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# Chinese Thinking on Crime and Punishment: Old and New

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# **Chinese Thinking on Crime and Punishment: Old and New**

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## **ABSTRACT**

As a scholarly discipline, criminology in China is growing in stature, maturity, and utility. To date, there are very few investigations into Chinese thinking of crime, punishment and control in China. This is a first attempt to do so.

The article begins with an exploration of “Literature on law, crime and punishment in China.” This is followed by discussions on “The idea of crime (“Fanzui”),” “Traditional thinking on crime and punishment in China,” and “Contemporary thinking on crime and punishment in China.” Finally, the conclusion summarizes what we have learned.

## Chinese Thinking on Crime and Punishment: Old and New

### Introduction

Since 1978, Chinese economic reform has brought along tsunami size crime waves.<sup>2</sup> In 1950, the People's Republic of China (PRC) recorded 513,416 crimes, or 9.3 crimes per 10,000 people. The crime rate was reduced to 56,300 crimes (5.9/10,000) and 57,482 crimes (4.2/10,000) in 1952 to 1952 respectively.<sup>3</sup> It has remained low since then until the reform era, starting 1978.

In 1981, only two years into the reform, crime rose to 89,000 or 8.9/10,000.<sup>4</sup> Since then the crime rate in China keep on increasing. Between 1981 and 2001 robberies grew 18 times, from 22266 to 352216.<sup>5</sup> In 2007, there were 80,000 juvenile arrests, up from 30,000 in 1998.<sup>6</sup>

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<sup>2</sup> J. Liu, "Social Transition and Crime in China: An Economic Motivation Thesis," *Australian and New Zealand Journal of Criminology*, Vol. 37: 122-38 (2004)

<sup>3</sup> Official crime statistics especially in China are subject to intentional manipulation and inadvertent distortion. He and Marshall, "Social Production of Crime Data: A Critical Examination of Chinese Crime Statistics," *International Criminal Justice Review* Vol. 7 (1): 46-64 (1997); Olivia Yu, Lening Zhang, "The under-recording of crime by police in China: a case study," *Policing: An International Journal of Police Strategies & Management* Vol. 22 (3):252 – 264 (PRC police internal survey in late 1980s and early 1990s shoed that that the police grossly under record crimes.)

<sup>4</sup> He Bingsong, "Crime and Control in China." In pp. 241 – 268. Hans-Günther Heiland, Louise I. Shelley, Hisao Katō, *Crime and Control in Comparative Perspectives* (Walter de Gruyter, 1992).

<sup>5</sup> Chapter 2 "Comparative Perspectives on Crime in China." In Bakken *Crime, Punishment and Policing in China* (Rowen and Littlefield, 2004), pp. 64 – 103.

<sup>6</sup> "Youth crime in China explodes as social values decline: report," *Sino Daily*, December 5, 2007. (Rise of juvenile crime resulted from decline of social values and increase in broken families.)

[http://www.sinodaily.com/reports/Youth\\_crime\\_in\\_China\\_explodes\\_as\\_social\\_values\\_decline\\_report\\_999.html](http://www.sinodaily.com/reports/Youth_crime_in_China_explodes_as_social_values_decline_report_999.html)

To date, there is very little research into Chinese thinking on crime, punishment and control (in English language).<sup>7</sup> This is a first attempt to do so.

This article is organized into the following sections. After this brief introduction, Section I provides an extensive review and critical assessment of the state of “Literature on law, crime and punishment in China.” Section II investigates into “The idea of crime (“Fanzui”)” in China. Section III explores “Traditional thinking on crime and punishment in China.” Section VI discusses “Contemporary thinking on crime and punishment in China.” In Section V “Conclusion” is a summary of what we have learned about Chinese thinking over crime and punishment, old and new.

## I

### **Literature on law, crime, punishment and control in China**

In the West, there is no independent field of study entitled “Chinese criminology,”<sup>8</sup> though sinologists have studied crime, law and justice since the 19<sup>th</sup> century. Indeed, foreign, comparative and cross-cultural criminological studies, especially from an indigenous perspective,<sup>9</sup> are

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<sup>7</sup> The rare exception being Frank, “Penology and Reformation in Modern China” by Dikotter. In Bakken *Crime, Punishment and Policing in China* (Rowen and Littlefield, 2004), pp. 29 – 64..

<sup>8</sup> Bakken observed that it is an ignored field of study because of received mysticism about China and perceived uniqueness of Chinese history and culture. In Bakken, *Crime, Punishment and Policing in China* (Rowen and Littlefield, 2004), p. 64.

<sup>9</sup> “Closing Remark” (AAPS Presidency Inauguration Speech) AAPS Third Annual Conference: Asian Policing in the 21st Century, Open University, July 29, 2002; “An Introduction to Asian Policing in the 21st Century,” “Status Check: Police Studies” International Police Conference at Eastern Kentucky University, June 12-14, 2003. (On file with author).

rare.<sup>10</sup> Since inception, the focus, methods, theories, and style of criminology scholarship in and about China are clearly and pre-dominantly Euro and Anglo-centric.<sup>11</sup> As yet very few indigenous theories of Chinese crime have emerged and made it into mainstream Western scholarship. For example, the practice of community policing<sup>12</sup> and the idea of re-integration shame<sup>13</sup> had been practiced in China for centuries, and are now being (re)introduced to China from the West, as a novelty. Western countries, and especially the Americans, are net exporters of criminological theories,<sup>14</sup> while China is a passive consumer.

Until 1980s, crime and punishment in China has been studied as an appendage to the larger intellectual terrain of China studies.<sup>15</sup> The primary focus was on Chinese political philosophy,<sup>16</sup> government administration,<sup>17</sup> and communal social control.<sup>18</sup> The preferred research methodology was textual

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<sup>10</sup> Bill Heberton, Susyan Jou, "In search of criminological tradition: the development of criminology in Taiwan," *Crime, Law and Social Change* Vol. 44(3): 215 – 6 (2005).

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

<sup>12</sup> Michael R. Dutton, *Policing and punishment in China: from patriarchy to "the people"* (New York: Cambridge University Press, 1992).

<sup>13</sup> "Chapter 7: From Shaming and Reintegration." In pp. 89 – 105, Liu, Jianhong, Lening Zhang, and Steven F. Messner, *Crime and Social Control in a Changing China*. (Westport, CT: Greenwood Press, 2001). (What Braithwaite describes in his book is precisely what is practiced in China.); John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989), p. 6.

<sup>14</sup> Gregory J. Howard, Graeme Newman, and William Alex Pridemore, "Theory, Method, and Data in Comparative Criminology." In pp. 139 – 213 *Measurement and Analysis of Crime and Justice* Vol. 4 (U.S. Department of Justice Office of Justice Programs, 2000). [http://www.ncjrs.gov/criminal\\_justice2000/vol\\_4/04d.pdf](http://www.ncjrs.gov/criminal_justice2000/vol_4/04d.pdf)

<sup>15</sup> For exceptions, see Joanna Waley-Cohen, *Exile in Mid-Qing China: Banishment to Xinjiang, 1758-1820* (New Haven: Yale University Press, 1991); Frank Dikötter, *Crime, Punishment and the Prison in Modern China* (London, Hurst and Company, 2002).

<sup>16</sup> Chin-Shing Huang, *Philosophy, Philology, and Politics in Eighteenth-Century China* (Cambridge University Press, 1995).

<sup>17</sup> John R. Watt, *The District Magistrate in Late Imperial China*. (New York: Columbia University Press, 1972)

<sup>18</sup> Hsiao Kung-chuan. *Rural China: Imperial Control in the Nineteenth Century* (Seattle: University of Washington Press, 1960)

analysis of historical and classical materials,<sup>19</sup> of late some archeology work.<sup>20</sup> There was little empirical investigation and field research into the nature and kind, incidence and prevalence, distribution and pattern, causation and remedy of crime.<sup>21</sup>

Of late, a few overseas scholars are paying increasing attention to criminology<sup>22</sup> – law, crime and punishment - issues in China.<sup>23</sup>

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<sup>19</sup> David N. Keightley, “Main Trends in American Studies of Chinese History: Neolithic to Imperial Times,” *The History Teacher* Vol. 19(4): 527 – 543 (1968).

<sup>20</sup> David W. Pankenier, *The "Bamboo Annals" Revisited: Problems of Method in Using the Chronicle as a Source for the Chronology of Early Zhou, Part 1*” *Bulletin of the School of Oriental and African Studies, University of London* Vol. 55(2): 272-297 (1992). “Part 2” Vol. 55(3): 498-510 (1992).

<sup>21</sup> For exceptions, see Marvin Wolfgang “Delinquency in China: Study of a Birth Cohort” (NIJ, May 1996); Lening Zhang, Steven F. Messner, Jianhong Lu, “Criminological Research in Contemporary China Challenges and Lessons Learned From a Large-Scale Criminal Victimization Survey,” *International Journal of Offender Therapy and Comparative Criminology*, Vol. 51, No. 1, 110-121 (2007)

<sup>22</sup> Unless otherwise specified, criminological refers to the study of criminal law, crime and punishment, and is used interchangeably.

<sup>23</sup> Lening Zhang, Steven F. Messner, and Jianhong Liu. “Criminological Research in Contemporary China: Challenges and Lessons Learned From a Large-Scale Criminal Victimization Survey.” *International Journal of Offender Therapy and Comparative Criminology* 51 (February):110-121 (2007);. Lening Zhang & Jianhong Liu, “China's Juvenile Delinquency Prevention Law,” *International Journal of Offender Therapy and Comparative Criminology*, Vol. 51, No. 5, 541-554 (2007) (The article explores the historical – philosophical context and explain the social – political background of the PRC Juvenile Delinquency Prevention Law.); . Y. Zhong and R. G. Broadhurst, “Building Little Safe and Civilized Communities: Community Crime Prevention With Chinese Characteristics?,” *International Journal of Offender Therapy and Comparative Criminology*; Vol. 51(1): 52 – 67 (2007). (Article explains how community crime prevention program in China is conducted, borrowing ideas from the West and adapting to the local conditions and needs.); H. Lu, J. Liu, and A. Crowther, “Female Criminal Victimization and Criminal Justice Response in China,” *British Journal of Criminology*, Vol. 46(5): 859 – 874 (2006) (Article examines four forms of sexual assault, including rape, abduction of women, sexual assault and forcing women into prostitution in China, seeking to reconstruct profile of offenders and victims with court data (1992 to 2002); David Drissel, “Subterranean Sources of Juvenile Delinquency in China: Evidence from Birth Cohort Surveys,” *Asian Journal of Criminology* Vol. 1 (2): (2006) (Article examines factors causing drastic increase in delinquency rate in China during the reform period, particularly how contradictions in political ideology vs. market forces impact upon youth attitude and conduct); Jianhong Liu, “Crime Patterns During the Market

In the West, investigators of crime and punishment in China can be classified broadly into three main groups: China observers and sinologists from Asian studies discipline, legal scholars and jurists from American law

