, arrived at the conclusion that QVOD intentionally evaded its obligations, not due to its lack of capacity, but because of its unwillingness to comply with its legal obligation.¹⁴⁴

Compared to the broad legal immunity granted under Section 230 of the Communication Decency Act to online intermediaries in the United States that host or republish their users' information,¹⁴⁵ Chinese law offers limited protection for digital platforms. And in contrast with the considerable space and discretion American platforms enjoy with regard to content moderation,¹⁴⁶ Chinese platforms partner with governmental entities to accomplish the latter's regulatory ends of monitoring and controlling user-generated content posted on their sites. Yet, these regulatory efforts are insufficient without the backdrop of coercive power. For the first time, the QVOD case established a form of collateral censorship¹⁴⁷ for Chinese internet platforms. Intermediaries faced realistic criminal liability for the content produced and distributed by their users.

¹⁴² Wu Ming deng zhizuo, fuzhi, chuban, fanmai, chuanbo yinhui wupin mouli zui yishen xingshi panjueshu(吴铭等制作、复制、出版、贩卖、传播淫秽物品牟利罪一审刑事判决书) [Haidian District People's Procuratorate v. Wu Ming Deng, the First Instance Criminal Judgment on the Crime of Producing, Reproducing, Publishing, Selling, and Disseminating Obscene Materials for Profit], ((2015) 海刑初字第 512 号) [(2015) Hai Xing Chuzi Number 512], Sep. 13, 2016 (China).

¹⁴³ Wu Ming deng zhizuo, fuzhi, chuban, fanmai, chuanbo yinhui wupin mouli zui ershen xingshi caidingshu(吴铭等制作、复制、出版、贩卖、传播淫秽物品牟利罪二审刑事裁定书) [Haidian District People's Procuratorate v. Wu Ming Deng, the Second Instance Criminal Judgment on the Crime of Producing, Reproducing, Publishing, Selling, and Disseminating Obscene Materials for Profit], (2016) 京 01 刑终 592 号 [(2016) Jing 01 Xing Zhong Number 592] (China).

¹⁴⁴ *Id.*

¹⁴⁵ Communication Decency Act, 47 U.S.C. § 230 (1996) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.")

¹⁴⁶ See Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2299 (2014); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2017).

¹⁴⁷ Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 317–18 (2011); Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 NOTRE DAME L. REV. 79, 118 (1995).

Beyond criminal law, cybersecurity law¹⁴⁸ also endorses criminal liability for violations of manifold obligations including cybersecurity management of illegal activities. The QVOD case produced immense legal and policy implications and reshaped the regulatory landscape of digital platform regulation in China. Today, all major social media platforms—including Weibo, WeChat, Tencent, Zhihu, Douban, and Bilibili—in cooperation with law enforcement and regulatory agencies, employ various degrees and forms of keeping platform-mediated content under watch. Digital platforms are forced and incentivized to actively police and clean up illicit content for fear of various regulatory and criminal sanctions.¹⁴⁹ And illicit content is not limited to pornography and terrorism-related content, either.¹⁵⁰ Illegal content includes a wide range of speech that “endanger[s] national security, honor and interests” or “fabricate[s] or disseminate[s] false information to disrupt the economic and social order.”¹⁵¹

3. *The Duty to Protect*

Judicial assessment for failing the duty to protect is closely associated with the ultimate goals of platform regulation: risk prevention and control. This positive duty imposed on digital platforms requires them to exercise reasonable care to protect their users from risks. Criminal offenses that target digital platforms for breaching the duty to protect

¹⁴⁸ Zhonghua Renmin Gongheguo Wangluo Anquanfa (中华人民共和国网络安全法) [Cybersecurity Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 7, 2016, effective Jun. 1, 2017), arts. 12, 48, 74, CLI.1.283838 (EN) (Lawinfochina) (the list of illegal content that should be subject to cyber management includes information that “endangers national security, honor and interests, incites to subvert state power or overthrow the socialist system, incites to split the country or undermine national unity, advocates terrorism or extremism, promotes ethnic hatred or discrimination, spreads violent or pornographic information, fabricates or disseminates false information to disrupt the economic and social order, or infringes upon the reputation, privacy, intellectual property rights or other lawful rights and interests of any other person.”)

¹⁴⁹ In December 2021, the Cyberspace Administration ordered China's Twitter-like Weibo to pay a penalty of 3 million yuan for disseminating “illegal information” in severe violation of regulations and law, in the immediate aftermath of the failure to remove a sensitive post on Weibo in twenty minutes after its initial publication. Over the first eleven months of 2021, the Internet regulators also fined Weibo more than forty times, imposing a total penalty equal to \$2.2 million, and sanctioned China's Quora-like social media platform Douban.com a total of \$1.4 million for content transgressions. Liza Lin, *China Fines Weibo for Spreading 'Illegal Information'*, WALL STREET J. (Dec. 14, 2021), <https://www.wsj.com/articles/china-fines-weibo-for-spreading-illegal-information-11639482120>.

¹⁵⁰ See *supra* “Criminalizing the Failure to Take Down Illegal Online Content: The Case of QVOD” under section IIIB2 (“The Duty to Manage”).

¹⁵¹ Zhonghua Renmin Gongheguo Wangluo Anquanfa (中华人民共和国网络安全法) [Cybersecurity Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 7, 2016, effective Jun. 1, 2017), art. 12, CLI.1.283838 (EN) (Lawinfochina).

include crimes relating to food, drug, and product safety¹⁵²; financial security¹⁵³; road traffic safety¹⁵⁴; and personal safety.¹⁵⁵ Depending on the nature and social impact of various types of risks, jurisprudence in this area has evolved haphazardly and inconsistently. In some cases, courts mete out criminal liability to digital platforms *per se*. Elsewhere, they implicate only the users of platforms—such as sellers of harmful and counterfeited goods and taxi drivers who cause death, injury, or harm to others. Moreover, variations can also be found on a case-to-case basis within the same offense.

Compared with the rigorous liabilities imposed on digital content providers under the duty to review and duty to manage, courts permit considerably relaxed criminalization parameters for e-commerce platforms and online taxi-hailing services. Meanwhile, they place demanding obligations on online lending platforms. This cross-offense inconsistency should be interpreted cautiously with regard to their different social impact. For instance, crimes enacted to prevent digital platforms from selling or distributing poisonous and harmful foods, medicines, and goods have seen a pattern of targeting individuals who sell fake and harmful products, rather than the digital intermediaries that enable and facilitate such illegal transactions. Of all criminal cases involving poisonous and harmful food sold through digital platforms in China from 2014 to 2022 (n=2,105), not a single case resulted in criminal or incidental civil liability for the platforms or their senior executives. In comparison, 85.94% resulted in criminal convictions for platforms or their senior executives for illegally taking public funds that involved peer-to-peer online lending platforms (n=5,705).

¹⁵² Zhonghua renmin gongheguo xingfa, 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 140 (Producing or Selling Fake or Shoddy Products), art. 141 (Producing, Selling or Providing Bogus Medicines), art. 142(1) (Disrupting Administration of Medicines), art. 144 (Producing or Selling Poisonous or Harmful Food), art. 214 (Selling Goods with Counterfeited Registered Trademarks).

¹⁵³ Zhonghua renmin gongheguo xingfa, 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 176 (Illegally Taking in Public Funds).

¹⁵⁴ Zhonghua renmin gongheguo xingfa, 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 133 (Causing a Traffic Accident).

¹⁵⁵ Zhonghua renmin gongheguo xingfa, 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 232 (Intentional Homicide), 234 (Intentional Injury), 236 (Rape), 237 (Compulsory Indecency), 263 (Robbery).

a. Food and Product Safety

In criminal trials concerning the safety of food, medicines, and general goods, courts often lean towards assigning criminal liability to individuals. E-commerce platforms through which such sales are transacted, in contrast, are generally immune from liability. In recent jurisprudence, to assure food and product safety, sellers of food, health, and wellness products are scrutinized according to a mixed test of objective standards and subjective attributes to determine whether they breached their positive obligations.¹⁵⁶ In this case, the defendant, with a career background in food and medicine, was deemed as possessing the cognitive abilities required to ensure the safety of the procured health products.¹⁵⁷ When accessing the liability, his role as the legal representative and purchaser of the platform company was also taken into consideration.¹⁵⁸

In a comparable case where the defendants were convicted of distributing weight-loss food supplements containing sibutramine (generically known as Meridia), the court concluded that defendants who were “long-term salespersons in the food industry” violated their positive obligations to “protect food safety”; they failed in their duty to scrutinize certification documents verifying product origin and food quality.¹⁵⁹ The salespersons' production of electronic copies of food quality inspection reports and manufacturing licenses fell short of fulfilling their legal responsibilities.¹⁶⁰ In another case involving sexual enhancement dietary supplements containing sildenafil (commonly known as Viagra), the court held that the defendant, with a professional background in the food and medicine industry, should be held to a higher standard of cognitive capacity

¹⁵⁶ Xu Wei, Zhejiang Guoji Yiyao Liansuo Youxian Gongsi Shengchan, Xiaoshou Youdu, Youhai Shipinzui Ershen Xingshi Caidingshu (徐伟、浙江国济医药连锁有限公司生产、销售有毒、有害食品罪二审刑事裁定书) [Wenzhou Municipal People's Procuratorate v. Xu Wei and Zhejiang Guoji Pharmaceutical Chain Co., Ltd., the Second Instance Trial of Crime of Producing and Selling Poisonous and Harmful Food], (2019) Zhe 03 Xing Zhong 17 Hao ((2019) 浙 03 刑终 17 号), Mar. 11, 2019 (China).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Yao Liping, Xu Changhui Deng Shengchan Xiaoshou Youdu Deng Xingshi Yishen Panjueshu (姚丽平徐长慧等生产销售有毒等刑事一审刑事判决书) [Jiaozhou City People's Procuratorate v. Yao Liping and Xu Changhui, the First Instance Trial of Crime of Producing and Selling Poisonous and Harmful Food], (2019) Lu 0281 Xing Chu 596 Hao ((2019) 鲁 0281 刑初 596 号), Jan. 13, 2021 (China); Yao Liping, Xu Changhui Deng Shengchan Xiaoshou Youdu Deng Xingshi Ershen Panjueshu (姚丽平徐长慧等生产销售有毒等刑事二审刑事判决书) [Jiaozhou City People's Procuratorate v. Yao Liping and Xu Changhui, the Second Instance of Crime of Producing and Selling Poisonous and Harmful Food], (2021) Lu 02 Xing Zhong 119 Hao ((2021) 鲁 02 刑终 119 号), Apr. 19, 2021 (China).

