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## Criminal Law Pays: Penal Law's Contribution to China's Economic Development

Margaret K. Lewis

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## Criminal Law Pays: Penal Law's Contribution to China's Economic Development

*Margaret K. Lewis\**

### ABSTRACT

*China's rapid rise to become the second largest economy in the world is nothing short of extraordinary. When economic reforms took off in the late 1970s, China had been without formal criminal law for three decades. China's economic development since the launch of the reform period has occurred directly alongside the development of its criminal law, but the academic literature has failed to ask what role criminal law plays in China's impressive growth.*

*This Article argues that not only has the People's Republic of China leadership historically used criminal law in service of economic ends but also, going forward, criminal law will likely play a multifaceted role in the leadership's strategy to sustain*

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\* Associate Professor, Seton Hall University School of Law. I would like to thank Kristen Boon, Jenny Carroll, Don Clarke, Keith Hand, Yanzhong Huang, Ben Liebman, Cobb Mixter, Alice Ristroph, Teemu Ruskola, Rachel Stern, Charlie Sullivan, Sue Trevaskes, Frank Upham, and Alex Wang, as well as participants at the Reading Group on Chinese Law and Workshop on Works-in-Progress on Chinese Law, both of which were held at Columbia Law School. I would also like to thank Jennifer Chawla, James DeBartolo, Xiao Ma, Marissa Mastroianni, and Elizabeth Matecki for their research assistance. In addition, this Article was supported by a summer research stipend from Seton Hall Law School.

*growth. This inquiry is particularly timely on the heels of a once-a-decade leadership transition and as China's ability to maintain a robust growth rate is facing rising skepticism.*

*Looking beyond China, the law and development literature more generally has also failed to seriously discuss criminal law. At a time when many are rethinking the role of law in economic development, it is worth broadening the discussion to include criminal law. China is an instructive test case to begin that conversation.*

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## I. INTRODUCTION

“Our country must develop; if we do not develop then we will be bullied. Development is the only hard truth.”<sup>1</sup> – *Deng Xiaoping, 1992*

“We must have a profound understanding of the development trend and requirements of our country’s social productive forces, focus on economic development and formulate and implement a correct line . . . .”<sup>2</sup> – *Jiang Zemin, 2001*

“Development is critically important, and upholding stability is also a critically important task.”<sup>3</sup> – *Hu Jintao, 2011*

“We must follow the strategic thinking that development is of overriding importance.”<sup>4</sup> – *Xi Jinping, 2013*

As these statements from the highest ranking members of the past four generations of leaders indicate,<sup>5</sup> development has been a paramount goal of the leadership of the People’s Republic of China (PRC or China). Viewing development from the perspective of macroeconomic growth, China’s development over the past three decades has been extraordinary. In the late 1970s, China was emerging from the chaos of the Cultural Revolution and the resulting shambles of its national economy.<sup>6</sup> By April 2010, China had surpassed Japan to become the world’s second largest economy in terms of nominal gross domestic product (GDP).<sup>7</sup> In 2013, the World Bank reported, “By any standard, China’s economic performance over

1. Deng Xiaoping Shishi 16 Zhounian Mianhuai Gaige Kaifang Zong Sheji Shi (邓小平逝世 16 周年 缅怀改革开放总设计师), XINHUANET (Feb. 19, 2013), [http://news.xinhuanet.com/politics/2013-02/19/c\\_124361679.htm](http://news.xinhuanet.com/politics/2013-02/19/c_124361679.htm) [<http://perma.cc/5H9N-UVZE>] (archived Jan. 14, 2014).

2. Jiang Zemin, General Secretary of the Central Committee of the Communist Party of China, Speech at the Meeting Celebrating the 80th Anniversary of the Founding of the Communist Party of China (July 1, 2001) (transcript available at <http://www.china.org.cn/e-speech/a.htm> [<http://perma.cc/N2ZG-L77F>] (archived Jan. 14, 2014)).

3. Hu Jintao, General Secretary of the Central Committee of the Communist Party of China, Speech at a Meeting Commemorating the 90th Anniversary of the Founding of the Communist Party of China (July 1, 2011) (transcript available at [http://news.xinhuanet.com/english2010/china/2011-07/01/c\\_13960505.htm](http://news.xinhuanet.com/english2010/china/2011-07/01/c_13960505.htm) [<http://perma.cc/FS8Q-PXRG>] (archived Jan. 14, 2014)).

4. *President Vows to Bring Benefits to People in Realizing “Chinese Dream,”* XINHUANET (Mar. 17, 2013, 10:58:31 AM), [http://news.xinhuanet.com/english/china/2013-03/17/c\\_132240052.htm](http://news.xinhuanet.com/english/china/2013-03/17/c_132240052.htm) [<http://perma.cc/J7WW-Z3QD>] (archived Jan. 14, 2014).

5. See Cheng Li, *China’s Leadership, Fifth Generation*, CAIJING MAG., Dec. 2007, available at <http://www.brookings.edu/research/articles/2007/12/china-li> [<http://perma.cc/L6VW-CN44>] (archived Jan. 14, 2014) (discussing how the leadership is divided in terms of generations).

6. Yuzhong Dai, *The Pursuit of Criminal Justice, in CHINA’S JOURNEY TOWARD THE RULE OF LAW: LEGAL REFORM, 1978–2008*, at 155, 158 (Dingjian Cai & Chenguang Wang eds., 2010).

7. See *Second in Line*, THE ECONOMIST (Aug. 16, 2010), [http://www.economist.com/blogs/freeexchange/2010/08/china\\_0](http://www.economist.com/blogs/freeexchange/2010/08/china_0) [<http://perma.cc/332L-DG87>] (archived Jan. 14, 2014) (noting that China has the second largest GDP).

the last three decades has been impressive. GDP growth averaged 10 percent a year, and over 500 million people were lifted out of poverty.<sup>8</sup> China's rosy story of uninterrupted growth masks concerns that its economy is slowing.<sup>9</sup> This uncertain moment in China's growth trajectory is an opportune time to reflect on the forces behind China's stunning economic rise. In particular, this Article considers China's rapid development and asks what role criminal law has played to date and will play in the future. This Article then goes a step further, asking why the law and development literature has failed to seriously ask this question both with respect to China and more generally.

Law and development literature, though extensive, generally overlooks the role of criminal law. At base, law and development scholars question how governments use law to create order in society and bolster the government's legitimacy. A common thread in the literature is how this foundation can in turn promote economic growth.<sup>10</sup> The debate has focused on the Washington Consensus's support for a market economy's need for clear and enforceable contract and property rights, often referred to as the "rights hypothesis":<sup>11</sup> "[T]he thesis is that property rights determine who has control over assets; contract law enables market participants to exchange those assets in complicated transactions; and the courts enable market actors to plan by resolving disputes predictably, efficiently, and in accordance with the legal rules."<sup>12</sup> China has repeatedly been singled out as posing a particular challenge to the rights hypothesis because of its astounding growth despite what is

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8. WORLD BANK, CHINA 2030: BUILDING A MODERN, HARMONIOUS, AND CREATIVE SOCIETY, at xxi (2013).