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Transition in China,” *British Journal of Criminology*, Vol. 45 (5):613-633 (2005) (Crime in China has been explained with classical Durkheim anomie theory. The study finds that economically motivated crimes (e.g. larceny, grand larceny, robbery and fraud) increased faster than less or non-economically motivated crimes (e.g. homicide, assault and rape) This can be better explained by economic motivation, structurally induced.); . G. Pearson, “Introduction. Crime and Criminology in China,” *British Journal of Criminology*, Vol. 42 (2): 235-239 (2002) (The special issue consisted of five contributions: “The Promise of Repentance. Prison Reform in Modern China,” pp. 240-249; “Incarcerated Chinese Men. Their Life Experiences and Criminal Onset,” pp. 250-266; “Legal Representation and Criminal Processing in China,” pp. 267-280, Author: Lu, Hong; “Policing in the People's Republic of China. The Road to Reform in the 1990s,” pp. 281-316, Author; “Narcotic Culture. A Social History of Drug Consumption in China,” pp. 317-336, Authors: Dikötter, Frank; Laamann, Lars); X Chen, “Social control in China: applications of the labeling theory and the reintegrative shaming theory *Int J Offender Ther Comp Criminol*. Vol. 46(1):45-63 (2002) (The author, a PRC law professor, discusses philosophy and functions of social control in the Chinese society, finding the Chinese favoring macro – social more so than micro-individual control. “The article also scrutinizes the implications of labeling theory and reintegrative shaming theory, as they are elaborated in the West, and tests their sensitivity to cross-cultural differences.”); Xin Ren, “Prostitution and Economic Modernization in China,” *VIOLENCE AGAINST WOMEN* Vol.5: 1411-1436 (1999) (PRC has shifted prostitution policy from eradication (1959) to control (1980s) to regulation (1990s). Prostitution resulted in part from women’s marginalized status in traditional society which lead to less education, economic and political opportunities); J. Liu, S. F. Messner, and A. E. Liska, “Chronic Offenders in China,” *International Criminal Justice Review* *International Criminal Justice Review* Vol. 7 (1): 35-46 (1997) (Using a sample of Tianjin inmates survey the author discovered no chronic offender profile with serious offenders but distinct chronic grouping with administrative offender.) Keith Forster, “The 1982 Campaign Against Economic Crime in China,” *The Australian Journal of Chinese Affairs*, No. 14: 1-19 (1985); Jinhong Liu; Dengke Zhou; Allen E. Liska; Steven F. Messner; Marvin D. Krohn; Lening Zhang; Zhou Lu , “Status, power, and sentencing in China,” *Justice Quarterly*, Vol.15 (2): 289 – 300 (1998) (Severity of sentencing of in China is positively related positively to individual status and negatively to the status of friends); Lening Zhang, Steven F. Messner, “Family Deviance and Delinquency in China,” *Criminology* Vol. 33 (3), 359–387 (1995). (Authors explore “the relationship between family deviance and delinquency using survey data from Tianjin, a large city in China. We hypothesize that, similar to findings in the West, family deviance will be positively related to delinquency in China... Consistent with expectations, family deviance is positively related to official delinquency status, exhibiting indirect effects via family controls, moral commitments, and deviant associations, and direct effects that are likely to reflect family group pressures....” (ABSTRACT)

schools – legal profession, and finally comparative sociologists and criminal justice scholars. As yet there is no integrated effort or cross disciplinary collaboration to study crime and punishment in China. Indeed, rarely do these three groups talk to each other. Within the respective groups there are few attempts to build upon the work of each other, in theory, methods or findings, e.g., validation and extension studies are non-existence. Overall, there is no common language, agreed upon paradigm, and accumulation of knowledge.<sup>24</sup>

Of the three groups, the Chinese observers were the first to study China. The first generation of sinologists was missionaries and diplomats. They lived and worked in China. They learned the language and were immersed in her culture. They were more appreciative of the complexities, intricacies, nuance and characteristics of the Chinese criminal justice system. The jurists and lawyers, mostly Americans, came to China to make money or spread ideology. They were less interested in understanding China on her own terms than seeing China in their own image. Finally, criminal justice scholars are the last to appear on the scene. Thus far, due to lack of data and interest, their efforts have not yet made a mark.<sup>25</sup>

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<sup>24</sup> The author reads and publishes on all three kinds of journals. It is clear from experience, as borne out by research, that there clear and distinctive scholarship style and disciplinary expectations within respective fields. This make cross-disciplinary publishing with inter-disciplinary piece very time consuming and difficult.

<sup>25</sup> Two pioneer studies define the field: Troyer, Ronald, John P. Clark, and Dean G. Rojek, *Social Control in the People's Republic of China*. (New York: Praeger; 1989); Liu, Jianhong, Lening Zhang, and Steven F. Messner, *Crime and Social Control in a Changing China*. (Westport, CT: Greenwood Press, 2001). While the former book looks at the Chinese criminal justice system outside in, the later introduce crime and control in China from inside out.

For a long time, the most futile area of criminological investigation into China is the study of imperial legal code<sup>26</sup> and criminal justice system, especially that of the Qing dynasty.<sup>27</sup> Most of these studies are descriptive accounts of how the legal system worked on paper. Many of them are documentary in nature and expository in style. They draw heavily from the Qing code and occasionally from historical and Confucian sources. They amount to detailed annotated treatises of the Qing Code.

Traditional Chinese legal scholarship is highly sophisticated in workmanship, as evidenced by its comprehensive scope and painstaking documentation, but it is grossly lacking in theoretical framework and empirical support. Few Chinese studies have a theoretical perspective other than emphasizing the historical continuity of the Tang Code, ideological dominance of Confucian ethics or observing the draconian nature of penal administration. This caused one 19th century French student of Chinese legal system to lament openly:

(N)one of these collections [Chinese law treatises], to my knowledge at least, contains an analysis of the whole Chinese

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<sup>26</sup> The study of imperial legal code and administration is the study of criminal law and criminal justice administration. According to some account, in imperial China there is no civil law but only criminal code.

<sup>27</sup> Some of the more important scholarship in Qing legal system included: Chang Wejen, *Ch'ing-Tai Fachih Yen-Chiu* (Research on The Legal System of The Ch'ing Dynasty) Vol. 1-3 (1983), Tao Hsi-Sheng, *Ch'ing-Tai Chou-Hsien Yaen Hsing-shish Shen-pan Chih-tu Chi Cheng-Hsu* (The System and Procedure for Resolving Judicial Matters at the District Level During the Ch'ing Dynasty) (1972).

I will not review Japanese scholarship in Chinese law. Interested persons should consult Osamu Oba, "Edo Period Studies on T'ang, Ming, and Ch'ing Law," in Brian E. McKnight, *Law and State in Traditional East Asia* (Honolulu: Hawaii University Press, 1987), pp. 1-27. For an excellent, though dated, survey of Japanese literature, see Dan F. Henderson, "Chinese Legal Studies in Early 18th Century Japans: Scholars and Sources," 30 *Journal of Asian Studies* 21-56 (1970).

law or has tried to deduce from it any theory whatsoever. Each commentator picks over the law, phrase by phrase, and tries to bring out some comparison, to find some unforeseen circumstances, and most of all, to justify the provision of the law. Alongside certain remarks that show a great exactitude in criticism, they are often platitudes and wretched inanities.<sup>28</sup>

The description of Chinese legal scholarship as “platitudes” and “inanities” was overkill and most unfortunate. It reflected perhaps a lack of understanding of the Chinese mind and insensitivity towards the oriental ways.<sup>29</sup> Nevertheless, the piercing criticism registered a real dissatisfaction and frustration with Chinese criminal law scholarship. It was also not a lone voice. It echoed widely shared sentiments and attested to a huge cultural gap. Negative reception of Chinese criminal law and punishment pervaded the Western scholarly community before the twentieth century, and has only recently been addressed.<sup>30</sup>

Chinese criminological studies were carried out by sinologists who were more interested in criminal law as an integral part of Chinese

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<sup>28</sup> See P.-L.-F. Philastre, *Le Code Annamite*, I. 2 ed. (Paris, 1909), as cited by Jones, *The Great Qing Code* (New York University Press, 1994), p.3.

<sup>29</sup> In spite of its long history and vast influence, the study of the Chinese legal system has been neglected by Western comparative legal scholars. *Id.* pp. 1-2, esp. n. 2. (No one in the comparative law field pays any attention to major non-European legal systems such as those of China and Islam.)

<sup>30</sup> Meijer (1949), Chu (1961), Bodde (1967), Creel (1970), Chen (1970), Sprenkel (1962), Brockman (1973) and Edwards (1980) have done much in replacing frustrated criticisms with constructive dialogues. See generally Cohen, Edwards, and Chang Chen, *Essays on China's Legal Tradition* (Princeton, 1980). More recently Alford (1984), Allee (1994), Jones (1994), and Huang (1994) have brought understanding and respectability to the Chinese legal system. For example Alford argued that the Qing judicial process has real and effective check and balance, i.e., accountability. Huang observed that the Qing trial process was effectively rule bounded, i.e., predictable. Both suggested that the Qing judicial process operated within a true and effective legal system.

comprehensive social control society<sup>31</sup> and lawyers whose main focus were on black letter law. There was no dominant paradigm, theoretical orientation, or methodological approach to the study of Chinese law.<sup>32</sup> Most of the investigations were philosophical in nature, descriptive in approach,<sup>33</sup> documentary in substance,<sup>34</sup> content analytic in methods,<sup>35</sup> and evaluative in overtone.<sup>36</sup> Sources of representative Chinese criminal law and justice research include: Geoffrey McCormack, *Traditional Chinese Penal Law* (Edinburgh University Press, 1990); B.E. McKnight, *The Quality of Mercy: Amnesties and Traditional Chinese Justice* (Honolulu: University Press of

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<sup>31</sup> J. Fairbank, *The United States and China* (4th ed. 1979) 117-23. L. Pye, *China: An Introduction* (2ed. 1978), 60-62, 71. L. Stover, *The Cultural Ecology of Chinese Civilization* (1974), 89-94. K. Wittfogel, *Oriental Despotism: A Comparative Study of Total Power* (1959), 131-133, 144-5, 158-9. To date, the most widely read and frequently cited is Schwartz "On Attitudes Toward Law in China," in M. Katz (ed.) *Government Under Law and The Individual* (1957), pp. 27 passim.

<sup>32</sup> See Lubman, "Western Scholarship on Chinese Law: Past accomplishments and Present Challenges" Op. cit., 83; "Book Review: Essays on China's Legal Tradition" Op. cit.

<sup>33</sup> For example, *Traditional Chinese Penal Law*, op. cit. At least, one author transformed his descriptive account into a theory (of a sort), see *Order and Discipline in China*, Op. cit.

<sup>34</sup> Almost all pre-WWII works are work of this gem. The most famous ones are of course Ta Tsing Leu Lee: *Being the Fundamental Laws of the Penal Code of China*, Op. cit. and E. Alabaster, *Notes and Commentaries on Chinese Criminal* (1899).