¹⁶⁰ *Id.*

and prudence than laypersons.¹⁶¹ Consequently, the defendant was deemed to have failed in their obligations as certain certification documents, including business licenses and organization code certificates, were found to lack necessary stamps.¹⁶²

The scrutiny standards have heightened during unique times, such as the COVID-19 pandemic, indicating that judicial perspectives align with evolving social realities. Experienced pharmaceutical sellers who sold what were claimed to be KN90 face masks were convicted for failing to foresee the risk that “during extraordinary times” and “through unusual channels,” their masks might be counterfeit.¹⁶³ There, the court considered the “formalistic review” conducted by the defendant to obtain product quality inspection reports and certificates insufficient to constitute “effective preventive measures” of risk control.¹⁶⁴ Not only were the defendants sentenced to lengthy prison terms given they breached a duty of care, but they were also punished due to the social impact of the crime: Over 500,000 counterfeited face masks with low filtration efficiency, below the standard for a KN90, were sold in pharmacies in Beijing, Tianjin, and Hebei during the COVID-19 pandemic.¹⁶⁵ This stringent standard stands in contrast to a case involving weight-loss dietary supplements, where the court concluded that one of the defendants fulfilled his obligation to review and protect because he merely asked the seller for inspection reports, business licenses, and other certification documents.¹⁶⁶

In some cases, the defense team highlighted the connection between regulatory insufficiency and prosecution. Rather than claiming that the harm at issue was directly caused by regulatory insufficiency, it suggested that the intervention of criminal law was unforeseeable because there were no regulatory guidelines. In *Shanghai Shuke Trade Co., Ltd.*, Fang Zhou, the defendant, argued that it relied on loose regulations over nicotine

¹⁶¹ Xu Wei, Zhejiang Guoji Yiyao Liansuo Youxian Gongsi Shengchan, Xiaoshou Youdu, Youhai Shipinzui Ershen Xingshi Caidingshu (徐伟、浙江国济医药连锁有限公司生产、销售有毒、有害食品罪二审刑事裁定书) [Wenzhou Municipal People’s Procuratorate v. Xu Wei and Zhejiang Guoji Pharmaceutical Chain Co., Ltd., the Second Instance Trial of Crime of Producing and Selling Poisonous and Harmful Food], (2019) Zhe 03 Xing Zhong 17 Hao ((2019) 浙 03 刑终 17 号), Mar. 11, 2019 (China).

¹⁶² *Id.*

¹⁶³ Luo Hanyi Deng Xiaoshou Weilie Chanpin Yishen Xingshi Panjueshu (罗涵毅等销售伪劣产品一审刑事判决书) [Chaoyang District People’s Procuratorate v. Luo Hanyi et al., the First Instance Trial of the Crime of Selling Fake or Shoddy Products], (2020) Jing 0105 Xing Chu 504 Hao ((2020) 京 0105 刑初 504 号), Jun. 19, 2020 (China).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Niu Mou, Ge Mou Shengchan, Xiaoshou Youdu, Youhai Shipin Zui Yishen Xingshi Panjueshu (牛某、葛某犯生产、销售有毒、有害食品罪一审刑事判决书) [Kuiwen District People’s Procuratorate v. Niu Mou and Ge Mou, the First Instance Trial of Crime of Producing and Selling Poisonous and Harmful Food], (2017) Lu 0705 Xing Chu 315 Hao ((2017) 鲁 0705 刑初 315 号), Apr. 23, 2018 (China).

replacement products and thus could not foresee criminal liability.¹⁶⁷ In *Xu Wei and Zhejiang Guoji Pharmaceutical Chain Co., Ltd.*, the defendant, Xu Wei, argued that based on his fifteen-year experience in the pharmaceutical retail industry, he assumed that he complied with regulatory requirements by reviewing the manufacturer's business licenses and quality inspection reports.¹⁶⁸ The efforts he made, however, were found insufficient as the regulatory regime tightened the sale of pharmaceutical commodities during the COVID-19 pandemic.¹⁶⁹ The defendant, responding to a charge of distributing harmful and noxious food,¹⁷⁰ reasoned that his breach of the law was partially an outcome of outdated state regulations given that dietary supplements were largely unregulated until the promulgation of the Food Safety Law.¹⁷¹

However, the courts have not provided a rationale for the conviction. The absence of stable and clear regulatory announcements left market participants unable to discern what constituted illegitimate market behaviors and navigate compliance risks effectively. This lack of transparency, both judicial and regulatory, defeated the very purpose of steering digital platforms and participants of platform economy away from risks.

Out of all harmful or counterfeited food, dietary supplements, and other health-related products distributed through China's various digital platforms (n=2,105), 40.76% were purchased on Taobao.com and 53.30%

¹⁶⁷ Shanghai Shuke Maoyi Youxian Gongsi, Fangzhou Deng Shengchan, Xiaoshou Weilie Chanpin Yishen Xingshi Panjueshu (上海戎客贸易有限公司、方舟等生产、销售伪劣产品一审刑事判决书) [Yangpu District People's Procuratorate v. Shanghai Shuke Trade Co., Ltd., Fang Zhou et al., the First Instance Trial of the Crime of Producing or Selling Fake or Shoddy Products], (2018) Hu 0110 Xing Chu 1058 Hao ((2018) 沪 0110 刑初 1058 号), Mar. 1, 2019 (China); Shanghai Shuke Maoyi Youxian Gongsi, Fangzhou Deng Shengchan, Xiaoshou Weilie Chanpin Ershen Xingshi Caidingshu (上海戎客贸易有限公司、方舟等生产、销售伪劣产品二审刑事裁定书) [Shanghai No. 3 Municipal People's Procuratorate v. Shuke Trade Co., Ltd., Fang Zhou et al., the Second Instance Trial of the Crime of Producing or Selling Fake or Shoddy Products], (2019) Hu 03 Xing Zhong 15 Hao ((2019) 沪 03 刑终 15 号), Jun. 3, 2019 (China).

¹⁶⁸ Xu Wei, Zhejiang Guoji Yiyao Liansuo Youxian Gongsi Shengchan, Xiaoshou Youdu, Youhai Shipinzui Ershen Xingshi Caidingshu (徐伟、浙江国济医药连锁有限公司生产、销售有毒、有害食品罪二审刑事裁定书) [Wenzhou Municipal People's Procuratorate v. Xu Wei and Zhejiang Guoji Pharmaceutical Chain Co., Ltd., the Second Instance Trial of Crime of Producing and Selling Poisonous and Harmful Food], (2019) Zhe 03 Xing Zhong 17 Hao ((2019) 浙 03 刑终 17 号), Mar. 11, 2019 (China).

¹⁶⁹ *Id.*

¹⁷⁰ 董雨敏生产、销售有毒、有害食品罪一审刑事判决书 [Dong Limin's First Instance Criminal Judgment on the Crime of Producing and Selling Toxic and Harmful Food], 大连市甘井子区人民法院 [Ganjingzi District People's Court of Dalian Municipality, People's Republic of China], (2018) 辽 0211 刑初 1018 号 [Criminal First Trial No 1018], 3 January 2019.

¹⁷¹ Zhonghua Renmin Gongheguo Shipin Anquanfa (中华人民共和国食品安全法) [Food Safety Law of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Feb. 28, 2009, effective Jun. 1, 2009, most recently amended Apr. 29, 2021), CLI.1.5012732 (EN) (Lawinfochina).

on WeChat.¹⁷² Yet, compared to the tough approach of threatening digital content providers with criminal punishment, the approach to food- and product-related prosecutions is quite lax: None of the digital intermediaries in the latter prosecutions were found criminally liable.

The fact that these cases represent only a fraction of the potentially harmful substances sold on China's e-markets, which could cause severe health issues for consumers, makes it especially alarming that *no* prosecutions were successful. If individual defendants are found guilty of undermining food and product safety laws, Taobao.com should also be held liable for its decade-long oversight of and willful blindness to illicit transactions taking place in Taobao's millions of digital stores.¹⁷³ And if individual distributors are subject to higher standards of care and review due to their professional background and expertise, it seems only reasonable to assume that these platforms, similarly, should "know" that many of the pharmaceutical ingredients that the China Food & Drug Administration (CFDA) identified as dangerous or harmful are plaguing their e-markets. With the requisite *mens rea* China's top-ranked and extremely resourceful e-commerce giants be held to equivalent—or even higher—appraisal standards.

b. Personal Safety in Ride-Sharing Platforms: Didi as An Example

Chinese criminal courts are reluctant to intervene in cases involving transportation services like ride-hailing and rental vehicles. As one of China's major ride-hailing platforms,¹⁷⁴ Didi Chuxing's repeated failures in protecting the safety of its users have sparked national public outcries. Two sources of precarity arose from Didi's business operations: (1) traffic accidents and dangerous driving and (2) crimes against the person and

¹⁷² The author's calculations based on court judgements in the SPC-run database China Judgements Online, <https://wenshu.court.gov.cn/>.

¹⁷³ E-commerce platforms such as Taobao and Pinduoduo have been criticized for years for their failures to curb the sales of harmful and bogus products. Taobao has been placed on the U.S. Trade Representative's Office's blacklist of the world's most notorious markets for counterfeit goods and has lobbied the Office to remove it from that list for years. See Wade Shepard, *Alibaba's Taobao Is Once Again Branded A 'Notorious Market' For Counterfeit Goods*, FORBES (Jan. 26, 2018), <https://www.forbes.com/sites/wadeshepard/2018/01/26/if-beijing-listened-to-jack-ma-hed-be-going-to-jail/?sh=1beb1ded49e3>; 2016 Out-of-Cycle Review of Notorious Markets, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Dec. 2016), <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>; 2021 Review of Notorious Markets for Counterfeiting and Piracy, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Aug. 2021), <https://ustr.gov/sites/default/files/IssueAreas/IP/2021%20Notorious%20Markets%20List.pdf>.

¹⁷⁴ Didi owns 450 million users and receives more than 30 million orders per day. See Didi Guatou: Wan'e Zhiyuan (滴滴寡头：万恶之源) [*The Didi Platform: The Source of All Evils*], XINLANG (新浪) [SINA] (Aug. 27, 2018), <https://finance.sina.cn/chanjing/gsxw/2018-08-27/detail-ihifuvph4239549.d.html?cre=tianyi&mod=wpage&loc=9&r=32&doct=0&rfunc=80&tj=none&tr=32&cref=cj>.

property of Didi users. For the former, Didi has been frequently involved in criminal lawsuits relating to traffic accidents and dangerous driving activities but is rarely held criminally or civilly liable: Of the ninety-nine criminal actions brought against Didi and Didi drivers,¹⁷⁵ the court awarded plaintiffs civil damages collateral to the criminal proceeding on a single occasion.¹⁷⁶ Moreover, the courts did not hold Didi criminally liable in any instance. This is also true for other taxi-hailing platforms. Of all such cases nationwide, only in one other case has the court ordered the platform to pay compensation.¹⁷⁷ In most of the cases, courts sided with platform defendants, adopting a narrow approach to interpreting the duty to protect.

In a traffic accident case, Didi argued that the online car-hailing platform and the driver were in a partnership without formal management or employment relations.¹⁷⁸ Didi thus refused to take responsibility because the accident occurred five minutes after the driver completed his last delivery.¹⁷⁹ Both the trial and appellate court agreed with Didi's reasoning.¹⁸⁰ In other cases, courts again rejected the argument that Didi owed a duty to manage and protect.¹⁸¹ In all cases, courts agreed that Didi did not owe positive duties to supervise and manage the conduct of its

¹⁷⁵ Relevant cases were retrieved from China Judgement Online as of Oct 2022.