9. See *China Export Growth Plummet Amid Fake-Shipment Crackdown*, BLOOMBERG (June 9, 2013, 2:30 AM), <http://www.bloomberg.com/news/2013-06-08/china-may-exports-trail-estimates-as-imports-unexpectedly-drop.html> [<http://perma.cc/4V64-3DG7>] (archived Jan. 14, 2014) (noting that data signals "weaker global and domestic demand"); Bob Davis, *China Recovery? Don't Uncork the Champagne in Beijing Just Yet*, WALL ST. J. (Jan. 18, 2013, 7:29 PM), <http://blogs.wsj.com/chinarealtime/2013/01/18/dont-uncork-the-champagne-in-beijing-just-yet/> [<http://perma.cc/KJ43-QX5G>] (archived Jan. 14, 2014) (citing findings that "China's economy has already downshifted from more than 10% growth in 2010 to about 8% growth now—and another sharp deceleration is likely to occur in a couple of years").

10. See Frank K. Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 N.Y.U. J. INT'L L. & POL. 551, 555 (2009) (defining economic growth as a per capita long-run rise in income). This Article focuses on GDP, not per capita income, though distributional concerns are on the rise in China as noted in the Conclusion, *infra*.

11. See, e.g., Donald Clarke, Peter Murrell & Susan Whiting, *The Role of Law in China's Economic Development*, in CHINA'S GREAT ECONOMIC TRANSFORMATION 375 (Loren Brandt & Thomas G. Rawski eds., 2008) (describing the rights hypothesis).

12. Upham, *supra* note 10, at 557; see generally Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) (describing economic theory in terms of property rights).

widely regarded as a weak legal system.<sup>13</sup> Academics have countered this position by exploring the role of informal institutions and questioning the significance of property rights in China's development.<sup>14</sup> Yet throughout these debates, the role of criminal law has been almost totally ignored. This is a mistake, and, at a time when many are rethinking the role of law in economic development, it is worth broadening the discussion to include criminal law.

The law and development literature's focus on empowering private actors by creating a neutral bureaucracy subject to objective judicial review has shifted the debate away from the most basic function of law: creating order. And creating order starts with the coercive power of the state exercised through criminal law. Not only is criminal law a direct way for the government to deprive people of money, liberty, and life, it is likely cheaper and faster to build than the civil and administrative law systems on which the rights hypothesis relies.<sup>15</sup> If a country's civil and administrative law systems are not credible enough to deter activities that are detrimental to economic growth, the government can invoke the heavy hand of criminal law. Furthermore, the politically neutral judiciary envisioned by the rights hypothesis may not be desirable to an authoritarian government.<sup>16</sup>

To the extent that the conversation is purely about the healthy functioning of a market-driven economy and an overriding concern about protecting property rights against the state, it is understandable that criminal law is pushed to the side. In a market economy, the state largely sets ground rules and then steps back and allows individuals to function with little intervention.<sup>17</sup> But criminal

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13. See, e.g., Cheryl Xiaoning Long, *Does the Rights Hypothesis Apply to China?*, J. L. & ECON. 629, 629 (2010) (China challenges the rights hypothesis of growth "as the country has experienced a record-breaking growth rate with very weak legal institutions"); Franklin Allen, Jun Qian & Meijun Qian, *Law, Finance, and Economic Growth in China*, 77 J. FIN. ECON. 57, 57 (2005) ("China is an important counterexample to the findings in the law, finance, and growth literature: neither its legal nor financial system is well developed by existing standards, yet it has one of the fastest growing economies.").

14. See *infra* Part II.B.

15. This is not to say that it is easy to build a functioning criminal justice system—many countries with advanced economies still struggle with how to mete out criminal justice in a fair and efficient manner. Nonetheless, this Article posits that it is likely more challenging to construct multiple complex, specialized bureaucracies that can effectively address issues like environmental harms, intellectual property violations, and workplace safety standards.

16. Cf. Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 14–21 (Tom Ginsburg & Tamir Moustafa eds., 2008) (discussing four strategies authoritarian regimes use to constrain courts).

17. There is, of course, no pure market-driven economy where the state merely sets ground rules and then fully extracts itself. A certain amount of state intervention inevitably occurs, though the neoliberal view seeks to heavily constrain that intervention. See David M. Trubek, *The Political Economy of the Rule of Law: The*

law is not the province of private actors; the state is an indispensable party.<sup>18</sup> Overlooking criminal law because it operates outside of the market structure creates a blind spot to how this critical area of law intersects with economic growth. This is not to say that a strong system of contract<sup>19</sup> and property rights that is enforceable through the civil and administrative court systems is unimportant. The choice between civil and administrative law on the one hand and criminal law on the other is not either-or. When the legal system for resolving disputes between private parties is weak, criminal law can act as an alternative mechanism, albeit incomplete and imperfect, to foster development. As argued herein, that is certainly the case with China.<sup>20</sup>

China is an instructive test case for broadening the law and development debate to include criminal law for three reasons. First, law in China has generally been understood to foster development,

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*Challenge of the New Developmental State*, 1 HAGUE J. RULE L. 28, 29–30 (2009) (explaining the neoliberal position that “[T]he role of the state in the economy should be strictly curtailed and . . . to the extent state action affected private decision-making, it should be confined to the application of precise rules so its operations are predictable in advance.”); Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC’Y REV. 829, 831 (2000) (“In both the political and economic spheres the task of law is to constrain the state and empower private economic actors. Thus, liberal notions of autonomous law are at the core of the new law and development activity.”).

18. China, in line with a practice seen in a number of civil law countries and in contrast to the United States, allows for limited private prosecutions in criminal cases, though even then the state invariably has some involvement. See Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [PRC Criminal Procedure Law] arts. 204–07 (promulgated by the Nat’l People’s Cong., July 1, 1979, effective as amended Jan. 1, 2013) (China).

19. This Article, like much of the law and development literature, focuses on property rights, though the arguments herein apply to contracts as well in that they are generally enforced through civil, as opposed to criminal, laws. Cf. Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89, 99 (2003) (“What the authors do not do is to attempt seriously to distinguish property rights from contract rights – i.e., the security of an expectation that one will not be subject to arbitrary and unpredictable confiscation as opposed to the security of an expectation that one will be able to enforce a promise made by another with whom one does business.”). To use the language of Calabresi and Melamed, contract rights may be protected by “liability rules”: “Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule.” Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972). If a court awards damages for a contractual violation, however, there is a further question of whether and how the state will step in if a losing party refuses to pay. Countries vary considerably with respect to the time required and percentage of awards recovered. See Enforcing Contracts, DOING BUSINESS PROJECT, <http://www.doingbusiness.org/data/exploretopics/enforcing-contracts/> (last visited Feb. 28, 2014) (assessing the efficiency of the judicial system by following the evolution of a commercial sale dispute over the quality of goods and tracking the time, cost, and number of procedures involved from the moment the plaintiff files the lawsuit until payment is received).

20. See *infra* Parts III & IV.

not to constrain the state.<sup>21</sup> Most literature on China, however, discusses this development-enhancing view of law in the context of civil and commercial law.<sup>22</sup> Other than passing references to the need for stability after the chaos of the Cultural Revolution, scholars have not linked criminal law to broader questions of law and development.<sup>23</sup> Second, when economic reforms took off in the late 1970s, China had been without formal criminal law for three decades.<sup>24</sup> China's economic development has occurred directly alongside the development of its criminal law. Third, China has long been viewed as a test case for the rights hypothesis.<sup>25</sup> Once the discourse is broadened to consider criminal law, previously overlooked ways in which law interacts with development become apparent.