<sup>35</sup> See the works of William C. Jones, "Studying the Ch'ing Code: The Ta Ch'ing Lu Li," and "Theft in the Qing Code" op. cit.

<sup>36</sup> The evaluation standard differs. Some of the more common ones are: law vs. no law; rule of law vs. rule of man; constitutional law vs. political rule. Needham, "Order Which Excludes Law," in *Science and Civilization*, Vol. 1, 572-77 (Cambridge University Press, 1956) (The Chinese have no law but order.); Pound, "Progress of the law in China," *Washington Law Review* (1948), Andre Bonnichon, *Law in Communist China* (The Hague: International Commission of Jurists, 1956) (The Chinese have no concept of due process of law.), J. Fairbank, *The United States and China* (1974) (Chinese law do not recognize individual rights and equality but imperial and family authority). Vogel, *Canton Under Communist* (Cambridge, Mass: Harvard University Press, 1971) (The Chinese political-legal system is oppressive). Of course, it was the perception of the Western powers that the Chinese (Ch'ing) legal system was corrupted, oppressive, and unjust which led to the demand for extraterritoriality, see *Order and Discipline in China*, op. cit., Chapter 5.

Hawaii, 1981); William C. Jones, "Studying the Ch'ing Code: The Ta Ch'ing Lu Li." 22 *The American Journal of Comparative Law* 330-64 (1974); Jones, "Theft in the Qing Code" 30 *The American Journal of Comparative Law* 499-521 (1982); Jones, "Book Review: Legal Systems"; William P. Alford, "Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China." 72 *California Law Review* 1180-1254 (1984); J.F. Harrison, "Wrongful Treatment of Prisoners: A Case Study of Ch'ing Legal Practice." 23 *Harvard Journal of Asiatic Studies* 227-244 (1964). V. W. Ng "Ideology and Sexuality: Rape Laws in Qing China." 46 *Journal of Asian Studies* 57-70 (1987); J.K. Ocko "I'll take It All the Way to Beijing: Capital Appeals in the Qing," 47 *Journal of Asian Studies* 291-315 (1988); Huang Liu-hung, *A Complete Book Concerning Happiness and Benevolence* (ed. and trans. Djang Chu. (University of Arizona Press, 1984); Michael Franz, "The Role of law in Traditional, Nationalist and Communist China." 9 *The China Quarterly* 124-48 (1961); Allison Wayne Conner, "The Law of Evidence During the Ch'ing Dynasty." Ph.D. dissertation, Cornell University, 1979; George Y. Staunton (trans.) *Ta Tsing Leu Lee: Being the Fundamental Laws of the Penal Code of China* (London: Cadell and Davis, 1810); Tao-tai Hsiap, *Rural China: Imperial Control in the Nineteenth Century* (Seattle: University of Washington Press, 1960). George Keeton. "Chinese Law and Historical Jurisprudence." 12 *Chinese Social and Political Science Review* 511-515 (1928);. Hsien Chin Hu. *The Common Descent Group in China and Its Functions* (N.Y.: Johnson, 1964), B. MacKnight, *Law and Order in Sung* (Cambridge University Press, 1992); Ocko, "Justice on Appeal: The Capital Appeals System in Ch'ing China," in B. McKnight, *Law and State in Traditional East Asia*

(Honolulu: University of Hawaii Press, 1987); P. Chen *Chinese Legal Tradition Under Mongols* (Princeton: Princeton University Press, 1979).

For the most part, Western scholars perceived the Chinese law and criminal justice system in negative light. For example, Professor William P. Alford pointed out that Western scholars were in the main concerned with four aspects of the Qing legal system: (1) There was a lack of separation of power, especially at the district magistrate level. (2) The Qing legal system was an instrument of political control, not a vehicle of individual justice. (3) The Qing law did not protect individual rights or promote social equality; rather it reinforced state and family authority. (4) The Qing system was abusive and oppressive.<sup>37</sup>

Such negative assessments resulted from the Western scholars trying to decipher Chinese social control system with a Western interpretative lens. As Professor Scogin, Jr. observed, the Western comparative jurists, the likes of Hegel, Weber, Maine, were much influenced by Western disciplinary paradigm and value system. Thus, Sir Henry Maine found China laboring under a status oriented society<sup>38</sup> and Weber concluded that Chinese suffered from an irrational justice system.<sup>39</sup>

A minority of Chinese legal scholars have observed that Chinese law differs from the West in philosophy, purpose, functions, style and methods.<sup>40</sup> These scholars represented a shift in research focus and method.<sup>41</sup>

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<sup>37</sup> See William P. Alford, pp. 1190-96.

<sup>38</sup> See Civil Law in Qing and Republic of China pp. 23-26.

<sup>39</sup> Robert M. Marsh, "Weber's Misunderstanding of Traditional Chinese Law," *The American Journal of Sociology* Vol. 106(2): 281 – 302 (2000).

<sup>40</sup> See e.g. "Order without law. In pp. 3-16" Thomas B. Stephens, *Order and Discipline in China: The Shanghai Mixed Court 1911-1927* (University of Washington Press, 1992). (The main difference between the West and Chinese is in their conception of order; whereas the West believes in a structured order imposed exterior to the flux, the Chinese conceive of order as a natural state of harmony deriving from within.) Li, *Law*

The state of the scholarship on Qing's criminal justice system and the difficulties of investigating the Chinese legal system are best summed by William P. Alford, a Chinese historian and law professor:

Ironically, for all the certainty with which the later imperial criminal justice process has been presented in the West over the past two centuries, we still know far too little about either the theory or operation of that process. This may be attributable to the lingering disdain of Confucian-oriented scholar-officials for law, to absence of systematic, official case reporting, or to the sheer difficulty of securing, reading, and evaluating the pertinent original source materials. But whatever its cause, notwithstanding the important efforts of a small number of specialists both here and abroad, research in Chinese legal history remains at too preliminary a stage to warrant exclusive judgments about the character of the formal criminal justice process.<sup>42</sup>

## II

### The idea of crime (“Fanzui”)<sup>43</sup>

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*Without Lawyers* (1977) (Chinese prefers informal, customary control over formal, legal punishment.) "Book Review: Essays on China's Legal Tradition" Op. cit. (Western law is concerned with private dispute settlement. Chinese law is concerned with maintaining the Emperor's (and natural) order.) James P. Brady Justice and Politics in People's China: *Legal Order or Continuing Revolution* (N.Y.: Academic Press, 1982) (PRC pursues popular justice and the West promotes legal order.)

<sup>41</sup> See discussion and literature in note 77 supra.

<sup>42</sup> William P. Alford, p.1185-9. Footnotes omitted.

<sup>43</sup> “2.3. The evolution and change of fanzui” (“Fanzui gannian de yuange”). Kang Shuhua, *Criminology: History, Status, Future* (“Fanzui xue: Lizhi, Xianzhuang, Weilai”) (Beijing: Qunzhong chubanshe 1998).

*In imperial China*

In Chinese, “crime” is translated as “fan zui” or “violating” (“fan”) what has been “prohibited” (“zui”),<sup>44</sup> or “weifa” (violation of the law).<sup>45</sup>

Historically and linguistically, the character “fan” first appeared in <Huai Nan Zhi.Xiuwu><sup>46</sup> equating “fan” with “chu”. “Chu” means to “touch” offensively. Thus “chu fan” means to “touch” and “violate” in the process.<sup>47</sup> As to how people can violated the law, the legalist Han Fei (289 – 233 BC) observed in <Hanfeizi (韓非子). Wutu> (“Five Vermin”) that “Scholars violate the law with the pen,<sup>48</sup> martial people violate (“fan”) prohibition by force.”<sup>49</sup> This is surely the first criminological theory of white collar crime.

The character “zui” according to Mozi (470 – 391 BEC) is equated with violation (“fan”) of a normative prohibition (jin”), as in “fan jin”. The old word for “zui” has two radicals, “zhi” on top referring to “noose” and “xin” the radical down bottom is a form of penal instrument. When “zhi” and “xin” were put together the character looks like the character standing for emperor “Huang - 皇”. Since in imperial China it was forbidden to use any words referring to or related to the emperor directly, the word “zui” was used as a substitute to offend the emperor, attracting punishment. Since then “zui” or “fan zui” means violating what is prohibited.

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<sup>44</sup> *Id.* pp. 37 – 38.

<sup>45</sup> “Fan” is violation of person, boundary, rule or norm. “Zui” is crime. “Fanzui” is thus a criminal violation. *PYCED* 188R.

<sup>46</sup> Huainanzi (淮南子) also known as the Huainan honglie 淮南鸿烈 (“The Great Brilliance of Huainan”) was compiled in 2<sup>nd</sup> BCE during the Han Dynasty. It presented literary and philosophical debates between Liu An (King of Huainan) and his guests in court.

<sup>47</sup> *PYCED* 103R.

<sup>48</sup> “Ru yi wen luan fa”

<sup>49</sup> “Xia yi wu fan jin”

*In the PRC*

Currently, there are two different definitions of crime: one is defined by criminal law and the other as defined by criminology. When crime is defined by law, a criminal act is determined with reference to the law. The purpose of law is to decide whether a set of act and circumstances rise to the level of a crime. As defined by Criminal Law of the People's Republic of China (PRC), Article 13:

“All acts that endanger the sovereignty, territorial integrity, and security of the state; split the state; subvert the political power of the people's democratic dictatorship and overthrow the socialist system; undermine social and economic order; violate property owned by the state or property collectively owned by the laboring masses; violate citizens' privately owned property; infringe upon citizens' rights of the person, democratic rights, and other rights; and other acts that endanger society, are crimes if according to law they should be criminally punished. However, if the circumstances are clearly minor and the harm is not great, they are not to be deemed crimes”<sup>50</sup>

When crime is defined by criminology a person's conduct is determined to be a crime or not a crime not (only with) reference to law, but also with reference to the nature (“benji”) (immoral vs. harmful) or

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<sup>50</sup> Criminal Law of the People's Republic of China (Adopted by the Second Session of the Fifth National People's Congress on July 1, 1979 and amended by the Fifth Session of the Eighth National People's Congress on March 14, 1997).

origination (deviance, labeling) (“yuanyin”) of the act in question.<sup>51</sup> The purpose here is to ascertain the causation and consequences of an act against social prohibitions, criminally, morally and normatively.

As a unit of analysis, both the jurists and criminologists consider crime as a legal violation. The jurist is contended in finding criminal violation in accordance with the law. The criminologists go further. The criminologists study crime as well as other normative violations or deviance, i.e., acts that violates moral, custom, rules in place and are harmful to society. This is an important distinction. First, in China, all criminal acts are violation of morality,<sup>52</sup> but not all immoral (and deviant) acts are criminal in nature. Second, causal factors (personal or social) of crime, immorality and deviance are not the same. Third, since moral violations and deviances are equally offensive to the victims and harmful to the society, they must be dealt with separately. Fourth, prevention is better than cure. Minor infractions or immoral acts are prelude to crime. They must be dealt with to prevent crime from happening.<sup>53</sup> Lastly and more significantly, the jurists ask the question whether there is a crime (given the facts of a case), the criminologists investigate how, why and what to do about crimes.<sup>54</sup>

## V

### **Traditional thinking on crime and punishment in China<sup>55</sup>**

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<sup>51</sup> Kang Shuhua, *Criminology: History, Status, Future* (“Fanzui xue: Lizhi, Xianzhuang, Weilai”) (Beijing: Qunzhong chubanshe 1998), p. 42.