¹⁷⁶ See Su Mou, Li Mou Yi Deng Jiaotong Zhaoshizui Yishen Xingshi Panjueshu (苏某、李某 1 等交通肇事罪刑事一审刑事判决书) [Anxi County People's Procuratorate v. Su Mou et al, the First Instance Trial of Crime of Causing a Traffic Accident], (2020) Min 0524 Xing Chu 783 Hao ((2020) 闽 0524 刑初 783 号), May 7, 2021 (China).

¹⁷⁷ Wei Haibo yu Zheng Weizhen Jiaotong Zhaoshi Zui Yishen Xingshi Panjueshu (魏海波与郑卫珍交通肇事罪一审刑事判决书) [Gaoping City People's Procuratorate v. Wei Haibo and Zheng Weizhen, Crime of Causing a Traffic Accident], (2019) Jin Xing Chu 35 Hao ((2019) 晋 0581 刑初 35 号), Apr. 22, 2019 (China); Wei Haibo Yu Zheng Weizhen Jiaotong Zhaoshi Zui Ershen Xingshi Panjueshu (魏海波与郑卫珍交通肇事罪二审刑事判决书) [Gaoping City People's Procuratorate v. Wei Haibo and Zheng Weizhen, Crime of Causing a Traffic Accident], (2019) Jin 05 Xing Zhong 173 Hao ((2019) 晋 05 刑终 173 号), Jul. 11, 2019 (China).

¹⁷⁸ Mo Mou, Zhang Mouyi, Chen Mou Deng Jiaotong Zhaoshizui Yishen Xingshi Panjueshu (莫某、张某 1、陈某等交通肇事罪一审刑事判决书) [Yucheng District People's Procuratorate v. Mo Mou et al., the First Instance Trial of Crime of Causing a Traffic Accident], (2020) Chuan 1802 Xing Chu 159 Hao ((2020) 川 1802 刑初 159 号), Nov. 26, 2020 (China); Liu Weicheng Jiaotong Zhaoshizui Ershen Xingshi Caidingshu (刘为成交通肇事罪二审刑事裁定书) [Ya'an Municipal People's Procuratorate v. Liu Weicheng, the Second Instance Trial of Crime of Causing a Traffic Accident], (2021) Chuan 18 Xing Zhong 5 Hao ((2021) 川 18 刑终 5 号), Jan. 19, 2021 (China).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Li Shaojun, Zhongguo Ping'an Caichan Baoxian Gufen Youxian Gongsi Shijiazhuang Zhongxin Zhigongsi Jiaotong Zhaoshi Yishen Xingshi Panjueshu (李少君、中国平安财产保险股份有限公司石家庄中心支公司交通肇事一审刑事判决书) [People's Procuratorate of Shijiazhuang Hi tech Industrial Development Zone v. Li Shaojun, the First Instance Trial of the Crime of Causing a Traffic Accident], (2018) Ji 0191 Xing Chu 158 Hao ((2018) 冀 0191 刑初 158 号), Apr. 8, 2019 (China).

drivers.¹⁸² The courts did not consider whether Didi properly trained its drivers, reviewed their licenses, or monitored their driving records to ensure the safety of the riders. Traditional taxi companies failing to meet such obligations would be held accountable for similar traffic accidents and would have to provide compensation for the victims.¹⁸³ Didi, however, successfully escaped all liability.

The judiciary's hesitancy to take proactive steps in managing risks

¹⁸² Su Mou, Li Mou Yi Deng Jiaotong Zhaoshizui Yishen Xingshi Panjueshu (苏某、李某 1 等交通肇事罪刑事一审刑事判决书) [Anxi County People's Procuratorate v. Su Mou et al, the First Instance Trial of Crime of Causing a Traffic Accident], (2020) Min 0524 Xing Chu 783 Hao ((2020) 闽 0524 刑初 783 号), May 7, 2021 (China); Mo Mou, Zhang Mouyi, Chen Mou Deng Jiaotong Zhaoshizui Yishen Xingshi Panjueshu (莫某、张某 1、陈某等交通肇事罪一审刑事判决书) [Yucheng District People's Procuratorate v. Mo Mou et al., the First Instance Trial of Crime of Causing a Traffic Accident], (2020) Chuan 1802 Xing Chu 159 Hao ((2020) 川 1802 刑初 159 号), Nov. 26, 2020 (China); Liu Weicheng Jiaotong Zhaoshizui Ershen Xingshi Caidingshu (刘为成交通肇事罪二审刑事裁定书) [Ya'an Municipal People's Procuratorate v. Liu Weicheng, the Second Instance Trial of Crime of Causing a Traffic Accident], (2021) Chuan 18 Xing Zhong 5 Hao ((2021) 川 18 刑终 5 号), Jan. 19, 2021 (China); Zhongguo Pingan Caichan Baoxian Gufen Youxian Gongsi Shijiazhuang Zhongxin Zhigongsi, Dong Mouyi Jiaotong Zhaoshizui Yishen Xingshi Caidingshu (中国平安财产保险股份有限公司石家庄中心支公司、董某 1 交通肇事二审刑事裁定书) [High Tech Industrial Development Zone People's Procuratorate v. Dong Mouyi et., Second Instance Trial of Crime of Causing a Traffic Accident], (2019) Ji 01 Xing Zhong 586 Hao ((2019) 冀 01 刑终 586 号), Jun. 29, 2019 (China); Xue Mouyi, Xue Mou'er, Xue Mousan Deng Jiaotong Zhaoshizui Yishen Xingshi Caidingshu (薛某 1、薛某 2、薛某 3 等交通肇事罪一审刑事裁定书) [Fuqing City People's Procuratorate v. Xue Mouyi et al., First Instance Trial of Crime of Causing a Traffic Accident], (2019) Min 0181 Xing Chu 879 Hao ((2019) 闽 0181 刑初 879 号), Dec. 23, 2019 (China); Quanzhoushi Yuegeche Zulin Youxian Gongsi, Xue Mouyi, Xue Mou'er Deng Jiaotong Zhaoshizui Ershen Xingshi Caidingshu (泉州市约个车租赁有限公司、薛某 1、薛某 2 等交通肇事罪二审刑事裁定书) [Fuqing City People's Procuratorate v. Quanzhou Yuegeche Rental Co., Ltd. et al., Second Instance Trial of Crime of Causing a Traffic Accident], (2020) Min 01 Xing Zhong 481 Hao ((2020) 闽 01 刑终 481 号), Jul. 6, 2020 (China); Chen Jinjiu, Didi Chuxing Keji Youxian Gongsi Guyi Shanghai Yishen Xingshi Panjueshu (陈金就、滴滴出行科技有限公司故意伤害一审刑事判决书) [Dongguan City People's Procuratorate v. Chen Jinjiu and Didi, First Instance Trial of Crime of Intentional Injury], (2018) Yue 19 Xing Chu 107 Hao ((2018) 粤 19 刑初 107 号), Oct. 23, 2018 (China); Li Mouyi, Zhao Mou Deng Jiaotong Zhaoshizui Yishen Xingshi Panjueshu (李某 1、赵某等交通肇事罪一审刑事判决书) [Chengxi District People's Procuratorate v. Li Mouyi et al., First Instance Trial of Crime of Causing a Traffic Accident], (2021) Qing 0104 Xing Chu 162 Hao ((2021) 青 0104 刑初 162 号), Nov. 16, 2021 (China); see also *Shunfengche pigntai shifou shi chengyunren? Dui jiaotong shigu shifou youze? Fayuan panjueshu zheme shuo* (顺风车平台是否是承运人? 对交通事故是否有责? 法院判决书这么说) [*Is the Ride Hailing Platform a Carrier? Are You Responsible for Traffic Accidents? The Court Ruling Says So*], FENGMIAN (封面) [THE COVER] (Aug. 14, 2023), <https://www.thecover.cn/news/RkZsrigNQzeH90qSdq8Jkw==>.

¹⁸³ *Zuigaofa: chengke cheng chuzu fasheng shigu kexiang yunyingfang suopei* (最高法: 乘客乘出租车发生事故拟可向运营方索赔) [*The Supreme People's Court: Passengers Who Experience Accidents While Taking Taxis May Claim Compensation from the Operator*], YANGSHI (央视) [CCTV] (Mar. 24, 2012), <https://news.cntv.cn/20120324/104490.shtml>.

concerning personal safety is striking.¹⁸⁴ It speaks volumes about the state's selective use of punitive power. Allocation of limited judicial resources appears to be tailored to specific issues, aiming to address regulatory gaps and soothe societal worries in the era of platform economies. The purpose is not, unfortunately, to provide right protection or remedies for individual victims. Food and product safety are not priorities—neither is individual safety in traffic-related injuries and deaths.

Shared rides are a second source of risks that emerge from ride-sharing platforms. Although Didi boasts that it is “the only ride-hailing platform in the industry” to cooperate with state regulators in China to conduct background checks of its drivers,¹⁸⁵ it nonetheless has failed to carefully screen and manage a large population of drivers.¹⁸⁶ This failure to protect the personal safety of platform users was most pronounced in a series of criminal offenses involving the injuries, deaths, and rape of Didi hitch-riding users.¹⁸⁷ Within three months in 2018, two young female riders were raped and murdered by Didi drivers.¹⁸⁸ In May of that year, a 21-year-old female flight attendant disappeared while riding a Didi car.¹⁸⁹ She was discovered half-naked, raped, and stabbed to death.¹⁹⁰ The driver had used his father's driver's license to operate the ride share service, and Didi failed to conduct a thorough check on the identity of the driver.¹⁹¹ On Didi's review and rating app, designed as a car-sharing interface as well as a social media platform, various drivers left comments that the victim was ‘extraordinarily good-looking,’ ‘with sweet voices,’ and ‘exposing herself while stepping outside the car.’¹⁹²

¹⁸⁴ The hesitation of Chinese courts to enforce accountability on platforms contradicts the academic push to impose affirmative duties on these platforms. An interesting comparison can be made in civil law. For instance, Prof. Zhang Xinbao has advocated for imposing safety obligations on digital platforms based on Article 37 of the Tort Law. Xinbao Zhang (张新宝), *Shunfengche wangluo pingtai de anquan baozhang yiwu yu qinquan zeren* (顺风车网络平台的安全保障义务与侵权责任) [*Security Obligations and Infringement Liability of Ride Hailing Network Platforms*], 12 FALV SHIYONG(SIFA ANLI) (法律适用(司法案例)) [J. OF LAW APPLICATION (JUDICIAL CASE)] 98 (2018).

¹⁸⁵ The Motley Fool, *How Does Didi Chuxing Keep Its Passengers Safe?*, NASDAQ (Jun. 11, 2016), <https://www.nasdaq.com/articles/how-does-didi-chuxing-keep-its-passengers-safe-2016-07-11>.

¹⁸⁶ *Didi Qing Huida: “Xinggan” he Anqun Ni Xuan Shui?* (滴滴请回答: “性感” 和安全你选谁?) [*Didi, Please Answer: “Sexy” and Safe, Which One Do You Choose?*], XINLANG (新浪) [SINA] (Aug. 27, 2018), <https://tech.sina.cn/i/gn/2018-08-27/detail-ihifuvph5086074.d.html>.

¹⁸⁷ See *infra* notes 189-197.