As an initial clarification, this Article uses an expansive view of "criminal law" to include both blackletter laws and deviations from the formal criminal justice system that are nonetheless important ways in which the state exercises its coercive power—for example, Chinese Communist Party (CCP or Party) disciplinary procedures, administrative detention, and extralegal measures.<sup>26</sup> Since the late 1970s, constructing a legal system has been a priority for the PRC government.<sup>27</sup> Changes to blackletter criminal laws over the past three decades, which occurred in tandem with development of laws more overtly geared toward creating a legal framework for market activity, reflect the leadership's desire to put criminal laws on the books that serve economic ends.<sup>28</sup> While proposing this top-down, instrumentalist<sup>29</sup> story of the role of blackletter laws in China's

21. See, e.g., Clarke, Murrell & Whiting, *supra* note 11, at 377 ("Economic reform in China was marked from the beginning by a recognition that law had a new and important role to play.").

22. See *infra* notes 82–85 with citations to recent works on China and law and development.

23. See *infra* notes 145–47 and accompanying text.

24. See *infra* note 137 and accompanying text.

25. See *infra* notes 76–78 and accompanying text.

26. See generally Margaret K. Lewis, *Legal Systems in China*, in THE ROUTLEDGE HANDBOOK OF CHINESE CRIMINOLOGY 51, 59–61 (Liqun Cao, Ivan Y. Sun & Bill Heberton eds., 2013) (discussing deviations from the formal criminal justice system).

27. See, e.g., White Paper, *China's Efforts and Achievements in Promoting the Rule of Law*, CHINA.ORG.CN (Feb. 28 2008), [http://www.china.org.cn/government/news/2008-02/28/content\\_11025486.htm](http://www.china.org.cn/government/news/2008-02/28/content_11025486.htm) [<http://perma.cc/RR9S-E4AC>] (Jan. 14, 2014) (At the end of the 1970s, the PRC government "made clear the importance of the principle of governing of the country by law").

28. See Hualing Fu, *Autonomy, Courts, and the Politico-Legal Order in Contemporary China*, in ROUTLEDGE HANDBOOK, *supra* note 26, at 76, 84 ("After China initiated market reform in the 1990s, the rule of law was revived to serve primarily the economic function."); see also *infra* Part III.

29. See BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 6 (2006) ("An instrumental view of law means that law—encompassing legal rules, legal institutions, and legal processes—is *consciously* viewed by people and



stellar economic growth, it is also important to recognize exercises of state power that diverge from the formal criminal justice system. The strength of China's political apparatus comes to the fore when the leadership sees a threat to Party rule that requires immediate and severe intervention, as most dramatically seen in the violent response to the 1989 protests in Tiananmen Square.<sup>30</sup> Following the initial crackdown, the leadership turned to criminal law to punish protestors—both as counterrevolutionaries and common criminals—while concurrently using “administrative” sanctions to silence others.<sup>31</sup> This is but one example of how China's formal criminal justice system is inextricably linked with quasi-criminal means of social control.<sup>32</sup> Accordingly, this Article is primarily interested in the PRC leadership's decisions with respect to laws on the books but recognizes that this view is unduly narrow and must be supplemented by analysis of policy decisions to use the coercive power of the state outside of those confines.

Part II provides context with respect to the general law and development debate, including the dearth of analysis regarding the role of criminal law (Part II.A). It next addresses China's role in the law and development literature (Part II.B). This Part also introduces the criminology literature that addresses how China's changing social and economic structures have influenced the nature of crime (Part II.C).

With Part II as a backdrop, Part III takes a retrospective view and analyzes how the PRC leadership has used criminal law in

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groups as a *tool or means* with which to achieve *ends*.”); KATHARINA PISTOR & PHILIP A. WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960–1995*, at 35 (1998) (“Since Jeremy Bentham's writings in the early nineteenth century, law has been increasingly viewed not as the result of socioeconomic development, but as a tool for governments to initiate and shape economic development.”).

30. See generally Michel Bonnin, *The Chinese Communist Party and 4 June 1989: Or How to Get Out of It and Get Away with It*, in *THE IMPACT OF CHINA'S 1989 TIANANMEN MASSACRE 33–47* (Jean-Philippe Béja ed., 2011) (analyzing means used by the CCP to strengthen its hold on the country in the wake of the Tiananmen Square protests of 1989).

31. See MICHAEL DUTTON, *POLICING CHINESE POLITICS: A HISTORY 270–71* (2005) (“In other words, well over 70 percent of the participants arrested in these [1989 Tiananmen] protests were defined as common criminals.”).

32. See generally SARAH BIDDULPH, *LEGAL REFORM AND ADMINISTRATIVE DETENTION POWERS IN CHINA* (2008) (presenting a detailed analysis of three administrative detention powers: detention for education of prostitutes; coercive drug rehabilitation; and reeducation through labor). Reeducation through labor was formally abolished at the end of 2013. See *China Abolishes Reeducation Through Labor*, XINHUA (Dec. 28, 2013), [http://news.xinhuanet.com/english/china/2013-12/28/c\\_133003042.htm](http://news.xinhuanet.com/english/china/2013-12/28/c_133003042.htm). Concerns remain, however, that abolishing reeducation through labor will be a cosmetic change. See, e.g., *China's 'Re-education Through Labour' Camps: Replacing One System of Repression with Another?*, AMNESTY INT'L (Dec. 17, 2013), <https://www.amnesty.org/en/news/china-s-re-education-through-labour-camps-replacing-one-system-repression-another-2013-12-17>.

service of economic ends, particularly since the late 1970s. In recounting this history, this Article fully recognizes the many challenges of making causal arguments in the law and development field.<sup>33</sup> It is impossible to ascribe a certain percentage of China's economic growth to instrumental use of criminal law. However, this Article posits that the PRC government has at a minimum used criminal law to help create an environment that is conducive to economic growth. This strategy includes both penalizing certain activities (e.g., imposing the death penalty for serious theft) and refraining from targeting other activities (e.g., lax enforcement of environmental standards and intellectual property rights).<sup>34</sup> The primacy of the state in driving economic growth is crucial to understanding China's overall development strategy and the specific role of criminal law in that strategy. Because the activist Chinese state sees itself as taking the lead in driving economic growth, it also sees itself as having a primary role in protecting the economy from the crime-related social fallout of rapid change.

Part IV explores how criminal law will likely play a multifaceted role in the leadership's strategy to sustain growth. The new leadership's rhetoric and actions since rising to power in late 2012 indicate that China will continue to use a distinctly hands-on approach to protecting social order through crime control.<sup>35</sup> This Article argues that what is needed is more thoughtful, targeted use of the state's coercive power, especially in areas where criminal law might effectively fill gaps in the relatively weak civil and administrative law systems. China's long-term economic prospects would be better served if the leadership harnessed criminal law to address activities that weaken the fabric of China's future economic health, such as environmental degradation and financial crimes, instead of as a convenient tool to silence people who expose festering problems. Put simply, the target should be the polluters themselves, not the people drawing attention to the pollution.