<sup>52</sup> See “Confucianizaion of the law”.

<sup>53</sup> *Id.* 44 – 45.

<sup>54</sup> *Id.* 42 – 43.

<sup>55</sup> Kang Shuhua, *Criminology: History, Status, Future* (“Fanzui xue: Lizhi, Xianzhuang, Weilai”) (Beijing: Qunzhong chubanshe 1998), pp. 227 – 251.

Historically, ideas of crime and punishment were discussed as part of the larger scheme of things, called the “cosmic order”.<sup>56</sup>

From the beginning of time, the sage thinkers were pre-occupied with how to secure peace and maintain order under heaven. The dominant view is that the peace and order is achieved first through personal self-cultivation by individuals as augmented with paternalistic regulations by the family and by virtuous rule of the emperor. In this way, the discussion of crime and punishment, law and order was blended imperceptibly into and merged holistically with the larger intellectual landscape and cultural discourse<sup>57</sup> on political philosophy and social practice of good governance and social control<sup>58</sup>

The philosophy of good governance has one objective, how to perfect the emperor’s rule approximating mandate of heaven. Good governance requires moral leadership and benevolent rule of the emperor (by and through his officials), manifested as stern discipline for intellectuals, ethical education for the public (especially the intellectuals), sound economic policy and paternalistic social programs by officials; all presented as universal principles and best practices of a good government.

Some of the earliest noteworthy sages who influenced Chinese thinking on crime and punishing are presented here.

### ***Zhou Gong***

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<sup>56</sup> Hsu Dau-lin, “Crime and Cosmic Order,” *Harvard Journal of Asiatic Studies* Vol. 30: 111 – 125 (1970). (Hus argued that Western scholars from Boode (1967) to Sprenkel (1962) misconstrued Chinese text in linking cosmic order and crime.)

<sup>57</sup> George A. Hayden, *Crime and Punishment in Medieval Chinese Drama: Three Judge Pao Plays* (Cambridge, Mass: Harvard University Press, 1978) (Crime drama as morality play.)

<sup>58</sup> Derk Bodde, *Law in Imperial China* (Cambridge, Mass; Harvard University Press, 1967), p. 43, 331.

The origin of criminological thoughts in China is traceable to *Zhou Gong* of Western Zhou (11 Century to 771 BC).<sup>59</sup> *Zhou Gong*, brother to Emperor Wu of Western Zhou, penned <Zhouli>, which was a required reading of Confucius. <Zhouli> set forth the protocol and etiquette in imperial court, and a must read for officials of the time.

*Zhou Gong* is known for his insight into and mastery of the intricacies of statecraft. He is also known for establishing a model government for later emperors to follow. *Zhou Gong* was very much a consummated craftsman of justice administration. He was driven by ideal of justice but was also grounded in realities of the time. He diligently sought to apply abstract principles of justice meticulously<sup>60</sup> to solve governance problems of the day. <Zhouli> was the annual of good government. It gives us the blueprint of what a perfect government should look like<sup>61</sup> and functioned.

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<sup>59</sup> Western Zhou has a special place in Chinese history. It provided the guiding paradigm for intellectual, governmental and social development. Michael Loewe and Edward L. Shaughnessy, *The Cambridge History of Ancient China* (Cambridge University Press, 1999), p. 292.

<sup>60</sup> The meticulousness of administration is best illustrated by the detail regulations for bells to be produced for performance in rites: "The "Wild Duck Master" produces bells. The two edges at the opening of the bell are called xian, the part between the edges (the opening) is called yu ("expansion"), the part above the "expansion" (the lower, undecorated part of the corpus) is called gu ("drum"), the part above the "drum" (the decorated upper part of the corpus) is called zheng ("sounding part"), the part above the zheng (the head of the corpus) is called wu ("dancer"), the part above the wu (the top of the corpus) is called yong ("protuberance"), the upper part of the hanger is called heng. The suspension part is called xuan, the dragon-like decoration of the suspension is called han ("reinforcement"), the belt-like decoration of the corpus is called zhuan, the (belt) parts between these "belts" are called mei, the protruding buttons (the "nipple nails" 乳釘) are called jing...." See "6. 冬官考工記 Dongguan Kaogongji Winter Ministry with the Overseer of Public Work." In Zhouli 周禮 "Rites of the Zhou" <http://www.chinaknowledge.de/Literature/Classics/zhouli.html#kaogongji>

<sup>61</sup> Chapters in <Zhouli> included:

1. 天官冢宰 Tianguan Zhouzai Celestial Ministry with the Prime Minister
2. 地官司徒 Diguan Situ Terrestrial Ministry with the Overseer of Public Affairs
3. 春官宗伯 Chunguan Zongbo Spring Ministry with the Overseer of Ritual Affairs

According to *Zhou Gong*, the Prime Minister (大宰 or Dai Zai”) is charged with establishing the “Six Constitutions” (“Liu Dian”) to regulate the country. What is apparent from reading <Zhouli> is that in fostering good governance, nothing is left to chance: Officials as with people needed to be regulated (First Constitution).<sup>62</sup> This is to be achieved first and foremost by instruction to officials and education of the people (Second Constitution)<sup>63</sup> with the use of rites, which define the role of the people and proscribe the conduct of the officials (Third Constitution).<sup>64</sup> Officials should act responsibly and people must behave correctly. This can be achieved by

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4. 夏官司馬 Xiaguan Sima Summer Ministry with the Overseer of Military Affairs  
5. 秋官司冠 Qiuguan Siguan Autumn Ministry with the Overseer of the Penal Affairs  
6. 冬官考工記 Dongguan Kaogongji Winter Ministry with the Overseer of Public Work.  
The chapter on “天官冢宰 Tianguan Zhouzai Celestial Ministry with the Prime Minister provided: “The only person that constitutes the empire, is the king. He determines the [four] regions and fixes the [governmental] positions; he embodies the cities and measures the countryside; he creates the ministries and separates their respective functions; this all to make a fixed pole for the people. Therewith, he institutes the "Heavenly ministry" and the office of prime minister, he charges the prime minister to head his subordinates and to take into his hands the administration of the state, to help the king to regulate the fiefdoms and the state. The ministry consists of the following persons: The Great Administrator, one ministerial person. Small Administrators, two prefects of second rank. Assistant Administrators, four prefects of third rank. Eight graduated officers of first rank, sixteen graduates officers of second rank. Ordinary officers: thirty-two graduated officers of third rank, six officers for the magazines, twelve scribes, twelve aides, and one hundred and twenty retainers...” In *Zhouli* 周禮 "Rites of the Zhou" <http://www.chinaknowledge.de/Literature/Classics/zhouli.html#kaogongji>

<sup>62</sup> “First, the Regulating Constitution, to measure the fiefdoms and the state, to regulate the ministries and to structure the people.” (“一曰治典，以經邦國，以治官府，以紀萬民。”) *Id.*

<sup>63</sup> Second, the Instructing Constitution, to consolidate the country, to instruct the Ministries and to civilize the people.” (“二曰教典，以安邦國，以教官府，以擾萬民”) *Id.*

<sup>64</sup> “Third, the Ritual Constitution, to harmonize the country, to unite the Ministries and to bring the people together.” (“三曰禮典，以和邦國，以統百官，以諧萬民”) *Id.*

administration (Fourth Constitution).<sup>65</sup> Punishment is needed to correct officials and disciplined the people (Fifth Constitution).<sup>66</sup> Finally, the state is charged with responsibility “to enrich the country, to make active the officers, and to nourish the people.”<sup>67</sup>

To *Zhou Gong*, a country that is well nourished, with a people that is well education, administered by responsible officials and supported with a fair but firm penal system is a country without crime and disorder.

*Zhou Gong* is also known for his enlightened penal philosophy. Learning from the fall of Shang dynasty, *Zhou Gong* cautioned against using indiscriminate and harsh punishment to rule. Instead he called of “ming de sheng xing” (promote benevolence and careful with penalty”) in governance.

The central tenets of *Zhou Gong*’s penal philosophy were:<sup>68</sup>

First, punishment should be applied prudently. There should be no personal punishment without individual liability.

Second, punishment should be imposed discriminatory. Penal measures should be made proportionate to the crime and suitable for the criminal, e.g., intentional act and habitual criminals should be punished more heavily, even with minor transgression, and accidental and occasional criminals should be treated lightly, even with major offense.

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<sup>65</sup> “Fourth, the Governmental Constitution, to appease the country, to correct the officers, and to make equal of all people.” “四曰政典，以平邦國，以正百官，以均萬民” *Id.*

<sup>66</sup> “Fifth, the Punishment Constitution, to correct the country, to chastise the officers, and to bind the people to what is needed.” (“五曰刑典，以詰邦國，以刑百官，以糾萬民”) *Id.*

<sup>67</sup> Sixth, the Labour Constitution, to enrich the country, to make active the officers, and to nourish the people.” (“六曰事典，以富邦國，以任百官，以生萬民。”) *Id.*

<sup>68</sup> Kang Shuhua, *Criminology: History, Status, Future* (“Fanzui xue: Lizhi, Xianzhuang, Weilai”) (Beijing: Qunzhong chubanshe 1998), pp. 227 – 251.

328 – 329.

Third, punishment should be based on individual liability, not collective responsibility, or guilt by association.

The major contribution of *Zhou Gong*'s criminological thoughts was in rejecting arbitrary, capricious and harsh punishment born out of ignorance, whim and mysticism. *Zhou Gong* was instrumental in introducing objectivity, rationality and normality into criminal punishment. Specifically, Zhou Gong called for the adoption of “ming de sheng xing” as a penal policy. In so doing, *Zhou Gong* achieved three advances criminological thinking of the time:

First, *Zhou* introduced analytical criminology to China by adopting a causal model in understanding crime, e.g., benevolent governance reduces crime and indiscriminate punishment increase criminality;

Second, *Zhou* introduced the idea of classification of crime and criminals for punishment purposes, suggesting that some criminals (habitual) and crimes (intentional) are more dangerous than others;

Third, *Zhou* shifted the focus of crime and punishment study, from exclusively focusing on the act of the offender to that policy of the state. Instead of asking why individuals commit crime, the focus is on how the emperor can avoid disorder and maintain peace. This is consistent with Chinese philosophy of seeking the cultivation the self (by the emperor), instead of regulating the conduct of others.

With <Zhouli>, an objective and analytical criminology system of thoughts was born.

### ***Guan Zhong***<sup>69</sup>

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<sup>69</sup> “Guan Zhong (Chinese: 管仲, Wade-Giles: Kuan Chung) (born 725 BC, died in 645 BC) was a politician in the Spring and Autumn Period. His given name was Yíwú (夷吾).”