¹⁸⁸ *Id.*

¹⁸⁹ *Kongjie Dacheng Shunfengche Yuhai, Zuowei Xinxi Zhongjie de “Didi Chuxing” Shifou Yinggai Chengdan Zeren?* (空姐搭乘顺风车遇害, 作为信息中介的「滴滴出行」是否应该承担责任?) [*Should Didi Taxi, as an Information Intermediary, Be Held Responsible for the Stewardess Who Was Killed by Hitchhiking?*], DUANCHUANMEI (端传媒) [Initium Media] (May 14, 2018), <https://theinitium.com/roundtable/20180514-roundtable-zh-didi/>.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

In August 2018, a 20-year-old female became the second victim of rape, robbery, and murder.¹⁹³ The defendant was a Didi driver who borrowed from at least fifty-one lending institutions, incurred substantial overdue loans, and had a history of multiple customer complaints and negative feedback.¹⁹⁴ Yet, he passed the eligibility screening test and joined Didi's driving service. During the criminal incident, Didi was criticized for delaying in providing essential information to the police and the family of the victim.¹⁹⁵ Additional criticism poured in for its failure in act upon a report filed against the same driver one day before the murder by another passenger who had a narrow escape from the driver's car.¹⁹⁶ After Didi's unethical practices were thrust into the media, along with criticism about belated regulatory scrutiny, its founder and Chief Executive Officer issued a joint apology, admitting that Didi prioritized aggressive capital growth at the cost of rider security and customer support.¹⁹⁷

The socialization feature in Didi's App—which claimed to ensure an enjoyable ride-and-share experience for all parties—was launched when Didi lacked both the awareness and capacity to protect the safety of its users.¹⁹⁸ Passengers were frequently sexually harassed during and even after completing their trips.¹⁹⁹ Like Uber, Didi introduced a dual rating system to allow drivers and passengers to rate each other, but it also went further by transforming such safeguard mechanisms to enhance service quality and safety into a socialization and romantic dating function.²⁰⁰ Critics accused the socialization app of being an unethical business strategy

¹⁹³ 女孩乘滴滴顺风车遇害 五问滴滴平台安全 [A Girl Killed When Riding Didi's Hitching Services; Five Questions for the Safety of the Didi Platform], XINHUA, http://www.xinhuanet.com/fortune/2018-08/26/c_1123328973.htm (last visited May 20, 2024).

¹⁹⁴ 滴滴杀人疑犯信用调查：曾向51家机构借款 多笔逾期已失信 [Credit Survey of the Homicide Suspect in the Didi Platform Case: Many Overdue Loans to 51 Institutions], FENGHUANG WANG, https://hunan.ifeng.com/a/20180828/6838320_0.shtml (last visited May 20, 2024).

¹⁹⁵ Didi siji sharen'an beihou de sange zhengyi xuanwo (滴滴司机杀人案背后的三个争议漩涡) [Three Controversial Vortex Behind the Murder Case of Didi Driver], BBC (May 12, 2018), <https://www.bbc.com/zhongwen/simp/chinese-news-44093798>.

¹⁹⁶ 滴滴网约车再酿命案引质疑 下线顺风车业务 [Didi's Homicide Case Happened Again; Didi's Hitching Services Went Offline], BBC (Aug. 27, 2018), <https://www.bbc.com/zhongwen/trad/chinese-news-45318172> (last visited Feb. 14, 2019).

¹⁹⁷ 滴滴创始人程维、总裁柳青发道歉声明 [Apology Statement by Cheng Wei, Founder of Didi Platform, and Liu Qingfa, President of Didi Platform], GUANCHAZHE (Aug. 28, 2018, 8:36 PM) https://www.guancha.cn/society/2018_08_28_469998.shtml (last visited Feb. 14, 2019).

¹⁹⁸ Kuaikan Didi Siji Xingqin Anjian Sannian Beipan 14 Qi Nuxing Xonghu Zhanbi Zuidi Jiangzhi 31% (快看 | 滴滴司机性侵案件三年被判 14 起 女性用户占比最低降至 31%) [Attention | The Proportion of Female Users Sentenced to 14 Sexual Assault Cases by Didi Drivers in Three Years Dropped to 31%], JIEMIAN XINWEN (界面新闻) [JIEMIAN NEWS] (Aug. 30, 2018), <https://www.jiemian.com/article/2428897.html>.

¹⁹⁹ *Id.*

²⁰⁰ Didi Anquan Yinhu de Yinbaoqi—Xing'anshi Shejiao! (滴滴安全隐患的引爆器—性暗示社交!) [Detonator of Didi's Potential Safety Hazard—Sexual Suggestive Social Interaction!], SOHU (搜狐) (Aug. 29, 2018), https://www.sohu.com/a/250785281_677580.

to lure and retain mostly single male drivers at the cost of the safety of its vulnerable riders.²⁰¹

As drivers earned lower wages under the hitching services compared to other ride-sharing services, the opportunity to socialize with riders became a primary selling point for driver recruitment. Drivers were provided with personal information about potential riders before ride shares so that they could pick and choose their customers based on their gender and looks.²⁰² Didi also supported drivers who opted to waive the fares for passengers they got along with during the rides.²⁰³ Drivers were allowed to label passengers on Didi's rating forums in languages with sexual undertones.²⁰⁴ For years, Didi ran advertisements and posters that encouraged riders and drivers to engage in romantic dating during rides.²⁰⁵

After media exposure of these high-profile criminal incidents, several safety features were introduced into Didi's revamped management systems, per enhanced state regulatory requirements²⁰⁶ to pacify storms of public outcry. Didi removed 3,000 drivers from its services who did not pass the company's background checks.²⁰⁷ Yet many loopholes in Didi's safety control mechanisms were still left unaddressed.²⁰⁸ State regulatory

²⁰¹ *The Didi Platform: The Source of All Evils*, *supra* note 174.

²⁰² *Shunfengche de Shejiao Houyizheng* (順風車的社交後遺症) [*Social Sequela of Didi Taxi*], AOMEN LIBAO (澳門力報) [EXMOO NEWS] (Aug. 27, 2018), <https://www.exmoo.com/article/77589.html>.

²⁰³ See Didi Xie Liangda Jigou Fabu Shoufen Zhineng Chuxing Niandu Baogao (滴滴携两大机构发布首份智能出行年度报告) [*Didi and Two Institutions Released the First Annual Report on Intelligent Transportation*], SOHU (搜狐) [SOHU] (Jan. 20, 2016), https://www.sohu.com/a/55552999_296780.

²⁰⁴ *Didi, Please Answer: "Sexy" and Safe, Which One Do You Choose?*, *supra* note 186; *Detonator of Didi's Potential Safety Hazard—Sexual Suggestive Social Interaction!*, *supra* note 200.

²⁰⁵ *Detonator of Didi's Potential Safety Hazard—Sexual Suggestive Social Interaction!*, *supra* note 200.

²⁰⁶ China's Ministry of Transports demanded Didi and other taxi-hailing services to enhance safety protection by adding drivers without approved licenses to a Discredit Joint Punishment Subjects List and required platforms to appraise drivers' service quality and credit history. See 关于加强和规范出租汽车行业失信联合惩戒对象名单管理工作的通知(征求意见稿) [*The Transport Service Department of the Ministry of Transport, The Notice on the Management of Improving and Regulating the List of Joint Discipline on Those Who Lost Their Credit in the Taxi Industry*] (May 11, 2018), <https://www.scmp.com/tech/enterprises/article/2145952/chinese-police-find-body-didi-driver-suspected-killing-flight> (last visited Feb. 14, 2019); Hitching services were incorporated into credit evaluation over service quality in the taxi industry, see 出租汽车服务质量信誉考核办法 [*The Methods on the Credit Evaluation on Taxi Services*], MINISTRY OF TRANSPORT (May 25, 2018 7:41 AM) http://www.gov.cn/zhengce/2018-05/25/content_5293493.htm (last visited Feb. 14, 2019).

²⁰⁷ *Didi Qingtui You Fanzui Jilu Zhuanche Siji* (滴滴清退有犯罪记录专车司机) [*Didi Ended Cooperation with Drivers with Criminal Records*], YANGSHI XINWEN (央视新闻) [CCTV.COM] (Apr. 1, 2016), <http://news.cctv.com/2016/04/01/ARTIcNjGuCBovrYIUKhQFzFr160401.shtml>.

²⁰⁸ Beijing News, 滴滴宣布恢复部分夜间时段顺风车订单 车主与乘客同一性别方可合乘出行 [*Didi Announced Restoration of Part of Its Night-time Hitching Service Booking; Same-gender has Become A Condition for the Ride*], SINA NEWS (Jun. 13, 2018 4:29 PM), <http://news.sina.com.cn/c/2018-06-13/doc-ihcwpcmq2706393.shtml>.

power over these ride-sharing platforms can best be described as patchy, reactionary, and parochial, falling through the gaps and overlaps among multiple state agencies. Regulatory power has also been delegated to various local authorities without specifying uniform national standards for its monitoring and enforcement.²⁰⁹ Thus, user safety is, by and large, contingent upon the willingness and capacity of self-regulation by respective local platforms.

Out of 397 Didi drivers convicted of offenses against the person or property of riders, nearly nine percent have prior records of crimes, administrative punishment, or substance abuse.²¹⁰ This is an improvement, compared with the past statistics, where thirty percent of registered car-hailing drivers in Shenzhen had a criminal history.²¹¹ A large number of cases committed by Didi drivers involve grievous bodily harm and sexual offenses. For example, in a rape case, a Didi driver with a felony history assaulted a nine-year-old girl who was unaccompanied by her parents.²¹² In a similar case a nine-year-old victim, who was also riding alone in a Didi booked by her mother, was sexually assaulted.²¹³ The considerable trust placed in these seemingly advanced and safe digital platforms by guardians and parents was shattered when Didi's promises of effective background screenings and safety mechanisms were unfulfilled.

²⁰⁹ 网络预约出租汽车经营服务管理暂行办法 [Interim Measures for the Administration of Online Taxi Booking Business Operations and Services], Ministry of Transport et al., Order No. 60 (2016) (adopted at the 15th executive meeting of the Ministry of Transport on 14 July 2016).