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33. See Chantal Thomas, *Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutional Critique of Institutionalism*, 96 CORNELL L. REV. 967, 1008–16 (2011) (discussing causation issues in law and development literature).

34. In other words, the strategy is one of using punishment to deter certain acts and, conversely, not punishing acts that are seen as economically beneficial. Cf. Kent Greenawalt, *Punishment*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1286–87 (Dressler ed., 2d ed. 2002) (explaining “general deterrence” as “[k]nowledge that punishment will follow crime deters people from committing crimes, thus reducing future violations of right and the unhappiness and insecurity they would cause”). There is much debate, however, over whether deterrence theory works. See, e.g., Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 818 (2010) (noting that we have “no real knowledge base about the celerity of punishment” but “there does seem to be a modest inverse relationship between the perceived certainty of punishment and crime”).

35. See *infra* Parts IV.A, IV.C.

Part V concludes by raising questions for future study. Looking beyond China, perhaps criminal law has made an underappreciated contribution to other countries' economic development as well. When writing about the early years of America's legal system, Lawrence Friedman noted, "Criminal laws naturally expressed economic policy in societies with a strong sense of authority and few special agencies of economic control."<sup>36</sup> It is past time to broaden the law and development literature to consider more fully how criminal law complements, and even fills gaps in, the civil and administrative law systems that are more commonly associated with fostering economic growth.

## II. CRIMINAL LAW, CHINA, AND THE LAW AND DEVELOPMENT DEBATE

Over the past half century, the law and development field has survived a rocky road as initial projects came under heavy scrutiny leading to much handwringing, a reevaluation of goals and assumptions, and efforts to pursue new areas of inquiry.<sup>37</sup> This Part briefly introduces the general law and development literature, including the thin analysis with respect to criminal law (Part II.A). It next addresses China's role in the literature (Part II.B). To date, criminal law has played at most a minor part in the law and development debate. In contrast, economics and crime have been frequently intertwined in the criminology literature that focuses on how China's changing social and economic structures have influenced the nature of crime (Part II.C).

### A. *Criminal Law and the Law and Development Literature*

When the law and development movement first arose in the 1960s, its proponents sought to use law, and particularly laws from Western models, to help countries that were struggling economically.<sup>38</sup> The basic idea was that laws and supporting institutions could be transplanted and, once they had taken root,

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36. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 38 (3d ed. 2005); *id.* at 37 (regarding colonial times, "[C]riminal law, as it always does, expressed more than current standards of morality, although that was extremely significant. It was also a vehicle for economic and social planning and an index to the division of power in the community.").

37. See generally David M. Trubek, *The "Rule of Law" in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 74, 74-93 (David M. Trubek & Alvaro Santos eds., 2006) (tracing the origins of and changes to the law and development movement).

38. See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1065-69 (1974) (briefly tracing the history of the "Law and Development Movement").

development would follow.<sup>39</sup> As the 1970s progressed, enthusiasm waned when the expected gains failed to materialize.<sup>40</sup> In hindsight, scholars who supported the initial wave recognized the lack of a coherent strategy, with David Trubek noting, “Beyond a general belief in the importance of law, the relevance of western models, and the importance of a modern legal culture, it was all ad hoc and pragmatic.”<sup>41</sup>

After a period of relative hibernation, law and development reemerged in an altered form. The new wave drew on Max Weber’s conceptualization of law’s relationship to economic growth.<sup>42</sup> Proponents further looked to Friedrich Hayek’s belief in the importance of minimizing government intervention in private economic transactions.<sup>43</sup> The neoliberal<sup>44</sup> pro-entrepreneurial and pro-minimalist-state approach reduced law “to an instrument that facilitated private transactions (for example, by creating incentives for market actors) and limited state intervention.”<sup>45</sup> Adherents of this approach touted the values of deregulation, liberalization, and privatization in kick-starting ailing economies.<sup>46</sup> This pro-free-market

39. See Tor Krever, *The Legal Turn in Late Development Theory: The Rule of Law and the World Bank’s Development Model*, 52 HARV. J. INT’L L. 287, 295–97 (2011) (explaining that 1970s law and development focused on the transplantation of institutions).

40. See Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT’L L. J. 209, 210 (2011) (“By the end of the 1970s, development theory was in disarray . . .”); see generally John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 460 (1977) (“Scholars formerly active in the field are drifting off, turning to other interests.”).

41. Trubek, *supra* note 37, at 78; see also Trubek & Galanter, *supra* note 38, at 1063 (noting the scholars’ inability to agree on common interests).

42. See Thomas, *supra* note 33, at 974 (“[B]oth the mid-twentieth century modernization and the late twentieth century neoclassical versions of law and development discourse shared this intellectual debt to Weber in the conceptualization of law’s relationship to economic growth . . .”); MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY (Max Rheinstein ed., 1954).

43. See Thomas, *supra* note 33, at 974 (noting Hayek’s influence in the field).

44. See generally DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005) (“Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms . . . characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.”).

45. Krever, *supra* note 39, at 298; see also Okezie Chukwumerije, *Rhetoric Versus Reality: The Link Between the Rule of Law and Economic Development*, 23 EMORY INT’L L. REV. 383, 396 (2009) (“[Neoliberals’] primary objective was to restrain the exercise of state power in so far as this power inefficiently inhibited private enterprise.”).

46. See Andrew Brady Spalding, *The Irony of International Business Law: U.S. Progressivism and China’s New Laissez-Faire*, 29 UCLA L. REV. 354, 362 (2011) (“The new model, promoted most famously by Milton Friedman, held that economic growth would increase only when markets could operate freely and efficiently, thus requiring deregulation, liberalization, and privatization.”).

approach did not incorporate a discussion of criminal law—an understandable omission considering that criminal sanctions are a direct and severe form of government intervention.

Nobel Prize-winning economic historian Douglass North championed the view that governments need to provide a stable framework of contract and property rights within which economic transactions can flourish, but, beyond creating that structure, governments should not meddle in private economic affairs.<sup>47</sup> North's emphasis on a market-facilitating view of law stressed the need for growth-supporting "institutions," hence the name "new institutional economics" (NIE).<sup>48</sup> The state is seen as having a vital, though limited, role in creating an environment in which institutions can thrive. Of particular concern for adherents of NIE is the role institutions play in protecting property rights.<sup>49</sup>

This turn toward free markets—albeit supported by an infrastructure of institutions that require at least some state involvement—as the answer for sluggish development became known as the Washington Consensus, so named because the idea's main supporters, including the International Monetary Fund and the World Bank, are based in the District of Columbia.<sup>50</sup> In the 1990s, development programming increasingly shifted toward an emphasis on how laws could support efficient transactions among private actors, and buzzwords like "good governance" and "rule of law" came to the fore.<sup>51</sup> The focus of development projects turned toward the implementation of a package of legal reforms that supported this end, including "laws on incorporation, securities, antitrust, banking, intellectual property, commercial transactions, protections for foreign investors, as well as property rights and contract enforcement."<sup>52</sup>

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47. See generally DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990) (seeking to explain the vastly different performances of economies over long periods of time).

48. "Institutions" is a term of art that North described as encompassing various types of "humanly devised constraints that structure political, economic and social interaction." Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97, 97 (1991). Put more colloquially, "[I]nstitutions are the prevailing rules of the game in society." DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH 51 (2007).