*Guan Zhong* was appointed the Prime Minister of the state of *Qi* in 685 BC. He was known for his enlightened reform policy in strengthen *Qi* state and improving the livelihood of the people. *Guan Zong* articulate and explain his policy in <管子(Guan Zi)>. A carefully reading the book shows that *Guan* is a realist, i.e., take things as they are, and a pragmatist, i.e., judge policy by results.

*Guan* suggested that the principles of governance are based on natural law, much like we need to know the season and soil in planting crops.<sup>70</sup> Thus “with the help of heaven above, small effort result in large achievements; act against the heaven, success will turn into failure. Act in accordance with heave, one will be success, act against to heaven’ ways, one bears the blunt of failures.” Particularly, *Guan* observed: “Effective governance follows people’s heart; dysfunctional governance runs against people’s heart.”<sup>71</sup>

Rulers who are shepherds of people (“mu min”) need to be vigilant and industrious. If the country is rich and strong, people would come from fair. “If the storage is full, people will know about protocol, if they have are properly clothed and fed, they know about shame and glory.”<sup>72</sup>

*Guan Zhong*’s major approach to enforcing law, maintaining order and preventing crime is by providing for the material well being of the

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Zhong was his courtesy name. Recommended by Bao Shuya, he was appointed Prime Minister by Duke Huan of Qi in 685 BC.” [http://en.wikipedia.org/wiki/Guan\\_Zhong](http://en.wikipedia.org/wiki/Guan_Zhong)

<sup>70</sup>“不務天時，則財不生；不務地利，則倉廩不盈” <Guan Zi. Mu Min>: “If (people) do not follow the heaven’s rhythm, then things of value will not materialize; if (people) do not work according the earth’s way, the granary will be empty.”

<sup>71</sup>“政之所興，在順民心；政之所廢，在逆民心。” <Guan Zi. Mu Min>:

“Government proper, when it is responsive to the people’s heart; government fails, when it goes against the people’s heart.”

<sup>72</sup>“倉廩實，則知禮節；衣食足，則知榮辱” <Guan Zi. Mu Min>: “If the granary is full, (people) know about protocols; if (people) are properly clothes and fed, (they will) know glory and shame.”

people. According to him, the effective governance of people starts with the provision of physical security and material well being. In this regard, *Guan Zhong* made clear: “When citizens are rich, they will settle peacefully at home and pay attention to the family (“an xiang zhong jia”), if they settle peacefully at home and pay attention to the family they will be respectful of authority and fearful of crime (“jing shang wei zui”, if they are respectful of authority and fearful of crime, they are susceptible to rule.” <Guan Zi. Mumin><sup>73</sup>

In order to govern well, the state must inculcate the people with four dispositions,<sup>74</sup> i.e., li,<sup>75</sup> yi,<sup>76</sup> lian,<sup>77</sup> qi.<sup>78</sup> People who know etiquettes will not transgress norms, thus people will not undermine authority. People who know honesty will not ask for more than deserve, thus people will not act dishonestly. People who know honor will not cover up bad deeds, thus people will not indulge in illegality and immorality. People who know shame will not tolerate injustice. Thus people will tolerate bad deeds.<sup>79</sup> The best state policy is to remove people’s anxiety, poverty, emergency and evilness.<sup>80</sup> Conversely, the worse policy is to use punishment and coercion.

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<sup>73</sup> <Guan Zi. Mumin> is a chapter on herding (“mu”) the people (“min”). For the book of <Guan Zi. Mumin> <管子. 牧民> see

<ftp://sailor.gutenberg.lib.md.us/gutenberg/etext05/8guan10.txt>

<sup>74</sup>“何謂四維？一曰禮，二曰義，三曰廉，四曰恥。” What are the four protocols: First is rite; Second is justice; Third is integrity; Fourth is shame.”

<sup>75</sup> “Li” is “etiquette; rite; protocol”. *PYCED* 415L.

<sup>76</sup> “Yi” is “justice; righteousness”. *PYCED* 821L.

<sup>77</sup> “Lian” is “sense of honor”. *PYCED* 424L.

<sup>78</sup> “Chi” is “sense of same”. *PYCED* 92L.

<sup>79</sup> “禮不逾節，義不自進，廉不蔽惡，恥不從枉。” “To follow rite is not to exceed bounds, to do justice is not to transgress norms, to have integrity is not to tolerate wrong, to know shame is not to participate in evil.”

<sup>80</sup>“民惡憂勞，我佚樂之；民惡貧賤，我富貴之；民惡危墜，我存安之；民惡滅絕，我生育之。” “When people are satisfied they are worried, it is my job to make them happy; when people do not like poverty, my job is to make them rich; when people are

Because punishment can never effectively remove desire and coercion has a tendency to court rebellion.<sup>81</sup>

### ***Kongzi (Confucius)***

The greatest intellectual contribution Confucius brought to crime and punishment is perhaps the idea that people should be treated different as a class.

Confucians claimed that people were born different. They were endowed with different intellect, ability, and moral disposition.<sup>82</sup> This was deemed as self-evident.<sup>83</sup> Structuring of society and ordering of human affairs must take such innate differences into account. The reasoning was as simple as it was pragmatic. All people have needs and wants. They are by nature insatiable. When unlimited wants met with limited goods, strife prevails. Thus, Hsuntze observed:

Man by birth has desire. When desire is not satisfied, then he cannot be without a seeking of satisfaction. When this seeking for satisfaction is without measure or limits, then there cannot

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concerned with safety, it is my job to secure them; when people do not have hope, I cultivate them.”

<sup>81</sup>“故刑罰不足以畏其意，殺戮不足以服其心。故刑罰繁而意不恐，則令不行矣；殺戮眾而心不服，則上位危矣。” “Thus punishment is not sufficient to deter people’s mind, killing and maiming is not sufficient to pacify people’s heart. Thus more punishment will lead to lack of fear, then government policy will not be effectively implemented. If by killing many and people are still not obedient, then rulers are at risk.”

<sup>82</sup> The distinction of noble and humble, superior and inferior were to be based on three sets of criteria: talent, virtue, and relations. Thus an educated person is superior to an illiterate, a virtuous superior to a mean person, and a father superior to a son. T’ung-Tsu Chu, *Law and Society in Traditional China* (Paris: Mouton & Co., 1965), p. 229.

<sup>83</sup> Consistent with Confucian’s philosophical approach, he did not provide any justification for this most fundamental assumption.

but be contention. When there is contention, there will be disorder; when there is disorder, then there will be poverty.<sup>84</sup>

It is interesting to observe that Confucius anticipated Merton's anomie theory by 2,000 years. Insatiable needs were Confucian's concern. Misdirected drives are the conceptual cornerstone to Merton's theory. The major difference between the two rests on the nature of the human needs and their social control. Confucius felt that human needs are born. Merton is of the opinion that human drives are socially induced. Confucius felt that human needs should be kept in place. Merton felt that human drives should be properly channeled. Their differences may have a lot to do with their relative historical era, political background, and intellectual orientation.

(1) Confucius lived in a time when the political ambitions of a few disrupted the orderly life of many. Insatiable desires were considered destructive (at least disruptive). Powerful people (dukes, lords) needed be kept in their places. Merton lived in America at a time where unlimited human opportunities were made the national ethos. Drives were considered constructive (at least potentially so). People should channel their drives properly.

(2) Confucius worked as a state official. He saw the need of and utility in suppressing unhealthy human needs. Merton was interested in observing the desirable effects and undesirable consequences of excessive drives. He saw the need to structure social desires...

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<sup>84</sup> See H.H. Dubs, *The Works of Husuntze* (London: Arthur Probsthain, 1928), p. 213. In a limited way Confucius political thought resembles that of Plato's republic where the Philosopher King ruled.

(3) Confucius was a philosopher. His preoccupation was ethics. His major concern was human nature as given. Merton was a social scientist. His preoccupation was social facts. His major concern was social nature as induced.

It also interesting to note that while Confucius thinks that insatiable human needs are bad and should be controlled, Adam Smith thinks that unlimited human desires (as economic demands) are good and should be promoted. Thus while Confucius frowns on letting human needs run wild, Adam Smith preaches against curbing human demands except by market forces. More significantly, while Confucius believes that unbounded human needs lead invariable to disorder and destruction, Adam Smith is confident that unrestrained demands bring about market order and improved efficiency.

Similarly, all people possess different ideas about how things should be done. When people are considered all equal, no one idea prevails. More time is spent arguing over right and wrong than doing the right thing.<sup>85</sup> More significantly, differences in ideas promote conflicts with no resolution possible; violence ensues. Nothing can be done: “When people are equal, no one will be able to command the services of others ... Two nobles cannot serve each other, and two humble persons cannot command each other.”<sup>86</sup> The solution is to have settled expectations, i.e., to build an ethical system explicitly recognizing people’s abilities in assigning communal duties and distributing social goods:

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<sup>85</sup> It is also a virtue in China to be tolerant in the face of adversity and impositions..

<sup>86</sup> Dubbs, p. 123.

Therefore the ancient kings formulated *li* and righteousness and made distinctions in order to have grades of the noble and humble, the difference between the elders and the young, and discrimination between the intelligent and the stupid, the able and the capable, thus making everyone assume his function and get into his proper position. Then the amount of one's salary will be in accordance with his ability.<sup>87</sup>

Instead of distributing social goods to satisfy people's unlimited wants, the wise emperor should set limits in accordance with social status, which is determined by an individual's virtue, ability, and contributions to the society.<sup>88</sup> The distributive principle is as simple as it is compelling. Social goods (privileges and salary) are given to those who are more intellectual, virtuous, and wise. "For those whose merits are great the salary is high; for those whose virtue is great the rank is high."<sup>89</sup>

Confucius contemplated two types of work corresponding to two kinds of people in an ideal society. There are those who labor with the mind and those who work physically. The mental workers prevail over the labor workers in social status and material rewards. It is also the duty of the former to govern the later. The scholars and officials belong to the first group. They are the educated and virtuous; the "gentlemen" and "big people." Their sole function is to study, seek virtue, and govern. The latter

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<sup>87</sup> Dubbs, pp. 65-66.

<sup>88</sup> For a theoretical discussion of such a reward system, see Talcott Parsons, *The Social System* (Glencoe, Ill.: Free Press, 1951), pp. 195-98.

<sup>89</sup> Ksuo Kan (171-218), quotes in n. 4, p. 227.

group consists of the commoners and “little people.” Their purpose in life is to serve.<sup>90</sup>

The above brief excursion into Chinese criminological thoughts and social control theories should put to rest any residual doubt that Chinese has no coherent approach to the understanding of or reaction to crime.<sup>91</sup> It should also raise the specter that there are other ways to look at crime and punishment issues.<sup>92</sup>

First, in the West, understanding crime is a scientific exercise. In China, explaining crime is a cultural venture.<sup>93</sup> Second, in the West criminologists study how to stop crime. In China, philosophers study how to perfect governance. Third, in the West criminologists sought justifications for punishment. In China, philosophers promote formula for successful rule. Fourth, in the West, crime is natural. People are born bad (genetically) or

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<sup>90</sup> Legge, Chinese Classics, II, 125

<sup>91</sup> X Chen, “Social and legal control in China: a comparative perspective.” *Int J Offender Ther Comp Criminol* Vol. 48(5):523-36 (2004) (The author, a Chinese laws professor, observed that Chinese think about crime, law and social control differently--that of China. “Chinese think positively about the nature of humans and their potential, and China's social control system weaves together a unique combination of formal and informal mechanisms with a strong emphasis on the latter.”)