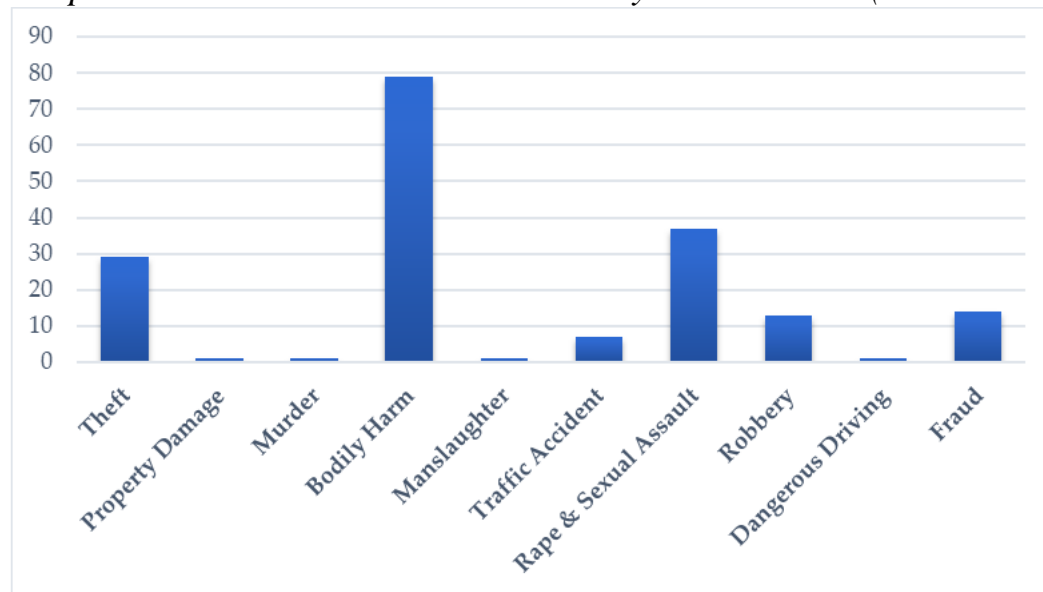
²¹⁰ These cases have been retrieved from China Judgments Online (<http://wenshu.court.gov.cn/>), a database developed by the China's Supreme People's Court (SPC) that officially went online in 2013.

²¹¹ See *supra* II.B.3.b Personal Safety in Ride-Sharing Platforms: Didi as An Example.

²¹² Zhao Sangan Qiangjianzui Yishen Xingshi Panjueshu (赵三赶强奸罪一审刑事判决书) [Shuangliu District People's Procuratorate v. Zhao Sangan, the First Instance Trial of the Crime of Rape], (2017) Chuan 0116 Xing Chu 1261 Hao ((2017) 川 0116 刑初 1261 号), Dec. 4, 2017 (China).

²¹³ Beigaoren Lin Moumou Tongguo Wangyueche Weixie Ertong An (被告人林某某通过网约车猥亵儿童案) [People's Procuratorate v. Lin Moumou, the First Instance Trial of the Crime of Child Molestation], (Jun. 1, 2018) (China), <http://www.lawinfochina.com/display.aspx?id=28246&lib=law> (last visited Nov. 19, 2023).

Graph One. Criminal Cases Committed by DIDI Drivers (2016-2022)



Regulating large and influential platforms such as Didi is difficult and costly. From the perspective of these platforms, compensating individual users when individual incidents occur is relatively affordable. Therefore, it seems strategically sensible—although not necessarily ethical—for these platforms to offer ex post compensation when incidents arise rather than investing resources in the protection of the interests of its users’ ex ante. This approach speaks to the asymmetrical power between a digital platform and its users, as well as the limit of criminalization as an approach to regulating digital platforms.

In many cases courts are unwilling to intervene due to the power and influences of giant digital platforms; however, even when prosecution is sought, platforms can insulate themselves from liability. Individuals, rather than the platform, are “liability sponges” who are blamed for the platform’s failure of risk management. In the governance of taxi-hailing and other goods-and-services platforms, criminalizing *individuals* stands in stark contrast to punishing *platforms* that provide digital content as described in the sections above.

c. Criminalizing Financial Risk-Taking: P2P Online Lending Platforms

The state’s regulation of online lending platforms tells a drastically different story. In September 2018, a 31-year-old single mother who lost her investment to a collapsed P2P lending platform took her own life. In her death note, she wrote: “[A] state-backed P2P just ran away, its shareholder[s] unwilling to take any responsibility, investigators are

dragging their feet. I am too tired and cannot see any hope.”²¹⁴ This tragedy epitomizes the profound impact of the systematic collapse of P2P platforms on individual investors, which mainly consist of China’s middle class who gained their wealth during the past decades of rapid economic growth.

P2P platforms²¹⁵ refer to online companies which match and facilitate the financing of funds by borrowing from individual investors and loaning the money to individual and corporate borrowers, often with promises of high returns.²¹⁶ During their peak, the P2P lending industry recorded transactions valued at \$445 billion in 2017²¹⁷ and outstanding loans of nearly \$218 billion.²¹⁸ However, this was only the industry’s momentary brilliance. According to Nikkei’s Asian Review, the industry faces a “Darwinian struggle for survival” after a fifty-two percent drop in total numbers and a twenty percent fall in their combined lending balance in 2018²¹⁹—a sharp decline from the industry’s historical peak of about 5,000 P2P lending platforms.²²⁰ CITIC Securities initially anticipated that fewer than fifty of these platforms would survive the domino collapse.²²¹ As of November 2020, however, the number fell to zero.²²² The entire industry was wiped out from the finance sector, entailing a loss of 20 trillion yuan (roughly \$3.04 trillion USD), primarily comprising the life savings of individual investors.²²³

Although many P2P platforms are nowadays portrayed as fraudulent and scandalous Ponzi schemes,²²⁴ the business which wiped out a substantial portion of China’s middle-class savings once received official

²¹⁴ *How China’s Peer-to-Peer Lending Crash Is Destroying Lives*, BLOOMBERG NEWS (Oct. 2, 2018), <https://www.bloomberg.com/news/articles/2018-10-02/peer-to-peer-lending-crash-in-china-leads-to-suicide-and-protest>.

²¹⁵ “Peer-to-Peer Platforms” refers to decentralized fundraising platforms whereby the borrower and the lender are connected and intermediated via the P2P service.

²¹⁶ Robin Hui Huang, *Online P2P Lending and Regulatory Responses in China: Opportunities and Challenges*, 19 EUR. BUS. ORG. L. REV. 63, 64 (2018).

²¹⁷ Emily Feng, *Chinese Government Faces Peer-to-peer Lending Scandals Dilemma*, FIN. TIMES (Nov. 12, 2018), <https://www.ft.com/content/c71eea4a-c198-11e8-84cd-9e601db069b8>.

²¹⁸ Shu Zhang & Elias Glenn, *Beijing Struggles to Defuse Anger over China’s P2P Lending Crisis*, REUTERS (Aug. 13, 2018), <https://www.reuters.com/article/china-lenders-p2p-idUKL4N1V02KL>.

²¹⁹ Yusho Cho, *China’s Peer-to-peer Lenders Fight for Survival*, NIKKEI (Feb. 18, 2019), <https://asia.nikkei.com/Business-trends/China-s-peer-to-peer-lenders-fight-for-survival2>.

²²⁰ Huaxia, *China’s P2P Platform Number Falls to Zero*, XINHUA (新华网) (Nov. 28, 2020), http://www.xinhuanet.com/english/2020-11/28/c_139549568.htm?bsh_bid=5568357847.

²²¹ See *How China’s Peer-to-Peer Lending Crash Is Destroying Lives*, *supra* note 214.

²²² Huaxia, *supra* note 220.

²²³ *Id.*

²²⁴ Joe Zhang, *Collapse of China’s Disgraced P2P Sector Offers Important Lessons: Online Platforms Forced Banks to Improve Offerings but Model Wasn’t Sustainable*, NIKKEI ASIA (Feb. 10, 2020), <https://asia.nikkei.com/Opinion/Collapse-of-China-s-disgraced-P2P-sector-offers-important-lessons>.

endorsement²²⁵ as part of a grand blueprint of business innovation and financial reform. The P2P business, which many hoped would facilitate commercial transactions and financial inclusion, started to thrive almost unregulated in China in 2011.²²⁶ Beijing hoped innovative technologies would help solve decades-old issues in the finance field, where traditional banks were inadequate in serving the needs of small businesses for funding and those seeking return on their deposits.

P2P platforms were endorsed by the authorities²²⁷ as they supplied funds to credit-starving start-ups and small-size enterprises, whose financing needs could hardly be met by traditional banking institutions due to a “long-standing problem of financial repression.”²²⁸ P2P platforms, therefore, became an important channel of “blood transfusion” to private enterprises. In particular, after China tightened bank credit following stimulus spending to counter the global financial crisis,²²⁹ state intervention triggered an industry-wide panic and a rapid decline in liquidity, causing a domino-like collapse across the nation.

Regulatory responses to the industry’s exponential growth in the past decade could largely be characterized as outdated, patchy, reactionary, and insufficient.²³⁰ No comprehensive regulatory framework existed until 2016,²³¹ years after millions of investors poured their savings into the industry. Regulatory insufficiency seems to be caused by a mixture of complex factors. Partly this could be understood as a capacity issue—the P2P industry grew too fast for inexperienced regulators to catch up and effectively regulate. But more completely, this could be explained institutionally: P2P fell through the cracks of a fragmented regulatory structure run by the China Banking Regulatory Commission.²³²

Amid this regulatory vacuum, the enforcement of criminal penalties against underperforming P2P platforms became the means to reprimand

²²⁵ Zhou Xiaochuan Wei P2P Dianzan (周小川为 P2P 点赞) [Zhou Xiaochun Endorses P2P], ZHONGGUO RIBAO (中国日报) [CHINA DAILY] (Oct. 12, 2015), http://finance.chinadaily.com.cn/2015-10/12/content_22163475.htm; Nicholas Loubere, *China’s Internet Finance Boom and Tyrannies of Inclusion*, 4 CHINA PERSPECTIVES 12, 14 (2017).

²²⁶ Yusho Cho, *supra* note 219.

²²⁷ Zhengfu Gongzuo Baogao (Quanwen) (政府工作报告(全文)) [Government Work Report (Full Text)], GUOWUYUAN (国务院) [GOV.CN] (Mar. 14, 2014), http://www.gov.cn/guowuyuan/2014-03/14/content_2638989.htm.

²²⁸ Huang, *supra* note 216, at 67.

²²⁹ *How China’s Peer-to-Peer Lending Crash Is Destroying Lives*, *supra* note 214.