49. See Tamanaha, *supra* note 40, at 226–27 (noting the NIE view that "development of legal institutions, particularly the protection of property, is an essential concomitant of economic development").

50. See Spalding, *supra* note 46, at 362 ("This paradigm also came to dominate the agendas of the two leading global financial institutions, both of which were headquartered in Washington, D.C.: the World Bank and the International Monetary Fund (IMF).").

51. Thomas, *supra* note 33, at 968–69; see also THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE 168–70 (1999) (critiquing foreign rule-of-law assistance in which aid is directed toward groups "that use law to pursue social and economic goals").

52. Tamanaha, *supra* note 40, at 225.

Like the disenchantment over the first wave of law and development, the Washington Consensus's approach has come under fire.<sup>53</sup> Critics have questioned whether this approach indeed fosters growth.<sup>54</sup> And, even if there are macroeconomic gains, distributional concerns remain.<sup>55</sup> Most famously, Amartya Sen criticized a narrow focus on macroeconomic growth and instead championed a broad view of development "as a process of expanding the real freedoms that people enjoy."<sup>56</sup> He incorporated a social vision into the rubric of law and development and broadened the discussion to include wealth distribution and protection of human rights.<sup>57</sup> Today, the landscape is increasingly textured,<sup>58</sup> people speak in terms of a post-Washington Consensus approach<sup>59</sup> and the emergence of a "Third Moment" in law and development theory.<sup>60</sup>

Throughout the various twists and turns in the debate, the role of criminal law has been ignored or, at most, addressed only in passing.<sup>61</sup> Scholars have noted the property-protecting function of

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53. See José E. Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223, 252 (2011) ("This formula for state disempowerment in economic affairs has been undermined by perceptions that it has not served to raise all boats as anticipated.")

54. See Krever, *supra* note 39, at 299 ("Dissent [from the neoliberal agenda of the Washington Consensus] stemmed in the first place from the apparent failure of neoliberal policies to achieve promised growth.")

55. See, e.g., David M. Trubek & Alvaro Santos, *An Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 37, at 1, 11 (noting incorporation into "the new development theory mainstream" of social concerns like direct poverty alleviation).

56. AMARTYA SEN, DEVELOPMENT AS FREEDOM 3 (1999).

57. See *id.* (noting that there are several determinants of development as freedom, including "social and economic arrangements . . . as well as political and civil rights"). The broad Senian conceptualization of development as increasing "freedom" no doubt involves issues of criminal law (the most direct and severe route by which a state can restrict people's freedom), but this Article is primarily concerned with economic growth. The omission of a broader view of development is not meant to deny its importance but rather to address directly the substantial body of economic development literature. Moreover, focusing on economic indicators is appropriate given that the inquiry is aimed at the PRC government's intentions with respect to using criminal law to support its stated goal of economic growth. See Hongming Cheng & David O. Friedrichs, *White-Collar and Corporate Crime in China*, in ROUTLEDGE HANDBOOK, *supra* note 26, at 238, 246 ("Economic goals are assigned high priority in comparison to non-economic or social goals.")

58. For a discussion of three recent books on law and development, see Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895 (2008).

59. See generally Randall Peerenboom & Bojan Bugarcic, *The Emerging Post Washington, Post Beijing Consensus: Prospects and Pitfalls* (June 11, 2013) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2277427](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2277427) [<http://perma.cc/89UT-YHCD>] (archived Jan. 14, 2014).

60. See generally Trubek & Santos, *supra* note 55, at 1–18.

61. See, e.g., Michael Trebilcock & Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization*, 30 U. PA. J. INT'L L. 397, 464 (2008) ("A functional police force is another institution that plays a critical role in enforcing and realizing the benefits of strong property rights."). For another view on

criminal law.<sup>62</sup> Other scholars have acknowledged the need for state force when interactions between private individuals fail to secure property rights.<sup>63</sup> And still others have pointed out that “[a]n effective criminal justice system is also conducive to economic growth because high crime rates tend to deter investment and deplete both human capital and governmental capacity.”<sup>64</sup> In general, however, criminal law is at most lurking in the background. The decades-old law and development conversation has also paid limited attention to China.<sup>65</sup>

As discussed below, an early avoidance of China was understandable for historical reasons. More recently, scholars have begun to question how, if at all, China fits the standard law-and-development narrative. The next Part surveys efforts to use law and development theory to explain China’s development path.

### B. *China and the Law and Development Literature*

Explaining China’s economic success has posed a challenge since the inception of the law and development movement. China was closed to foreign aid and almost all foreign contact during the first wave of law and development. Accordingly, there was little engagement with China and little attempt to explain how China might fit the thesis that transplanting foreign (primarily Western) legal norms was a development-enhancing endeavor.

By the time that the law and development movement had shifted to a focus on a market-based economy, China too had transformed. When Deng Xiaoping took the helm in the late 1970s, China quickly embarked on a path of welcoming foreign investment and embracing

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the role of crime in development, see Clarke, *supra* note 19, at 91 n.14 (noting that criminal gangs cannot be viewed as an informal rights-enforcing mechanism because they enforce demands, not legal rights).

62. See Tamanaha, *supra* note 40, at 226–27 (“Criminal law maintains social order, provides security, and saves people from expending resources to protect themselves or their property.”); Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER, Feb. 1998, at 1, 9 (“In such countries [facing rampant acquisitive crime] a strict criminal law and a corresponding de-emphasis on the protection of civil liberties may be an important part of legal reform and an important tool for the protection of property and contract rights.”).

63. See Ronald J. Daniels & Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT’L L. 99, 118 (2004) (“[P]rivate law ultimately depends on public enforcement of its norms through the application of force or coercion, if necessary, by agencies of the State.”); Clarke, *supra* note 19, at 89 (“An important school of thought in institutional economics holds that economic growth requires a legal order offering stable and predictable rights of property and contract because the absence of such rights discourages investment and specialization.”).

64. Kevin E. Davis & Michael J. Trebilcock, *Legal Reforms and Development*, 22 THIRD WORLD Q. 21, 23 (2001).

65. See Upham, *supra* note 10, at 577 (“[A]lthough the general law and development literature may not pay a lot of attention to Chinese law, those writing about Chinese law have paid attention to law and development.”).

a more vibrant, albeit limited, role for the private sector.<sup>66</sup> Deng further ushered in a wave of new laws that gave structure to foreign direct investment and began to clarify relationships between private entities.<sup>67</sup> Yet China stopped far short of giving free rein to market forces and instead maintained a strong government hand over the economy.<sup>68</sup> Furthermore, unlike other law and development projects largely driven by foreign actors, “Chinese leaders themselves decided that they wanted to revise their institutions.”<sup>69</sup> When the Washington Consensus emerged in the late 1980s, China had only a fledgling private sector and remained a developing economy that was dominated by gigantic state-owned enterprises.<sup>70</sup> Even for the limited segment of China’s economy that was open to private activity, the legal system failed to provide reliable protection of property and contract rights.<sup>71</sup> China had an increasing number of formal laws addressing economic matters on the books, but these nascent laws appeared to create little in the way of constraints on the behavior of private parties or the government.<sup>72</sup> Despite this blatant divergence from the rights hypothesis, China’s economy flourished.<sup>73</sup>

More than three decades after Deng’s initial surge of economic reforms and the concomitant changes to the legal system, the PRC government has not released its tight grip on economic activities.<sup>74</sup> It

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66. See BARRY NAUGHTON, *GROWING OUT OF THE PLAN: CHINESE ECONOMIC REFORM, 1978–1993*, at 59–96 (1995) (examining Deng’s initial reorientation of economic policy).