<sup>92</sup> Liqun Cao & Francis T. Cullen, “Thinking about Crime and Control: A Comparative Study of Chinese and American Ideology,” *International Criminal Justice Review*, Vol. 11 (1): 58-81 (2001) (Research finds: (1) PRC citizens more so that the government considers crime to be caused by structural defects in social order. (2) Both Chinese and Americans considered the causation to and control of crime in a multi-dimensional way. (3) There are substantial differences between Chinese and Americans with the appropriate role and powers the state should adopt in fighting crime.)

<sup>93</sup> Shame is more effective than punishment in stopping crime because: (1) It is also a more populist measure. Only government can impose punishment. But everyone can show moral disapproval of certain misconduct. (2) It is a more democratic measure. Only experts can understand crime and propose punishment. But everyone has an opinion about right or wrong, and acts accordingly. (3) Punishment is expensive and cumbersome. Moral disapproval is cheap and fast. John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989), p. 12. (Government can impose punishment, and experts can poses solution to crime. But everyone can dispense with moral disapproval. )

turned evil (sociologically). In China, crime is unnatural. People are born good. They turn to crime out due to necessity and otherwise made to do so. Fifth, in the West the unit of analysis is the criminal. The question is why do some people commits crime and others do not. In China, the unit of analysis is the society. The question is how do state policies or government (in) action contribution to crime.

## VI

### **Contemporary thinking on crime and punishment in China**

#### *First ideas of crime and punishment*

In 1908 penology was introduced to China.<sup>94</sup> Dr. Sbigejiro Ogawa (1861 – 1915) a penologist was invited from Japan to establish a prison system and teach corrections. In 1909 the First Prison of Peking was build with suggestions from Dr. Ogawa. By 1922 *every* province began to construct new prisons with a new mission, i.e., reform of prisoners.<sup>95</sup> One prison reformers<sup>96</sup> of the time provided indispensable leadership in brining crime and punishment study to China.

Yan Jing-yue (1905 - 1976) was born in Zhejian province. He studied sociology at Peiping Yanjing University as an undergraduate (1924-8), and stayed as a teaching assistant, conducting research and teaching

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<sup>94</sup> Guo Ming, *Brief history of Penology* (“Zhongguo jianyu xue shigaan” (Zhongguo zhongzheng chubanshe, 2005).

<sup>95</sup> “Chapter XII: Prisons”. In Sidney David Gamble, John Stewart Burgess, *Peking: A Social Survey Conducted Under the Auspices of the Princeton* (George H. Doran Company, 1921) pp. 303 – 323. (Prisoners were treated barbarously and degradingly. Prisons were known as “hell”. They were crowded, dark, and unsanitary. (p. 304)

<sup>96</sup> Other noteworthy penologists of the time included: Wang Yuanzeeng who served as director of Beijing Number One Prison and then Minister of Justice (Nationalist government). Sun Xiong, another penologist who worked in prison. *Jianyuxue* (Changsha: Shangwu Yinshuguan, 1936) Li Jianhua who wrote a defining book on penology. *Jianyuxue* (Shanghai: Zhonghu shuju, 1936).

criminology.<sup>97</sup> He was interested in crime and punishment problems in China while in college. He discovered that there was very little research conducted and data collected about crime and punishment in China.<sup>98</sup> This gave him the incentive to pursue criminological study. While in school (1927), he volunteered to stay in two Beijing model prisons for three months in the summer to learn about prison conditions. In the follow summer, he toured eight provincial capital's prisons. In 1930 he worked as a research assistant at the Central Research Institute (Zhongyang yangjiu yuan). While there he received a scholarship from *Academica Sinica* to conduct a four-month long survey of prisons in Shanxi, Hebei, Hunan and Hubei with three Yanjing sociology students, including C.K. Yan. All told they conducted prison survey in 20 cities and compiled over 300 case studies.<sup>99</sup> This was to be the first scientific study of Chinese prisons ever. The prison survey and prisoners' case studies allowed him to have access to the personal history, family background, and social circumstances of the prisoners. They contribute to his understanding of the reasons why prisoners engaged in crime and how they were treated in prison.

In 1934, Yan obtained a Ph.D. in sociology from the University of Chicago.<sup>100</sup> His doctoral work involved systematic and scientific survey of crime in China. His dissertation was appropriately entitled "Crime in

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<sup>97</sup> Yan Jingyue, *Zhongguo de fazui wenti yu shehui bianqian de guanxi* (Beijing: Beijing daxue chubanshe, 1986), pp. 1 – 11.

<sup>98</sup> Yan Jingyue, "Zhongguo jianyu wenti," *Shehuixue jie* 3: 25 – 46 (1929).

<sup>99</sup> Yung-Chen Chiang, *Social Engineering and the Social Science in China, 1919 – 1949* (Cambridge: Cambridge University Press, 2001), 51.

<sup>100</sup> Christian A. Hess, "Unlikely Spaces of Liberal Hope: Yan Jingyue and the Model Prison in Republican China," <http://orpheus.ucsd.edu/chinesehistory/pgp/Hess--Prisons.pdf>

Relation to Social Change in China.”<sup>101</sup> His broke ranks with the past and his peers in proposing to study crime empirically, scientifically and sociologically. Particularly, he championed the use of statistical evidence to understand the nature, characteristics, incidence, prevalence and distribution of crime. Influenced by the Chicago School, Yan conducted social research with ground level observation and looked at prison as a functioning community, e.g., as a “social hospital” for criminals who were sick.<sup>102</sup>

Yan’s defining and enduring contribution to the study of crime and prison included:

- (1) Crime has a legal as well as sociological definition. Legally, crime is to act against law. Sociologically, a crime are conducts harmful to the society.<sup>103</sup>
- (2) Study of crime must be done scientifically and objectively with the use of empirical data and grounded theory.<sup>104</sup>
- (3) Crime can only be completely understood and effectively dealt with in cultural context.<sup>105</sup> How criminals, victims and society perceived and received crime depends on cultural meaning assigned and feelings evoked.

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<sup>101</sup> Ching-yueh Yen, *Crime in relation to social change in China* . Thesis (Ph. D.)-- University of Chicago, 1934.c Ann Arbor, Mich. : UMI Dissertation Services, 1995. A summary of his methods and findings are contained in Ching-Yueh Yen, “Crime in Relation to Social Change in China,” *The American Journal of Sociology* Vol. 40 (3): 298-308 (1934).

<sup>102</sup> Jan Jingyue, “A Study of Crime in Peping,” Publication of the Department of Sociology and Social Work. Yenching University Series C. no. 20: 1 – 29 (1920).

<sup>103</sup> Yung-Chen Chiang, *Social Engineering and the Social Science in China, 1919 – 1949* (Cambridge: Cambridge University Press, 2001), p.1.

<sup>104</sup> Yang Yabin, *Contemporary Chinese sociology* (upper vol.) (“Jindai zhongguo shehuixue (shang)”) (Beijing: Zhongguo shehui kexue chubanshe, 2001), p. 203.

<sup>105</sup> *Id.*, p. 199.

- (4) Criminals are not born evil but a product of their social environment.<sup>106</sup> People are born into pre-existing roles and relationships which affect their outlook and determine their action.
- (5) Prisons should not be an institution of punishment, but a place to reform offenders.<sup>107</sup>
- (6) Prisoners should be treated individually.<sup>108</sup> Collective treatment and punishment of prisoners with uniform rule, identical policy and fixed regulation will not be effective in reforming prisoners, who suffer from different personalities, labor under disparate life circumstances, and offend in unique situations.
- (7) Prisons should be staffed by social workers schooled in treatment of sick people and not prison guards specialized in the punishment of offenders.<sup>109</sup>

### *Communist theory of crime*

Traditionally, the dominant theory of crime, law and punishment in Communist China is that of Marxism. Max's political – economic theory however does not specifically addresses issues of crime and disorder. According to Marx, crime is a by product of a class – politically oppressive and economic exploitative – society. The discovery of private property necessitates the invention of the state and law, to be secured by police,

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<sup>106</sup> *Id.* Pp. 199 – 200.

<sup>107</sup> Ching-Yueh Yen, "Penal Reform and Criminology in China," *Journal of Criminal Law & Criminology* Vol. 22 (4): 576-578 (1931).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

prison and army. Criminals are the casualties of a class – economic war between the haves (the capitalists) and have not (the proletariat). With the demise of the capitalistic order, there is no need for law, police, court and prison. In a Communist society there is no crime.

It takes a generation of Marxist criminologists to construct a Marxist theory of crime.<sup>110</sup> Bonger<sup>111</sup> was one of the very first social theorists to elaborate upon and document the relationship between crime and economic conditions in the 19<sup>th</sup> Century, theoretically<sup>112</sup> and statistically.<sup>113</sup>

Fundamentally, Marxists departed from Western criminologists in following regards: First, crime is natural, not abnormal.<sup>114</sup> Second, crime is inevitable, not exceptional.<sup>115</sup> Third, crime is a result of social (labeling)<sup>116</sup>

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<sup>110</sup> David F. Greenberg, *Crime and Capitalism: Readings in Marxist Criminology* (Pala Alto, CA: Mayfield 1981)

<sup>111</sup> Willem Adriaan Bonger, *Criminality and Economic Conditions* (Translated by Henry Pomeroy Horton) (Little, Brown, and Company, 1916)

<sup>112</sup> *Id.* Chapter I “Precursors” p.p. 1 – 28.

<sup>113</sup> *Id.* Chapter II “The Statisticians” pp. 29 – 87.

<sup>114</sup> From a biological point of view all crimes are normal acts. The mind draws no distinction between cold blooded murder of others and patriotic killing of enemy of state. Willem Adriaan Bonger, *Criminality and Economic Conditions* (Translated by Henry Pomeroy Horton) (Little, Brown, and Company, 1916), p. 378.