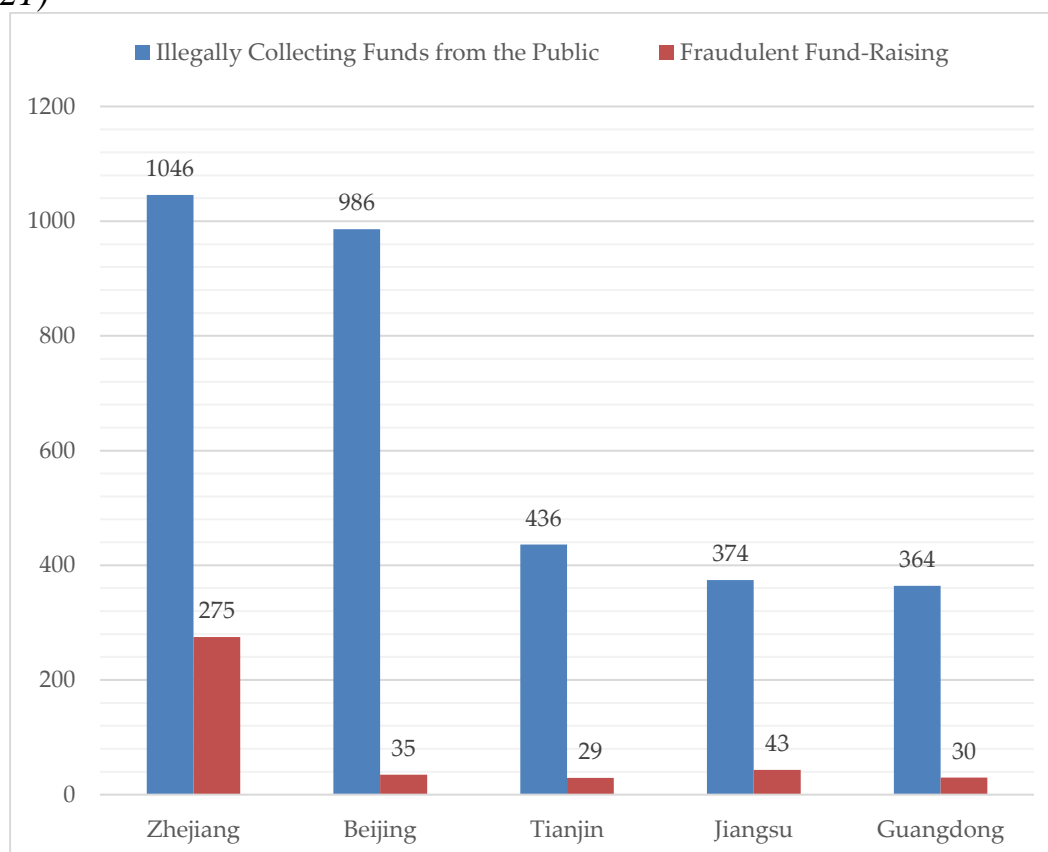
²³⁰ Robin Hui Huang & Christine Meng Lu Wang, *The Fall of Online P2P Lending in China: A Critique of the Central-Local Co-regulatory Regime*, 36 BANKING & FIN. L. REV. 481, 482 (2021).

²³¹ See Wangluo Jiedai Xinx Zhongjie Jigou Yewu Huodong Guanli Zanxing Banfa (网络借贷信息中介机构业务活动管理暂行办法) [Interim Measures for the Administration of the Business Activities of Online Lending Information Intermediary Institutions] (promulgated on 17 August 2016 by the China Banking Regulatory Commission and others).

²³² Xusheng Yang, *Inside China: Reining in P2P Lending*, 33 Int’l Fin. L. Rev. 224, 224 (2014).

unsuccessful and deceptive risk-taking practices in the sphere of P2P finance. P2P platforms are charged under two statutes, which correspond to different mental states—Illegally Collecting Public Funds²³³ or Fraudulent Fund Raising²³⁴. To convict for Illegally Collecting Public Funds, the prosecution does not need to prove fraudulent intent; it therefore punishes failure to observe regulatory requirements. As of October 2022, there are more than 5,000 pending convictions involving digital platforms.²³⁵

Graph Two. Top Five Provinces with P2P Platform Convictions (2014-2021)



One of the most high-profile and notorious Ponzi schemes involving a P2P platform was Ezubao, which caused its 900,000 investors to lose 38 billion yuan (\$5.8 billion USD) after it had raised more than 76 billion

²³³ *Zhonghua renmin gongheguo xingfa*, 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 176.

²³⁴ *Zhonghua renmin gongheguo xingfa*, 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 1997), CLI.1.556 (EN) (Lawinfochina), at art. 192.

²³⁵ Case statistics collected by the author through China Judgment Online. *See supra* Graph Two (Top Five Provinces with P2P Platform Convictions (2014–2021)).

Chinese yuan (\$10.8 billion USD).²³⁶ To appease the nationwide discontent of platform investors, twenty-six defendants involved in the business operations of the platform were convicted, two were sentenced to life.²³⁷

In high-profile cases like Ezubao, where the state takes a tough stance, both the platform and major senior executives are convicted.²³⁸ In less prominent cases, however, convicted defendants mostly included low-ranking personnel.²³⁹ There, the government cast the net of criminalization excessively wide to include those with little knowledge of or control over the business operations of platforms. These minor roles included low-ranked salespersons,²⁴⁰ customer service officers,²⁴¹ I.T. support

²³⁶ Anhui Yucheng Konggu Jituan, Yucheng Guoji Konggu Jituan Youxian Gongs, Ding Ning, Ding Dian, Zhang Min Deng 26 Ren Fan Jizi Zhapianzui, Feifa Xishou Gongzhong Cunkuanzui, Zousi Guijinshuzui, Touyue Guojingzui, Feifa Chiyou Qiangzhizui Yi'an (安徽钰诚控股集团、钰诚国际控股集团有限公司、丁宁、丁甸、张敏等 26 人犯集资诈骗罪、非法吸收公众存款罪、走私贵金属罪、偷越国境罪、非法持有枪支罪一案) [Beijing No. 1 Municipal People's Procuratorate v. Anhui Yucheng Konggu Jituan et al., the First Instance Trial of the Crimes of Fraudulent Fund-Raising, Illegally Collecting Funds from the Public, and others], (2016) Jing 01 Xing Chu 140 Hao ((2016) 京 01 刑初 140 号), Sep. 12, 2017 (China).

²³⁷ *Id.*

²³⁸ "E Zubao" Feifa Jizi'an Zhenxiang Diaocha ("e 租宝"非法集资案真相调查) [*Investigation of the Truth about the Illegal Fund-raising Case of "e zubao"*], ZHONGHUA RENMIN GONGHEHUO ZUIGAO RENMIN JIANCHAYUAN (中华人民共和国最高人民检察院) [THE SUPREME PEOPLE'S PROCURATORATE OF THE PEOPLE'S REPUBLIC OF CHINA] (Feb. 1, 2016), https://www.spp.gov.cn/zdgg/201602/t20160201_111982.shtml.

²³⁹ "Feixi" Danwei Yewu Renyuan Mianlin de Sifa Rending Kunjing ("非吸"单位业务人员面临的司法认定困境) [*Difficulties in Judicial Determination for the Personnel in Companies in Terms of "Illegally Collecting Deposit from the Public"*], XINGHAN LVSHI SHIWUSUO (星瀚律师事务所) [RICC & CO] (Jan. 14, 2016), <https://www.ricc.com.cn/En/events-248>.

²⁴⁰ See, e.g., Hu Tongjie Chen Zhong Deng Yu Cheng Nianzhong Jizi Zhapianzui Ershen Xingshi Panjueshu (胡同杰陈忠等与程念忠集资诈骗罪二审刑事判决书) [Kelamayi Municipal People's Procuratorate v. Hu Tongjie et al., the Second Instance Trial of the Crime of Fraudulent Fund-Raising], (2020) Xin Xing Zhong 76 Hao ((2020) 新刑终 76 号), Apr. 18, 2020 (China); Zhu Yuqun Huang Fangjuan Deng Feifa Xishou Gongzhong Cunkuanzui Yishen Xingshi Panjueshu (朱玉群黄芳娟等非法吸收公众存款罪一审刑事判决书) [Qidong City People's Procuratorate v. Zhu Yuqun et al., the First Instance Trial of the Crime of Illegally Collecting Funds from the Public], (2020) Su 0681 Xing Chu 624 Hao ((2020) 苏 0681 刑初 624 号), Jan. 25, 2021 (China).

²⁴¹ See e.g., He Lina, Shen Zhangkun Fan Jizi Zhapianzui, Feifa Xishou Gongzhong Cunkuanzui Ershen Xingshi Caidingshu (何丽娜、沈掌坤犯集资诈骗罪、非法吸收公众存款罪二审刑事裁定书) [Huzhou Municipal People's Procuratorate v. He Lina, Shen Zhangkun, the Second Instance Trial of the Crimes of Fraudulent Fund-Raising and Illegally Collecting Funds from the Public], (2016) Zhe Xing Zhong 68 Hao ((2016) 浙刑终 68 号), May 25, 2016 (China).

officers,²⁴² front desk clerks,²⁴³ and design artists.²⁴⁴ To shift the public gaze away from regulatory deficiency, the government opted to prosecute and convict at all costs, even when this meant disproportionate and excessive punishment.

In the aftermath of P2P platform bankruptcies and collapses, criminal law intervenes to enforce ineffective regulations aimed at curbing financial risks and mitigating negative social impacts. Consequently, criminal sanctions function as a tool of state governance, perhaps even constituting a distinct form of regulation marked by its coercive nature. By criminalizing and regulating these actions, the government reallocates various financial, legal, and political risks among stakeholders within the P2P industry. Despite the high investment returns sought by investors, often promised at rates substantially exceeding typical bank deposit returns, the government initially supported P2P platforms driven by short-term economic motives and a lack of regulatory foresight during the industry's early growth phase, endorsed P2P platforms. This support, however, came at the expense of significant threats to financial and social stability inherent in this unsustainable business model. The responsibility that the government shirked in regulating and mitigating personal and societal financial risks has now shifted to the platforms and their employees through the criminalization process.

Why is regulation through criminal law harsh on e-finance intermediaries but relatively lenient on e-commerce and taxi-hailing platforms? A possible explanation is the relative reach and depth of social impact created by these activities. The impact of food and product safety risks, although they have the potential to severely affect individual victims, normally does not arouse collective protests and large-scale public outcry. The risks posed to the governance by the ruling regime are manageable. In contrast, when P2P platforms fail, aggrieved investors may trigger considerable social disorder. This focus on socio-political risks is the key to understanding the varying mechanisms of regulating digital platforms through criminalization.

²⁴² See e.g., Wang Jie Ren Jianrong Deng Jizi Zhapianzui Ershen Xingshi Panjueshu (王杰任建荣等集资诈骗罪二审刑事判决书) [Kunshan City People's Procuratorate v. Wang Jie and Ren Jianrong, the Second Instance Trial of the Crime of Fraudulent Fund-Raising], (2020) Su 05 Xing Zhong 254 Hao ((2020) 苏 05 刑终 254 号), Oct. 28, 2020 (China).

²⁴³ See e.g., Sun Taoli Song Rongfei Gai Shubo Deng Jizi Zhapianzui Ershen Xingshi Panjueshu (孙涛利宋荣飞盖书波等集资诈骗罪二审刑事判决书) [Luanping County People's Procuratorate v. Sun Taoli et al., the Second Instance Trial of the Crime of Fraudulent Fund-Raising], (2021) Ji 08 Xing Zhong 21 Hao ((2021) 冀 08 刑终 21 号), Mar. 1, 2021 (China).

²⁴⁴ See e.g., Lin Shangfu Ye Chunhua Zhang Wenmei Deng Jizi Zhapianzui Yishen Xingshi Panjueshu (林上夫叶春华张文美等集资诈骗罪一审刑事判决书) [Yuhuan City People's Procuratorate v. Lin Shangfu et al., the First Instance Trial of the Crime of Fraudulent Fund-Raising], (2018) Zhe 1021 Xing Chu 562 Hao ((2018) 浙 1021 刑初 562 号), May 27, 2019 (China).

III. A CHINESE MODEL FOR PLATFORM GOVERNANCE

Criminal law has become a primary resort when regulating digital platforms. Legislative and jurisprudential developments echo broader concerns about the modality of platform regulation worldwide: To what extent should the adverse effects of technology, rather than technology *per se*, be regulated?²⁴⁵ In this section, three theoretical issues will be addressed: (1) the impact on regulatory techniques as a result of regulation through criminalization; (2) the defensibility and necessity of the regulatory turn of criminal law; and (3) the main models of platform governance globally. I argue that regulation through criminalization has caused a tripartite shift of regulatory burden, power, and accountability. These changes result in the privatization and individualization of regulation. In the second subsection, I argue that the use of criminal law to regulate digital platforms is both excessive and insufficient. Last, I highlight the unique model of platform governance in China through threats of punishment and coercion, which is distinguishable from the European and American approaches.