67. See STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 173–216 (1999) (discussing the extensive enactment of laws and rules to implement economic reforms).

68. See NAUGHTON, *supra* note 66, at 95 (“Reorientation was marked by direct government intervention in many aspects of the economy. . . . There was never a period of hands-off policymaking in the Chinese reform.”).

69. Carl F. Minzner, *China’s Turn Against Law*, 59 *AM. J. COMP. L.* 935, 968 (2011).

70. See BARRY NAUGHTON, *THE CHINESE ECONOMY: TRANSITIONS AND GROWTH* 298 (2007) (“A variety of ownership forms began to develop in Chinese industry during the 1980s, and only gradually was the diverse ownership structure that we see today created. Thus, while the scale of change has been enormous, there has also been continuity, most strikingly in the continued role of [state-owned enterprises].” (internal citation omitted)).

71. *Cf.* Upham, *supra* note 10, at 577 (“Even after the government started promulgating law-like rules and regulations in the 1980s, legal entitlements to important economic assets remained sketchy at best.”).

72. *Cf.* Clarke, Murrell & Whiting, *supra* note 11, at 403 (“In sum, our tentative conclusion is that passably secure property rights might have provided a basis for China’s economic growth during the first two decades of reform, but the legal system probably had little to do with the creation and enforcement of these rights.”).

73. See WORLD BANK, *supra* note 8, at 5 tbl. 1 (charting China’s increase in GDP from 1960 to 2010).

74. See, e.g., *id.* at 26 (“Reforms in the enterprise sector must begin with the recognition that government ownership is widespread and varied, covering most sectors and ranging from outright ownership to controlling interest to minority shareholder.”).



is not surprising that China's at least nominally communist government has not fully embraced free-market mechanisms. Rather than following the Washington Consensus, some scholars have argued that China has created its own consensus that focuses on economic development as guided by the government's heavy hand: "The China Model, or Beijing Consensus, features an all-powerful political leadership that effectively manages social and economic affairs . . . ."<sup>75</sup>

When scholars have addressed China's impressive growth, they have often noted the puzzle<sup>76</sup> of squaring China's experience with the beliefs of the Washington Consensus.<sup>77</sup> China has been heralded as a challenge and important counterexample to the rights hypothesis.<sup>78</sup> Others have noted that China achieved its impressive economic growth "without a legal system worthy of the name."<sup>79</sup> While acknowledging that China has very noticeably deviated from the standard law and development narrative, this Article does not want to suggest that China is a lone outlier. Each country's story of development is unique and none has strictly adhered to the Washington Consensus's blueprint of free market ideology.<sup>80</sup>

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75. Kenneth Lieberthal & Jisi Wang, *Addressing U.S.-China Strategic Distrust* 10 (John L. Thornton China Ctr. Monograph Series no. 4, Mar. 2012); see also Teemu Ruskola, *Where is Asia? When is Asia? Theorizing Comparative Law and International Law*, 44 U. CAL. DAVIS L. REV. 879, 888-89 (2011) ("Much like Asian Values, the Beijing Consensus prescribes economic development without democracy, offering China as a global model.").

76. See, e.g., Davis & Trebilcock, *supra* note 58, at 934 ("[T]he most radical interpretations of China's recent astounding rates of economic development, despite weak ratings on most conventional criteria for quality of laws and legal institutions (the so-called 'China Enigma'), suggest that formal laws and legal institutions are not central determinants of a country's economic development.").

77. See RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* 19 (2002) (commenting that economists, political scientists, and legal scholars are left "to puzzle over the success of China's economy despite market and legal imperfections"); see also YASHENG HUANG, *CAPITALISM WITH CHINESE CHARACTERISTICS: ENTREPRENEURSHIP AND THE STATE*, at xiii (2008) ("Much of the economic research on the Chinese reforms revolves around the following question: Given the manifest inefficiencies in the Chinese economy, how do we explain its growth?"); Trebilcock & Veel, *supra* note 61, at 427 ("China is an important case study in the examination of the relationship between protection of property rights and economic development, given that it has achieved dramatic rates of economic growth despite weak formal property rights protection.").

78. See generally Demsetz, *supra* note 12 (articulating the rights hypothesis).

79. Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* 13 (Carnegie Endowment for Int'l Peace Rule of Law Series no. 30, Sept. 2002).

80. See generally JOE STUDWELL, *HOW ASIA WORKS: SUCCESS AND FAILURE IN THE WORLD'S MOST DYNAMIC REGION* (2013) (researching nine Asian countries, including China, to challenge the standard narrative of the "East-Asian economic miracle"). For a thorough discussion of the complexities of tailoring foreign assistance programs aimed at promoting democracy, see generally CAROTHERS, *supra* note 51; see also William P. Alford, *Exporting "The Pursuit of Happiness,"* 113 HARV. L. REV. 1677, 1680 (2000) (reviewing THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999)) ("[E]ven as *Aiding Democracy Abroad* argues persuasively

Compared to the development of other countries, China's experience has just been more obviously at odds with the prescription of the Washington Consensus, and this divergence is all the more apparent because of the great attention paid to China's meteoric economic rise in recent decades.

A number of scholars have flagged China's development path as at least inconsistent with the rights hypothesis, but, until recently, few have delved into substantive analysis.<sup>81</sup> A small group of scholars has started to take an in-depth look at China's relationship to the broader law and development field. For example, scholars have analyzed how changes to China's formal property law regime interact with the rights hypothesis.<sup>82</sup> Others have questioned whether China's economic success can be explained by a reliance on interpersonal norms outside of the formal legal system.<sup>83</sup> This approach leaves open the possibility that the legal system will eventually take on a more important role, and, at that time, China's experience might start to align with the rights hypothesis. Still others have proposed that China has flipped the rights hypothesis on its head and questioned whether China's economic growth might have spurred legal developments instead of the other way around.<sup>84</sup> There continues to be a dearth of empirical analysis to back up the various claims, in significant part due to the substantial challenges that conducting research about China poses.<sup>85</sup> There is considerable skepticism regarding the accuracy of available macroeconomic figures, and it is

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that a principal failing of such programs has been their tendency to treat situations fraught with complex political and normative considerations as amenable to relatively formulaic solutions . . .").

81. See Upham, *supra* note 79, at 13 ("No one would claim that China has had the legal institutions envisioned by the World Bank during most of this period, and yet, except for a series of conferences by the Asian Development Bank, there has been little interest in finding out how this has been done or whether it can be replicated elsewhere.").

82. See generally Upham, *supra* note 10, at 556 (arguing that "China does not need property law to create wealth, but to manage it and to provide some measure of justice in the face of the social dislocation that inevitably accompanies rapid economic growth").