<sup>115</sup> Crime is inevitable in two senses. In absolute sense, starving people is forced to lie, cheat and steal to survive. In relative terms, poor(er) people are envious of the rich(er) people will be more likely to steal than not. In both instances, draconian law and severe punishment will not be effective in stopping crime. Willem Adriaan Bonger, *Criminality and Economic Conditions* (Translated by Henry Pomeroy Horton) (Little, Brown, and Company, 1916). Crime is also inevitable because according to conflict theorists consensus in ideas/ideal and convergence of individual/collective interests in any society is a myth. In real terms, a society is made up of various groups pursuing their own interests and competing for dominance. For example, economically, politically, militarily powerful groups are able to promulgate law to protect their own interests. Austin Turks, *Criminality and Legal Order*. Chicago: Rand McNally, 1969)

<sup>116</sup> What is an immoral and in turn illegal act is on which hurts interest of some group(s) in the society who holds the balance of power to immortalize or criminalize an act. Willem Adriaan Bonger, *Criminality and Economic Conditions* (Translated by Henry Pomeroy Horton) (Little, Brown, and Company, 1916), p. 379.

not personal (deviance).<sup>117</sup> Fourth, crime is not determined by individual free will or biological constitution, but resulted from oppression of the ruling (capitalist) class<sup>118</sup> alienation of the dominated (proletarian) mass.<sup>119</sup> In sum, crime is material in origin, structural in consequence,<sup>120</sup> and personal in manifestation.

Since 1980s, Chinese contemporary criminologists adopt a less ideological and more scientific approach to the study of crime and punishment. In liberating themselves from the straightjacket of Marxist theory, Chinese criminologists began to look at crime in multi-faceted and nuanced ways, i.e., crime is a social as well as individual phenomenon, an individual as well as collective problem. Thus crime can only be adequately explained and effectively controlled by looking at it as a social (structural, process, material and/or cultural) as well as a personal (psychological, physiological, experiential, mental) problem. In this regard, crime is caused

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<sup>117</sup> Becker (1963) "Deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an offender." Howard Becker, *Outsiders: Studies in the Sociology of Deviance* (NY: Free Press, 1963)

<sup>118</sup> "Le testament de J. Meslier" pp. 28-36, Bonger observed that the expropriation of property that belong in the natural state to all by a few caused many to do without. This caused envy and disorder: "From these spring in turn murmurings, complainings, commotions, insurrections, and wars, which cause an infinity of evils among men ..it also happens that those who have nothing, or who have not all that they need, are constrained and obliged to employ evil means to get subsistence. From this come the frauds, deceptions, rascalities, in- justices, extortions, robberies, thefts, murders, assassinations, and brigandages which cause such an infinity of evils among men." Willem Adriaan Bonger, *Criminality and Economic Conditions* (Translated by Henry Pomeroy Horton) (Little, Brown, and Company, 1916), p. 8

<sup>119</sup> Marx' theory of alienation is fundamental in the understanding of etiology of criminal in a capitalistic state. According to Marx, the working class proletarians do not own the means of production. They subsist by selling their labor as a commodity, and in the process feels alienated by it. Once alienated the workers have no compunction to obeying "Alienation". <http://www.marxists.org/glossary/terms/a/l.htm>.

<sup>120</sup> Gary Jensen, "The Lingering Promise of a Structural Criminology," *Contemporary Sociology* Vol. 9(1): 12-14 (1990). (Structural theorists argued that people in position of power is less likely to be criminalized, as compared to the people with little power.)

by objective social factors, e.g., class oppression or cultural corruption, as well as subjective factors, e.g., biological constitution, individual propensity and personal indiscretion. Any treatment of criminal and control of crime, be it prevention or reform, must take all criminogenic factors into account. Anti-crime measures in China is called comprehensive crime control (“zhonghe zhili”), and include arresting corrupting influence by family, providing for education by schools, conducting supervision by community.

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In theorizing about crime, Chinese criminologists observed that: First, crime has “radiating” effects, or crime spread from one place, person, idea to another, replicating, accelerating and amplifying. The radiating effect of crime is a function of information communication, and culture.<sup>122</sup> Thus the control of crime must be by removal of corrupting influences, e.g., blocking off Western media, and early intervention, e.g., administration control of risky population.<sup>123</sup>

Second, crime has wave like tendency over time (or crime trend) and undulating effect in places (or crime pattern), what we called the distribution of crime, in time and place. A criminologists’ job IS to observe and document the relative distribution of crime, prospecting the future development and providing for prevention or intervention.<sup>124</sup> Thus treatment of crime must be contingent on time, place and people, not with a one size fits all approach.<sup>125</sup>

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<sup>121</sup> Kang Shuhua, *Criminology: History, Status, Future* (“Fanzui xue: Lizhi, Xianzhuang, Weilai”) (Beijing: Qunzhong chubanshe 1998), p. 45

<sup>122</sup> *Id.* 50.

<sup>123</sup> *Id.* 51.

<sup>124</sup> *Id.* 51.

<sup>125</sup> *Id.* 52.

Third, crime is caused by many factors. We should seek to understand causation of crime from the phenomenon of crime itself, e.g. its distribution in time, place, or with people. Reasons of crime can be classified as primary and secondary, direct and indirect, subjective and objective, historical and reality. They can be political, economical, cultural, historical or customary.<sup>126</sup>

Fourth, explanation of crime is local and hidden. To say crime is local is to observe that explanation for crime differs from one region and community to another. To observe that crime is hidden is understand the manifestation of crime might be due to structural or permanent conditions not apparent to common observations.<sup>127</sup>

Fourth, there is no single or uniform explanation for all crime and all criminals. Since there are many kinds of crime, e.g. crime against the state vs. crime against the person, economic crime vs. personal crime, the explanation for crime and reaction to crime necessarily different.<sup>128</sup>

### *Mao's theory of contradiction*

Mao did not propose a theory of crime and punishment. Mao's idea on such issues is made part of his larger political thought of class struggle and proletarian dictatorship.

The clearest exposition of Mao's thinking on crime and punishment is in a speech at the Eleventh Session (Enlarged) of the Supreme State Conference, entitled: "On the Correct Handling of Contradictions" on June

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<sup>126</sup> *Id.* 53.

<sup>127</sup> *Id.* 53.

<sup>128</sup> *Id.* 67 – 69.

18, 1957<sup>129</sup> “Contradiction” refers to “unity and opposite” state of affairs inherent in existence of all things.<sup>130</sup> It registers the contentious relationship and conflictual tendency between material things and abstract ideas, leading to dialectical interaction and resulting in evolutionary changes.<sup>131</sup> In the context of crime and punishment, “contradictions” manifested as conflicts of ideas or ideal or competition in values and interests are ultimately settled with the use of law and punishment. Unresolved personal disputes (“contradiction”) will lead inevitably to disrupted social relationship, manifested as crime.<sup>132</sup>

In the speech Mao drew a clear distinction between “contradictions” (or conflicts) of the people and between enemies, the former are non-antagonistic in the nature while the later is antagonistic in kind:

The contradictions between ourselves and the enemy are antagonistic contradictions. Within the ranks of the people, the contradictions among the working people are non-antagonistic, while those between the exploited and the exploiting classes have a non-antagonistic as well as an antagonistic aspect. There have always been contradictions among the people, but they are different in content in each period of the revolution and in the period of building socialism. ...Our People's Government is one that genuinely represents the people's interests, it is a

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<sup>129</sup> First published in *People's Daily* on June 19, 1957. Mao Tse-tung, “ON THE CORRECT HANDLING OF CONTRADICTIONS AMONG THE PEOPLE,” *Selected Works of Mao Tse-tung*, (Beijing: Foreign Languages Press, 1977) Vol. V, pp. 384-421. <http://www.marx2mao.com/Mao/CHC57.html#c1>

<sup>130</sup> Mao Tse-tung, “ON CONTRADICTION” (August 1937). *Selected Works*, Vol. I, pp. 321-22 (“The law of contradiction in things, that is, the law of the unity of opposites, is the basic law of materialist dialectics. Lenin said, "Dialectics in the proper sense is the study of contradiction in *the very essence of objects.*" (Note 1)

<sup>131</sup> Mao Tse-tung, “ON CONTRADICTION” (August 1937). *Selected Works*, Vol. I, pp. 321-22

<sup>132</sup> Donald C. Clarke; James V. Feinerman, "Antagonistic Contradictions: Criminal Law and Human Rights in China," *The China Quarterly* Np. 141: 135-154 (1995).

government that serves the people. Nevertheless, there are still certain contradictions between this government and the people. These include the contradictions between the interests of the state and the interests of the collective on the one hand and the interests of the individual on the other, between democracy and centralism, between the leadership and the led, and the contradictions arising from the bureaucratic style of work of some of the state personnel in their relations with the masses. All these are also contradictions among the people. Generally speaking, the fundamental identity of the people's interests underlies the contradictions among the people.<sup>133</sup>

The two kinds of “contradictions” are to be dealt with differently:

Since they are different in nature, the contradictions between ourselves and the enemy and the contradictions among the people must be resolved by different methods. To put it briefly, the former entail drawing a clear distinction between ourselves and the enemy, and the latter entail drawing a clear distinction between right and wrong. It is of course true that the distinction between ourselves and the enemy is also one of right and wrong. For example, the question of who is in the right, we or the domestic and foreign reactionaries, the imperialists, the feudalists and bureaucrat-capitalists, is also one of right and wrong, but it is in a different category from questions of right and wrong among the people.<sup>134</sup>

While both kinds of “contradictions” are structural in nature, only the “contradictions” within the people are – can and should to be - resolved through reconciliation and education.

“Contradictions” between enemies are to suppressed by force.

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<sup>133</sup> . Mao Tse-tung, “ON THE CORRECT HANDLING OF CONTRADICTIONS AMONG THE PEOPLE,” *Selected Works of Mao Tse-tung*, (Beijing: Foreign Languages Press, 1977) Vol. V, pp. 384-5.

<sup>134</sup> . Mao Tse-tung, “ON THE CORRECT HANDLING OF CONTRADICTIONS AMONG THE PEOPLE,” *Selected Works of Mao Tse-tung*, (Beijing: Foreign Languages Press, 1977) Vol. V, pp. 384-5.

To maintain public order and safeguard the interests of the people, it is necessary to exercise dictatorship as well over thieves, swindlers, murderers, arsonists, criminal gangs and other scoundrels who seriously disrupt public order.<sup>135</sup>

This includes “For instance, to arrest, try and sentence certain counter-revolutionaries, and to deprive landlords and bureaucrat-capitalists of their right to vote and their freedom of speech for a certain period of time -- all this comes within the scope of our dictatorship.”<sup>136</sup>

Mao’s theory of contradictions while appearing simply on its face, is very complication when applied. Three kinds of question come to mind:

First, who are the people? Who are the enemies? How are such status conferred, maintained and removed? Mao suggested that a person can be a member of the “people” in one situation and not the other, e.g., KMT cadres were treated differently during (internal) civil war vs. in the (external) Sino-Japanese war? How and when a “people” become an “enemy” and vice versa is never to clear. Although it is clear that when one owns up to ones wrongdoing by demonstrating contrition and providing for assistance, his “counter-revolutionary” acts might be forgiven.

Second, what makes for the “antagonistic” vs. “non-antagonistic” nature of an act? Is it a function of the nature (i.e., kinds of harm, such as spying) and/or consequence (i.e. degree of harm, such as petty theft) of the act? Is it a function of the status of the offender, e.g., counter-revolutionaries

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<sup>135</sup> . Mao Tse-tung, “ON THE CORRECT HANDLING OF CONTRADICTIONS AMONG THE PEOPLE,” *Selected Works of Mao Tse-tung*, (Beijing: Foreign Languages Press, 1977) Vol. V, pp. 387.