A. Shifts of Regulatory Burden, Power, and Accountability

Regulation through criminalization, including the rise of positive duties, creates a tripartite shift of regulatory burden, power, and accountability. As Garland argues, through the criminal process, governments are “seeking to renegotiate the question of what is properly a state function and what is not.”²⁴⁶ Through this process, governments offload and outsource to digital platforms, as well as the judiciary, inherent governmental functions of regulation. This is illustrated by two parallel processes: 1) a shift of managerial burden from the state to the tech industry and 2) a transfer of regulatory power from governmental agencies to the judiciary. First, the burden of policing platform-mediated activities and contents shifts from national and local governmental agencies—who have limited capacity, resources, and tech literacy to enforce regulatory compliance—to digital content, goods, and service providers. Under the threat of coercive penal power, digital platforms are incentivized to invest enormous resources, manpower, and algorithmic programs in the detection and removal of illicit content to comply with regulatory mandates. Failed self-regulation and enforcement leads to criminal sanctions in the form of

²⁴⁵ DAVID M. KAPLAN, READINGS IN THE PHILOSOPHY OF TECHNOLOGY XVI (Rowman & Littlefield, 1st ed. 2009).

²⁴⁶ DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 126 (University of Chicago Press, 1st ed. 2002).

imprisonment and fines on platforms and personnel.

Alongside this transfer of managerial burden from the state to the tech industry is a parallel shift of regulatory power from governmental agencies to police, prosecutors, courts, and prisons. The judiciary, with its longstanding legal expertise in harm evaluation, is now endowed with power and expertise in *ex post* criminal responsibility assignment are delegated the new power to assess risks *ex ante*. This power shift triggered changes in the configuration of the criminal law and process. Eventually, changes in regulatory burden and power led to a redistribution of moral and legal risks between platform users, platforms, and state agencies.

The digital platform economy enabled large-scale risk-taking activities and opportunities that enrich our contemporary social life while exponentially growing exposure to risks. Platform users, owners, and employees all take part in risky yet potentially rewarding activities, often with the endorsement or acquiescence of state regulatory agencies. As such, risk associated with the platform economy can be redistributed but not eliminated. Who takes blame and responsibility if things go awry? This remains the fundamental question that confronts many legal systems, including Chinese society, which embraces a rapid process of platformization of its economy and society. Allocating criminal accountability between the three parties—digital platforms, participants in the platform economy, and state agencies—conveys moral blame and reveals the ultimate power relationship behind the judicial process. Criminal law is useful here as a moral institution.

Regulation through criminalization is thus a risk redistribution process. These shifts in regulatory burden, power, and accountability do not mean state agencies are less important. They merely make state interventions indirect. In all three dimensions, regulatory agencies have maintained and even strengthened their roles as the ultimate powerholders by setting standards. Behind the shift of regulatory burden from the state to the industry are new resources regulatory agencies acquired—through surveillance and threats of coercion—to shape cyberspace from afar. They define the standards for the platform to implement in self-regulation such as which posts, phrases, and words are to be blocked, hidden, and removed from social media platforms and to what extent user data is to be logged, stored, and transferred to state agencies.

Behind the delegation of regulatory power from governments to judicial agencies is a growing list of regulatory offenses incorporating noncriminal regulations as the basis for determining criminal guilt and sentencing severity. Criminal liability is triggered when regulatory provisions are not complied with. This nexus indicates the long arm of regulatory agencies in reshaping criminal responsibility imposed on digital platforms by courts. Criminal liability becomes a second layer of a safety

net to fix regulatory noncompliance. Criminal law essentially serves a regulatory function.

How accountability is distributed to place moral and criminal blame on various parties depends on the specific nature and context of the criminal case. In the case of distributing obscene materials, as in the QVOD case, blame is allocated to the digital platform as a way of punishing its failure to manage user-generated digital content. In product and personal safety cases, individual sellers and drivers are censured instead of the profit-pursuing platforms. In cases involving failed P2P lending platforms, the owners, executives, and employees of selected platforms are punished in lieu of risk-taking users and governmental endorsers.

Beneath the quicksand of shifting policy rationales is the need for political governance. When state authorities need to censor online digital content, platforms are held legally accountable for harmful and controversial content created and distributed by their users. Similarly, when public discontent with financial precariousness needs to be diverted away from state agencies, vicarious liability is imposed on digital platforms for the risk-taking investment activities of their users. But in everyday e-commerce and taxi-hailing transactions, ordinary citizens bear the brunt and take the blame for tech giants.

Regardless of how fault is assigned, state regulators avoid accountability and obtain greater clout over civil society. Regulation through criminalization thus represents a new type of political power and governance, a new way through which the state maintains control over information and transactions in a platformized society. The Chinese government privatized and individualized regulatory responsibility. State agencies do not rule by direct control and punishment but govern from a distance. Both platforms and individuals must recognize that they have a duty to manage and assess risks when acting or modifying their behaviors to avoid adverse consequences.

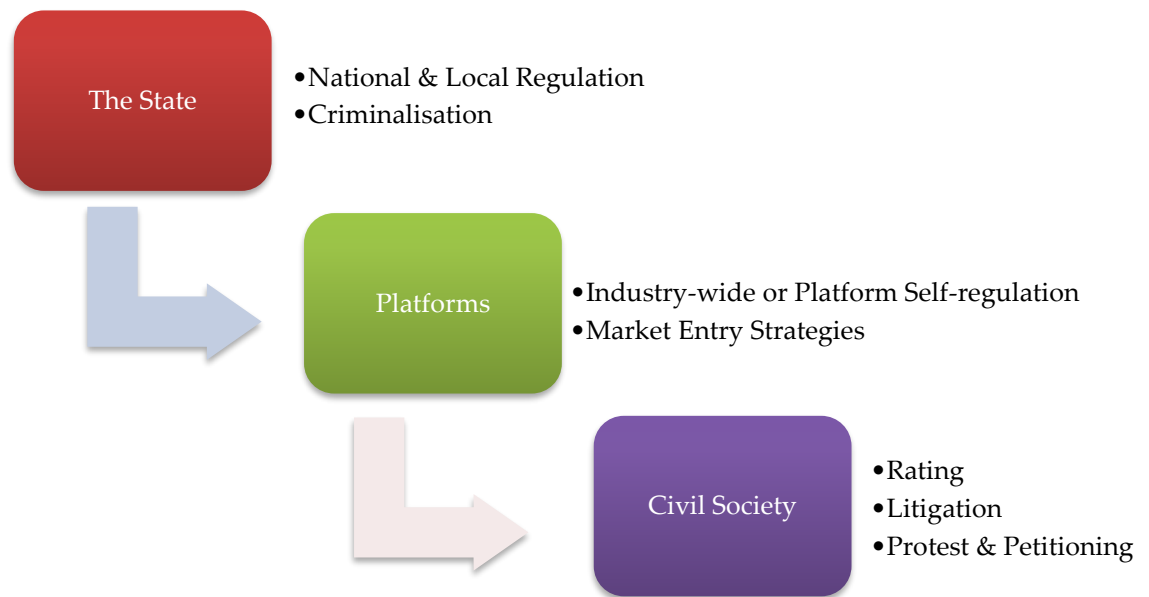
The new obligations placed on digital platforms is an expansion of their influences in cyberspace both upward and downward. Many social governance functions that were traditionally and exclusively reserved for government bodies are now delegated to private sector entities that manage and support the cyberspace infrastructure. Platforms have become pivotal in the performance of government duties, so much so that their actions could be treated as a quasi-public function. This privatization of authority results in an upward extension of the influences of digital platforms. Meanwhile, digital platforms gain control over civil society, exerting influence downward. On a daily basis, digital platforms surveil and reshape individual behaviors and the online civil space in discrete and dispersed ways. Out of a growing emphasis on cyber security, the state

offloads policing activities to digital platforms, particularly in the areas of user content controls around pornography, terrorism, intellectual property violations, and other spheres of national security and social order. As the power to regulate civil space trickles down from the state to the tech industry, surveillance and discipline invades individual life and activities which were previously protected from public gaze and intervention.

B. A Typology of Platform Accountability Models

The crime-regulation of digital platforms in China, from a comparative perspective, can be situated within a framework of four models of platform accountability: (1) government direct regulation; (2) regulation through (government-backed) sanctions; (3) platform-led self-regulation; and (4) voluntary collaboration between all parties. I distinguish these models in light of the relationships among the three main stakeholders involved: the state, the platform industry, and civil society. Each of these entities has its own mechanisms to regulate and self-regulate platform-derived activities and transactions.²⁴⁷ These four models can be summarized as follows: First, the government exercises direct regulation over digital platforms and intervention in platform-mediated digital spaces. Second, the government imposes coercive measures and penalties on digital platforms, which, in turn, pressured these platforms to control its content, activities, and users. Third, the tech industry self-regulates, with minimal governmental intervention and little civil society supervision. And fourth, state, industry, and civil society achieve voluntary and mutually beneficial regulatory collaborations.

²⁴⁷ See *Infra* Figure One: Three Main Stakeholders.

Figure One. Three Main Stakeholders

Under this four-model framework, the fourth model, the collaborative model, alone represents a scenario in which all parties—the state, the platform industry, and civil society—participate in platform governance amicably, equitably, and willingly. Realistically, this ideal situation would be hard to achieve and sustain given the diverging interests, resources, and power balance of all parties involved.²⁴⁸

I also compare the other three models with platform governance systems in major jurisdictions worldwide. European practices seem to closely resemble Model One, where direct regulations are implemented, infused with some elements of Model Four, the collaborative model.²⁴⁹ With a strong emphasis on fundamental individual rights, supranational and national authorities in Europe play a decisive role in leading the formulation and enforcement of regulatory norms and policies over digital platforms that even extended beyond E.U. member states. The European Commission, for instance, started to envisage a roadmap for pan-E.U. regulatory and policy development as early as 2015.²⁵⁰ Notably, these earlier initiatives led to the adoption of the General Data Protection

²⁴⁸ José van Dijck, *Governing Digital Societies: Private Platforms, Public Values*, 36 COMPUT. L. & SEC. REV. 105377, 105379 (2020).

²⁴⁹ *Id.* (“The European Rhineland model ideally balances off the powers of state, market, and civil society actors in multi-stakeholder organizations. Obviously, these multiple stakeholders do not have the same interests, so government bodies need to take the roles entrusted to them as legislator, regulator, moderator, and enforcer to negotiate the public interest.”).

²⁵⁰ Pieter Nooren et al., *Should We Regulate Digital Platforms? A New Framework for Evaluating Policy Options*, 10 POL’Y & INTERNET 264, 266 (2018); Annabelle Gawer et al., *Online Platforms: Economic and Societal Effects*. European Parliamentary Research Service, KING’S RESEARCH PORTAL IV (2021), https://kclpure.kcl.ac.uk/portal/files/149143202/EPRS_STU_2021_656336_EN.pdf.