83. See KENNETH DAM, *THE LAW-GROWTH NEXUS* 277 (2006) ("Rather the Chinese experience is consistent with Rodrik's view that considerable development is possible without strong legal institutions but sustainable growth to higher per capita levels requires considerable development of legal institutions."); see generally Dani Rodrik, *Introduction: What Do We Learn from Country Narratives?*, in *IN SEARCH OF PROSPERITY: ANALYTIC NARRATIVES ON ECONOMIC GROWTH* 8–15 (Dani Rodrik ed., 2003).

84. See Clarke, Murrell & Whiting, *supra* note 11, at 420 ("If anything, economic success has fostered the development of law, rather than the reverse.").

85. A notable exception is Professor Xin He who undertook an empirical study of the economic performance of two basic-level courts. Xin He, *A Tale of Two Chinese Courts: Economic Development and Contract Enforcement*, 39 *J.L. & SOC'Y* 384, 384–409 (2012). Professor He suggests that both economic and non-economic factors are responsible for improvements in formal contract enforcement. *Id.* at 405.

unclear how to determine empirically whether law influences those figures.<sup>86</sup>

Policymakers at international organizations have likewise failed to grapple with the role of criminal law in China's economic development. In 2013, the World Bank and the PRC's Development Research Center of the State Council released a joint report that sought to develop "a strategic framework for reforms that could assist China's policy making as well as guide future China–World Bank relations."<sup>87</sup> That report mentions criminal law only once in passing, in the midst of a section praising China's progress in protecting intellectual property rights.<sup>88</sup> The report, which is nearly four hundred pages long, addresses neither the contribution of criminal law to China's economic growth to date nor the role that it might play in creating "a new development strategy for 2030."<sup>89</sup> The report instead focuses on the standard prescriptions of the rights hypothesis: "As the government transitions away from direct intervention in enterprise and market activities and toward creating a policy and regulatory environment supportive of free and fair competition, it must also safeguard the rule of law."<sup>90</sup> Admittedly, criminal law has not been within the standard purview of the World Bank's work, and no organization can do everything.<sup>91</sup> While acknowledging these limitations, the unduly narrow rights hypothesis has had too strong a hold on the law and development narrative. Recent indications are that the World Bank is recognizing the need to expand the discussion and is starting to explore what role criminal law might play in its work.<sup>92</sup>

The literature on China's relationship to the law and development field has not reached a uniform conclusion regarding whether China merely deviates from the general assumptions or fundamentally undermines their basic underpinnings.<sup>93</sup> Nor can one

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86. See Eve Cary, *The Curious Case of China's GDP Figures*, DIPLOMAT (Mar. 5, 2013), <http://thediplomat.com/2013/03/the-curious-case-of-chinas-gd-figures/> [<http://perma.cc/SQ9G-3DL8>] (archived Jan. 14, 2014) ("There are a number of reasons for doubts about the accuracy of China's GDP.").

87. WORLD BANK, *supra* note 8, at xiii.

88. *Id.* at 177–78 ("Not only did China launch reforms in 2008 to support the creation, utilization, management, and protection of intellectual property, but it may be the only country to have criminalized violations of intellectual property rights.").

89. *Id.* at 15.

90. *Id.* at 20; *see also id.* ("Where contract disputes arise, whether between private parties or between private entities and the State, the disputants should have access not only to legal recourse but also to a transparent and effective judicial system that imparts justice without fear or favor.").

91. WORLD BANK, LEGAL NOTE ON BANK INVOLVEMENT IN THE CRIMINAL JUSTICE SECTOR 1 (Feb. 9, 2012) ("[W]hile the Bank has been engaged in justice reform for over twenty years, the Bank has only more recently become involved in the criminal justice sector as a logical continuation of its overall justice reform work.").

92. *Id.*

93. *See supra* notes 82–84 and accompanying text.

expect the causal interplay between development and law to be crystal clear because there remain too many variables and complex interactions. The experience of China's booming economic growth is not an easily observed and analyzed interaction in a controlled Petri dish. These limitations, however, do not explain the failure even to question what role the PRC government's choices with respect to criminal law may have played in the story of China's economic growth.

### C. Literature on China's Economic Growth and Crime

Compared to the relatively thin literature addressing how China's experience diverges from the standard law and development narrative, there is a selection of work analyzing how crime changes with economic development both across countries and specifically in China.<sup>94</sup> China's economic boom brought both legal and illegal entrepreneurial activity, and China has continuously revised its criminal law to adapt to these changing circumstances.<sup>95</sup> There was little need for an anti-money-laundering law in Mao-era China when the government tightly constrained the circulation of money and used rationing to distribute consumer goods.<sup>96</sup> And, especially during the height of the People's Communes—large rural organizations that managed practically all economic and social activities—acquisitive crime was not a major concern when there was little to steal and

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94. See, e.g., Shanhe Jiang, *Social and Crime Control with Chinese Characteristics*, in ROUTLEDGE HANDBOOK, *supra* note 26, at 27 ("Since economic reform commenced in 1978, China's gross domestic product has increased by an average of more than 9 percent annually. At the same time, China's crime rate has had a striking increase." (internal citation omitted)); Richard R. Bennett, *Development and Crime: A Cross-National, Time-Series Analysis of Competing Models*, 32 THE SOC. Q., Autumn 1991, at 343 (evaluating "competing explanatory models by analyzing the effects of level of development and rate of growth on crime rates"); Paolo Buonanno, *The Socioeconomic Determinants of Crime: A Review of the Literature* (Working Paper, Series 2003) (discussing theoretical and empirical papers regarding the economics of crime); Jianhong Liu, *Crime Patterns During the Market Transition on China*, 45 BRIT. J. CRIMINOLOGY 613, 626 (2005) (positing that crime data "shows that economically motivated crimes have generally increased faster than less or non-economically motivated crimes").

95. See Susyan Jou, Bill Heberton & Liqun Cao, *The Development of Criminology in Modern China: A State-Based Enterprise*, in ROUTLEDGE HANDBOOK, *supra* note 26, at 16 ("Rising crime rates, however, have also been one of the accompaniments in China's march to market liberalization and economic prosperity."); DUTTON, *supra* note 31, at 257–58 (graphically noting a low crime rate in 1967–68 of 21 per 100,000 people as compared with 294 per 100,000 people in 2000).

96. See Zhonghua Renmin Gongheguo Fanxiqian Fa (中华人民共和国反洗钱法) [Anti-Money Laundering Law of the PRC] (promulgated by the Nat'l People's Cong., Oct. 31, 2006, effective Jan. 1, 2007), available at [http://www.chinacourt.org/flwk/show1.php?file\\_id=114077](http://www.chinacourt.org/flwk/show1.php?file_id=114077); NAUGHTON, *supra* note 70, at 81 ("From 1955 until well into the 1980s, ration coupons were required for the purchase of grain and cotton cloth.").

collective living arrangements made it difficult to squirrel away stolen property for future use.<sup>97</sup> The situation is strikingly different today. For instance, opportunities for theft tied to complex financial transactions have blossomed, with the PRC government seeking the return of Chinese nationals who allegedly absconded to the United States after defrauding the Bank of China of approximately \$485 million.<sup>98</sup> As Professor Susan Trevaskes explained:

Chinese authorities have been all too aware of the social impact of this exponential growth in the incidence of particular types of serious crime that is a corollary of China's post-Mao economic transition towards the market. The timing and nature of the emergence of this serious crime phenomenon indicate that, in China as elsewhere, serious crime is both enabled by and linked inextricably with national economic growth and rapid social change.<sup>99</sup>

While this Article's focus is on how the PRC government's choices with respect to criminal law can at least in part be explained by a desire to fuel economic growth, it recognizes that reality is more complicated. It is insufficient to merely say that criminal laws can curb activities that are detrimental to a country's economic success and can encourage a more stable atmosphere for growth. As the economy grows, further changes to the criminal law are needed. Indeed, as China's economy has grown, so have the opportunities for new and more expansive criminal activity, which has combined with the challenges of social upheavals accompanying rapid growth.<sup>100</sup> For example, China has toughened its approach to drunk driving in recent years.<sup>101</sup> By definition, the offense of "driving while intoxicated" requires both vehicles (usually cars) and intoxicants (usually alcohol). Only when an economy reaches a level where both

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97. Cf. Trebilcock & Veel, *supra* note 61, at 427 (citing the effective abolishment of private property in rural land by 1956).