<sup>136</sup> *Id.*

vs. patriots? It appears that a member of the “people” (“mass”) can also engage in “antagonistic” contradiction with the requisite intent to harm the communist state or subvert the Party ideology. It is also not clear whether an “enemy” of the people can escape “antagonistic” treatment for minor infraction against the state. A study of what constitute counter-revolutionary crime (an antagonistic contradiction if performed) should demonstrate the difficulties involved and issues presented in separating antagonistic vs. non-antagonistic contradictions.

The PRC Criminal Law (1979) provides in Article 90 that “Conduct which is harmful to the People’s Republic of China and done with the purpose of over-throwing the proletarian dictatorship and socialist system are all counter-revolutionary crimes.” Counter-revolutionary crimes include the following elements: (1) inciting people to resist and harm the implementation of state law and order and (2) use counter-revolutionary slogans, pamphlets and other means to incite others to over-throw the proletarian dictatorship and socialist system. (The PRC Criminal Law (1979) Article 102.)

An exhaustive review of prior and existing counter-revolutionary laws, regulations, and directives is not informative on what constitute counter-revolutionary conduct beyond the fact it refers to speech or conduct which is intended to or in effect was harmful to the state’s political order or challenge the established government.<sup>137</sup>

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<sup>137</sup> See for example “Zhongguo Renmin Zhengzhi Xieshang Huiyi Gongtong Ganlin (The Chinese People’s Political Consultative Conference Common Program) (promulgated on September 29, 1949) Article 7; PRC Constitution (promulgated on September 20, 1954) Article 19; Zhengwuyuan, Zuigao Renmin Fayuan, “Guanyu Zhenya Fangeming Huodong de Zhishi” (Government Administrative Council and Supreme People’s Court “Directive on the Suppression of Counter-revolutionaries”) (promulgated on July 23, 1950); Zhonghua Renmin Gongheguo Zhenzhi Fangemin Tiao Li (PRC Punishment of

Third, how should “antagonistic” vs. “non-antagonistic” be treated? Should people’s contradiction with great consequences be punished? Should minor enemy’s contradiction with little impact be ignored?

### *Theory of corrections*

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Counter-revolutionary Regulations) (promulgated on Feb. 20, 1951), Article 2.; Zhongyang Sifabu “Guanyu Eba, Guanfei, Bufa Dizhu Ruhe Shiyong Zhenzhi Fangemin Tiaoli Pifu” (Party Central Judicial Department “Reply Regarding How to Apply Punishment of Counter-revolutionary Regulations to Local Tyrant, Habitual Criminals, and Illegal Landlord”) (promulgated in 1951); Zhongyang Xiren Xiaozu “Guanyu Fangeming-fenzi he Qita Huaifenzi de Jieshi ji Chuli de Zhengce Jiexian de Zanxing Guiding” (Party Central Party of Ten Committee Temporary Regulations Regarding Policy and Limits on Explaining and Handling of Counter-revolutionary Elements and Other Bad Elements (promulgated March 3, 1956); Zhongyang Xiren Xiaozu “Guanyu Fangeming-fenzi he Qita Huaifenzi de Jieshi ji Chuli de Zhengce Jiexian de Zanxing Guiding” (Party Central Party of Ten Committee “Temporary Regulations Regarding Policy and Limits on Explaining and Handling of Counter-revolutionary Elements and Other Bad Elements”) (promulgated March 3, 1956); Zhonggong Zhongyang Xiren Xiaozu Dui “Guanyu Fangeming-fenzi he Qita Huaifenzi de Jieshi ji Chuli de Zhengce Jiexian de Zanxing Guiding” de Buchong (Communist Party Central Party of Ten Committee “Supplement to Temporary Regulations Regarding Policy and Limits on Explaining and Handling of Counter-revolutionary Elements and Other Bad Elements (promulgated June 24, 1957) (Counter-revolutionary damages mean causing damage with counter-revolutionary intent and purpose); Renmin Gongan Pianweihui Guanyu Zhongyang Xiren Xiaozu “Guanyu Fangeming-fenzi he Qita Huaifenzi de Jieshi ji Chuli de Zhengce Jiexian de Zanxing Guiding” de Buchong Jieshi Zhong Yixie Wenti de Jieda (PRC Organizing Committee “Answers to Certain Questions on Supplementary Explanation Regarding Temporary Regulations Regarding Policy and Limits on Explaining and Handling of Counter-revolutionary Elements and Other Bad Elements”) (promulgated 1957) (Contemporary counter-revolutionary elements means people who spread reactionary pamphlets with counter-revolutionary intent); Zhongyang Xiren Xiaozu “Guanyu Putong Fangemin Fenzi ji Qita Fandong Fenzi de Jieshi” (Committee of Ten from Party Central “Explanation Regarding Common Counter-revolutionary Elements and Other Reactionary Elements”) (November 1957) (Counter-revolutionary elements are people who insist upon their reactionary class viewpoint); Zhongyang Zhengfa Xiaozu “Guanyu Xinde Fangeming Fanzui Xingwei de Jiexian” (Party Central Political-legal Committee “Regarding the classification of Counter-revolutionary Elements” (1962). (People who are merely critical of the party or government policy or implementation are not counter-revolutionary.) Zuigao Renmin Jianchayuan, *Xingshifanzui Anli Conshu (Fanfeminzui)* (Book on Criminal Cases) (Counter-revolutionary Crimes) (Beijing: Zhongguo Jiancha Chubanshe, 1990), pp.269-311.

In 1960 Mao once said: “Our prisons (unlike those in the past) are really schools, they are also factory or farms.”<sup>138</sup> This statement is most revealing of Mao’s thinking on corrections and reform, and has been practiced in China since 1930s.<sup>139</sup> Mao’s idea is based on the fundamental believe that “man can be reformed” (“ren shi keyi gaizao de”).<sup>140</sup> Finally, Mao’s theory of correction is grounded in Marxist analysis, particularly a person’s thinking is conditioned by society, material base and economic relationship.<sup>141</sup> People can be made to change their mind by education and indoctrination and society has a responsibility in removing corrupting ideas and correcting unwholesome ideology.<sup>142</sup> Mao called his theory a scientific one. Thus observed, Mao’s correction theory is very much “environment” (macro change in social structure and material condition) and “mind” work (individual change of mental state and ideology).

First, Mao believed that prisons are for punishment as well as education, with the later function being more prominent and important. Prison is not only for inflicting punishment and achieving incapacitation, but to reform and transform prisoners by way of education. Mao’s punishment as reform comes right out of Confucius teaching, i.e., education can transform people, in thinking, action and character.

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<sup>138</sup> Guo-en et. al. (Ed.), *Maozedong Theory on Criminal Reformation* (“Maozedong Gaizao Zuifan Lilun Yanjiu,”) (Beijing: Renmin chubanshe, 2006), p. 7.

<sup>139</sup> Wu Zongxian, “Western Prisons and Chinese Prisons: Focusing on Differences,” *European Journal of Crime, Criminal Law & Criminal Justice* Vol. 11 (1): 93-113 (2003). Wu is a Professor of Institute for Crime Prevention, Ministry of Justice, The People's Republic of China

<sup>140</sup> *Id.* p. 8. The thesis that “man can be reformed” raises many issues, including: First, what kind of man can be reformed? Mao suggested that enemies of the state cannot be reformed and must be deal with coercive means, including extermination. Second, how can man be reformed? By education? By labor? With punishment? In prison? Third, are all men (who are not enemy of the state) amenable to form, in theory and practice.

<sup>141</sup> *Id.* p. 35.

<sup>142</sup> *Id.* p. 35.

As a theorist, Mao should not be understood as ignoring the punitive aspect of correction process. Mao is a realist, just as Confucius is a pragmatist. Education would only work if offenders are given a choice between punishment and education.<sup>143</sup>

Second, to observe that prison and labor farm is like a factory is to suggest that offenders should sweat off their crime. To Marx and Mao, there is something special – liberating and fulfilling – about the laboring process. The sweat labor cleanses the (evil) soul and purify ones (polluted) mind, from capitalistic tendencies and corrupting way of life.<sup>144</sup> He is a productive member of a society relying on his own effort. Last not least, living the life of a labor and working from hand to mouth as a farmer, allows the offender to see things the proletarian and peasant way. In essence, through working in the factory and farm, the prisoners not only come to learn about their mistakes. They become transformed socially (be a good citizen) and politically (be a good communist).<sup>145</sup> In the ultimate analysis, Mao is less interested in reforming prisoner, as much as he is committed to recreating a new breed of socialist citizens.<sup>146</sup>

Mao also postulated that in order for reform to work, prisoners must be treated humanly, not oppressively, i.e., he should be adequately cared for. He should be given a realistic hope of rejoining the community as a productive member of society, totally re-integrated and forgiven. The idea here is that the prisoner is not changing because of cold utility calculus (pain

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<sup>143</sup> *Id.* p. 31. The idea originated in early years of PRC, in how to deal with political prisoners, e.g. ex-KMT officials or capitalists. Mao opted for sever punishment and compassionate treatment at the same time.

<sup>144</sup> *Id.* P. 9.

<sup>145</sup> Mao's labor education policy was first codified in "PRC Regulations on labor reform" <Zhongghu renmin gonghe guo laodong gallazo tiaoli" (August 26, 1954).

<sup>146</sup> Xin Guo-en et. al. (Ed.), *Maozedong Theory on Criminal Reformation* ("Maozedong Gaizao Zuifan Lilun Yanjiu,") (Beijing: Renmin chubanshe, 2006), p. 24.

of imprisonment vs. likelihood of liberty) but because of heart felt appreciation for the compassion shown him by the state, or “ganhua” (moved emotionally to reform). The larger cultural context is that Chinese are taught to “bao en, bao de” or “repay kindness with kindness, repay virtue with virtue”.<sup>147</sup>

Finally, any successful reform scheme must involve the mass which helps with community supervision (“bangjiao”) and social reintegration.

## VII

### Conclusion:

In the past decade, Chinese scholars have explored the causation, etiology, control, prevention and correction of crime. It is clear that Chinese and Western criminologists do not think alike when it comes to crime, punishment and control.

From a Chinese perspective, crime is less a legal violation as it is a moral transgression. More importantly, it is less a specialized policing issue as it is a general social malfunctioning – poverty, inequities, corruption – problem. As a social phenomenon, crime is too complicated to be attributable to any one single factor. Thus criminologists should not be pre-occupied only with the origin or etiology of crime alone, e.g., looking at crime in a communist society solely in political ideological terms. It is also unrealistic what we will ever discover the complete picture of causations and dynamics of crime.

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<sup>147</sup> *Id.* p. 10 See Dutton, *Street Life in China* (Cambridge University Press, 1998), p. 32 (“Bao” stands for mutuality and reciprocity, a larger principle governing the cosmos. “Bachou” is the idea that wrong must be revenged. “Boa en” is the idea that a debt must be repay with gratitude. “Baoying” is the idea that one rips what he sows.)