Regulation in 2016,²⁵¹ the Platform to Business (P2B) Regulation²⁵² in 2019 as well as the Digital Markets Act²⁵³ and the Digital Services Act²⁵⁴ in 2022. In contrast, the U.S. model of platform regulation appears to incorporate ingredients of Model Three, platform-led self-regulation.²⁵⁵ The roots of this regulatory model date back to Section 230 of the Communication Decency Act, which provides limited federal immunity to providers and users of interactive computer services.²⁵⁶ This both shields providers of interactive computer services from liability for third-party content²⁵⁷ as well as incentivizes them to conduct “Good Samaritan” screening of objectionable materials.²⁵⁸ This considerable immunity and discretion bestowed upon U.S. digital platforms by the legislative branch constitutes a key factor in explaining the disparities between the governance paradigms of China and the United States in the realm of digital platforms.

Compared to the rich literature about the European and U.S. models of platform governance, so far there has been a dearth of literature²⁵⁹

²⁵¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O. J. (L 119) 1.

²⁵² Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on Promoting Fairness and Transparency for Business Users of Online Intermediation Services Platform to Business (P2B) Regulation, 2019 O. J. (L 186) 57.

²⁵³ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in The Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O. J. (L 265) 1.

²⁵⁴ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), 2022 O. J. (L 277) 1.

²⁵⁵ Marietje Schaake, *A Conversation About Digital Platforms And Regulation*, MEDIUM (Feb. 15, 2019), <https://medium.com/@marietje.schaake/a-conversation-about-digital-platforms-and-regulation-77fbef7dd1bf>. A European Parliament member advocating for platform accountability stated that “Americans in general trust private companies more than they trust the government, and in Europe roughly speaking it’s the other way round, so intuitively most people in Europe would prefer safeguards coming from law than trusting the market to regulate itself” after comparing with Silicon Valley’s push-back against regulation and “move fast and break things” attitude that with European media pluralism, multi-party political system and high public trust of ruling authorities.

²⁵⁶ Communication Decency Act, 47 U.S.C. § 230 (c) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” And that such providers may not be held liable for voluntarily acting to restrict access to objectionable material.). For the legislative intention of Section 230, *see, e.g.*, *Zeran v. Am. Online, Inc.* 129 F.3d 327, 330–31 (4th Cir. 1997).

²⁵⁷ Communication Decency Act, 47 U.S.C. § 230 (c) § 230(c)(1).

²⁵⁸ *Id.* § 230(c)(2)(A).

²⁵⁹ Some of the most up-to-date literature explores the differences between China and the US model from perspectives of data trafficking and sovereignty, but not the specific mechanisms of regulation. *See generally* AYNNE KOKAS, *TRAFFICKING DATA: HOW CHINA IS WINNING THE BATTLE FOR DIGITAL SOVEREIGNTY* (Oxford University Press, 1st ed. 2022) (arguing that the practices in Silicon Valley’s

offering detailed descriptions of the Chinese approach, which integrates Model One, government direct regulation, and Model Two, regulation through sanctions. Besides direct regulations, Chinese authorities rein in from a distance by threatening digital platforms with fines and punishment. This unique blend of the state's *direct* and *indirect* control characterizes the Chinese platform governance regime. To a certain extent, this mixed formula is the outcome of China's broader political and economic structure: a unique combination of authoritarian politics and a market-driven economy. Authoritarian power structure breeds the state's urge to tightly control the platforms and digital civil society but falls short of effectively doing so with limited regulatory insight, experience, and resources. Strong bureaucratic muscles and judicial control, meanwhile, enable the state to regulate through criminal courts. Furthermore, economic growth and technological innovations sustain the performance legitimacy of the party-state and motivate its provision of space for platforms' self-regulation under state-imposed pressure.

In sum, regulation through criminalization serves as a supplier of political legitimacy in three inter-connected ways: First, the criminal process serves as a symbol of good governance when the market and regulators both fail to timely address pressing social problems. Second, the criminal process restores public faith in the growth-driving digital sector, which feeds on individual data and numbs user anxiety toward prevalent risks. Third, criminal process pins moral condemnation on selected entities and persons, shifting the focus of blame away from state regulatory oversight and onto the fault of selected individuals and entities.

CONCLUSION

Recent years saw the application of criminal law to Chinese digital intermediaries as well as their executives and employees in the digital platform economy. Despite the inherent risk in the business model of digital platforms, the need for successful interventions stands in contrast with how governments manage those associated risks. Effective *ex ante* regulation remains a rhetorical ideal while governments employ flawed and inadequate regulatory responses. This regulatory deficiency has led to the ascendance of criminal law in regulating transactions and activities mediated through internet platforms. Digital intermediaries face criminal

oversight in data regulation have given China the opportunity to rise up a major global shaper of Information and technology policies); ZUBOFF, *supra* note 5 (arguing that the social credit system represents as “the apotheosis of instrumentarian power fed by public and private data sources and controlled by an authoritarian state” but did not offer analysis on the Chinese government’s approach to platform governance).

censure for behaviors ranging from disseminating pornographic materials to fraudulent fundraising. In particular, platforms are held liable for failures to live up to their three general positive obligations: the duties to review, manage, and protect. Recent high-profile cases—the large-scale criminalization of meltdown P2P lending platforms and their operators as well as the high-profile conviction of online video-streaming platforms—illustrate this failure. In this context, criminal law acts as a filler for the regulatory state.

Meanwhile, criminal law also serves as a risk redistributor. The government has used it to suppress and redistribute risks introduced and induced by the platform economy. New varieties and forms of insecurity, as opposed to old-time hazards, are consequences of expanding individual activities and risk-taking business models of digital platforms. Criminal law has also become a useful legal tool to reassign and reallocate moral blame for failures and harms resulting from these socioeconomic activities. By regulating through criminalization, governments shift the regulatory burden, power, and accountability, allowing for the legal redistribution of legal and political risks. In this sense, digital platforms also serve as ecosystems within which moral and political meaning is constructed and reorganized.

These transformed roles of criminal law as a risk redistributor, regulatory filler, and legitimacy enhancer, has led to considerable changes in its nature, scope, and shape. The extension of criminal law, in horizontal and vertical dimensions, suggests that traditional limits on its role have been relaxed in an age of the platform economy. In addition to censuring new behaviors that were previously only subject to administrative punishment, the government extended criminal liability temporally, broadened it interpersonally, and spread it from commission to a wide range of omission offenses. The purview of criminal law has grown to impose three major positive duties on digital platforms—the duty to review, the duty to manage, and the duty to protect. These changes are made so that criminal law could deter, prevent, and regulate risks in an ex ante way.

How do we make sense of China's approach to regulating digital platforms? Some argue that digital platforms' technical properties are independent of human interests and moral values. Others disagree, believing this liberal approach is suboptimal and self-defeating.²⁶⁰ China adopted an aggressive approach to regulating its digital platforms. In light of failing layers of industry self-regulation and government-implemented

²⁶⁰ B. A. Greenberg, *Rethinking technology neutrality*, 100 MINN. L. REV. 1495, 1495 (2016); Kokas, *supra* note 259.

regulation, China's unique legal response to tackling the undesired social consequences associated with the rise of the platform economy has been to threaten digital intermediaries with punishment. The criminal process has been adjusted to serve as a compensating regulatory force, a legitimacy enhancer, and a symbolic power to satisfy the collective desire for security and risk mitigation. This is so despite established principle that criminal law should, in principle, serve as a last resort to resolve grave wrongs. The current state of criminal law is not a mere replacement or complement of state regulation. It is, in its own right, a form of coercive regulation.

APPENDIX

Table One. A Typology of Criminal Offenses Involving Digital Platforms under The 1997 Chinese Criminal Law (28 in Total)

	Criminal Offense	Criminal Code §	Year of Enactment	Risk/Harm	Criminalization*	Positive Duties**
1	Advocating Terrorism or Extremism or Instigating Terrorist Activities	A120-3	2015	Social Order	VT	DTM
2	Causing a Traffic Accident	A133	1997	Personal Safety	VBP	DTP
3	Dangerous Driving	A133-1	2011	Personal Safety	H	DTP
4	Producing or Selling Fake or Shoddy Products	A140	1997	Market Order	H	DTP
5	Producing, Selling, or Providing Bogus Medicines	A141	2020	Market Order & Public Health	VBP	DTP
6	Disrupting Administration of Medicines	A142-1	2020	Social Order & Public Health	VBP	DTP
7	Producing or Selling Poisonous or Harmful Food	A144	1997	Market Order & Public Health	H	DTP
8	Smuggling Ordinary Goods or Articles	A153	1997	Border control and Tax Monopoly	VBP	DTR
9	Illegally Collecting Public Funds	A176	1997	Financial Security & Order	VBP	DTP
10	Unlawfully Raising Funds by Fraud	A192	1997	Financial Security & Order	H	N/A
11	Selling Goods with Counterfeited Registered Trademarks	A214	1997	Intellectual Property	H	DTR
12	Infringement on Copyright	A217	1997	Intellectual Property	H	DTR
13	False Advertising	A222	1997	Consumer Rights	VBP	DTR
14	Contract Fraud	A224	1997	Property Safety	H	NA
15	Organizing or Leading Pyramid Selling Activities	A224-1	2009	Personal & Financial Safety	H	NA
16	Infringing on Citizens' Personal Information	A253-1	2015	Cyber Security	H	DTM
17	Fraud	A266	1997	Property Safety	H	NA

8	1	Evading Labor Remunerations	A276-1	2011	Financial/ Employment Safety	VBP	NA
9	1	Illegally Obtaining Data in Computer Information Systems or Exercising Illegal Control over Computer Information Systems	A285(2)	2009	Cyber Security	VI	DTM
0	2	Providing Programs or Tools Used for Intruding into or Illegally Controlling Computer Information Systems	A285(3)	2009	Cyber Security	VI	DTM
1	2	Evading Cyber Security Obligations	A286-1	2015	Cyber Security	VBP	DTM
2	2	Illegally Utilizing Information Networks	A287-1	2015	Cyber Security	VI	DTM
3	2	Aiding Criminal Activities through Information Network	A287-2	2015	Cyber Security	VI	DTM
4	2	Fabricating or Deliberately Spreading False Terrorist Information	A291-1(1)	2001	Social Order	VT	DTM
5	2	Fabricating or Deliberately Spreading False Information	A291-1(2)	2015	Social Order	VT	NA
6	2	Running Gambling Houses	A303(2)	2006	Financial Security & Order	H	DTM
7	2	Arranging and Participating in Gambling Overseas	A303(3)	2021	Financial Security & Order	H	DTM
8	2	Producing, Reproducing, Publishing, Selling, or Disseminating Obscene Materials for Profit	A363(1)	1997	Moral Integrity	H	DTM

* This categorization refers to ways in which criminal law expands in scope and depth—namely, horizontally (H), (vertically) temporal (VT), (vertical) behavioral patterns (VBP), (vertical) interpersonal (VI).

** The types of positive duties are divided into duty to review (DTR), duty to manage (DTM), and duty to protect (DTP). NA stands for offenses whose legislative interpretations and existing case law do not support commission by omission.