98. Press Release, Dep't of Justice, Former Bank of China Managers and Their Wives Sentenced for Stealing More Than \$485 Million, Laundering Money Through Las Vegas Casinos, (May 6, 2009), available at <http://www.justice.gov/opa/pr/2009/May/09-crm-446.html> [<http://perma.cc/449K-D2BT>] (archived Jan. 14, 2014); see also *United States v. Xu*, 706 F.3d 965 (9th Cir. 2013) (affirming the convictions and vacating the sentences of four Chinese nationals who participated in a scheme to steal funds from the Bank of China).

99. SUSAN TREVASKES, *POLICING SERIOUS CRIME IN CHINA: FROM 'STRIKE HARD' TO 'KILL FEWER'* 3-4 (2010).

100. See, e.g., Yue Ma, *The Police System in China*, in *ROUTLEDGE HANDBOOK*, *supra* note 26, at 64, 67 ("The implementation of the policy of economic modernization brought about rapid economic development. This economic development in turn brought about changes in socioeconomic conditions and an unprecedented rise in crime.").

101. See *Chinese Lawmakers Suggest Harsher Penalties for Drunk Driving Crimes*, XINHUANET (Aug. 25, 2010, 9:57 PM), [http://news.xinhuanet.com/english2010/china/2010-08/25/c\\_13462528.htm](http://news.xinhuanet.com/english2010/china/2010-08/25/c_13462528.htm) [<http://perma.cc/9G6M-UTD6>] (archived Jan. 14, 2014) (describing a draft amendment increasing penalties for drunk driving and street racing).

cars and alcohol are readily available does drunk driving become a widespread concern.<sup>102</sup>

In other words, criminal law is neither wholly reactive nor proactive: the PRC government has continuously adapted criminal law to address emerging issues by both reacting to unforeseen problems and anticipating problems on the horizon. This ongoing dynamic between economic development and criminal law is a universal issue, and there remains much debate regarding how economic development generates new types of crime and more crime overall.<sup>103</sup>

China presents a special challenge to criminologists' efforts to explain crime rates because of its lack of transparency with respect to how statistics are compiled,<sup>104</sup> combined with concerns of underreporting.<sup>105</sup> Although underreporting of crimes is not unique to China, the problem is estimated to be particularly acute in China because of the incentive system under which police operate.<sup>106</sup> The fact that what might be considered a "crime" in other countries is classified as an administrative penalty under China's Security Administration Punishment Law or one of China's other quasi-criminal law schemes further complicates efforts to quantify crime rates.<sup>107</sup> In addition, while it is a truism that China is a large and complex country, this reality greatly hinders the compilation of accurate data from the numerous local public security offices on up.<sup>108</sup> Scholars have further raised concerns that official statistics

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102. Cf. JAMES B. JACOBS, DRUNK DRIVING: AN AMERICAN DILEMMA, at xiv (1989) ("For those who are not alcohol abstainers, active participation in American social life practically ensures a high probability of at least occasional driving after drinking.").

103. See, e.g., Donald C. Clarke & James V. Feinerman, *Antagonistic Contradictions: Criminal Law and Human Rights in China*, 141 CHINA Q. 135, 135 (1995) ("Newer and more sophisticated studies found the roots of crime in features of contemporary Chinese society such as rising expectations and dissatisfaction with poverty, the transitional structures of economic reform such as the dual price system, and the overcentralization of power and the inadequacy of supervisory institutions.").

104. See Phil He, *The Politics of Numbers: Crime Statistics in China*, in ROUTLEDGE HANDBOOK, *supra* note 26, at 147, 152 ("[V]ery few published technical notes are available on how the Chinese crime statistics are recorded, compiled, and validated.").

105. See generally Olivia Yu & Lening Zhang, *The Under-Recording of Crime by Police in China: A Case Study*, 22 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 252, 253 (1999) ("[W]e suggest that the observed problem of crime statistics is a result of police responding to the social and organizational pressures they encounter in a fast changing period of China's history.").

106. *Id.* at 255 (discussing low reporting rates by PRC police).

107. See generally BIDDULPH, *supra* note 32.

108. Cf. Carl F. Minzner, *Riots and Cover-Ups: Counterproductive Control of Local Agents in China*, 31 U. PA. J. INT'L L. 53, 61 (2009) (discussing China's "sprawling authoritarian bureaucracy").

regarding criminal justice in China might well say more about what the government wants to convey than what is actually occurring.<sup>109</sup>

With this recognition of the complex bidirectional interplay between economic growth and crime as a backdrop, the next Part examines how criminal law is a part of China's law and development experience. It looks retrospectively to explain how the PRC leadership has used criminal law in service of economic ends, particularly since the late 1970s.

### III. THE HISTORICAL VIEW

Since the reform era began, the PRC government has used criminal law toward economic ends.<sup>110</sup> This is not to say that the sole driving force behind criminal law reforms over the past three decades has been to create an environment that is conducive to economic growth. Development goals, however, are part of China's criminal law story. What is lacking in the law and development literature—and a gap that this Article seeks to fill—is a detailed discussion of the relationship between criminal law and China's economic growth strategy. Beijing has used law to fuel its economy, but not necessarily as the Washington Consensus encourages.

In simple terms, criminal law has helped to provide structure to society or, as termed herein, layers of stability that are a crucial foundation for a vibrant economy. This Article proceeds from the hopefully uncontroversial premise that chaos is not conducive to a healthy economy.<sup>111</sup> Kinship ties or other non-state-sponsored institutions can help create a stable base for economic transactions,<sup>112</sup> but the strength of these bonds becomes strained as

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109. See, e.g., Daniel J. Curran, *Criminological Research in China: Challenges, Rewards, and the Need for Sensitivity*, in ROUTLEDGE HANDBOOK, *supra* note 26, at 160, 166 (“It is fair to say that crime statistics are often filtered through an official lens for public consumption.”).

110. See JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 288 (2008) (Economic development has since 1978 remained a top priority for the post-Mao leadership. Crimes against such development are thus treated seriously and punished heavily.); see also *supra* notes 26–31 and accompanying text (defining use of “criminal law”).

111. Cf. Anne Barnard, *Syria Weighs Its Tactics as Pillars of Its Economy Continue to Crumble*, N.Y. TIMES (July 13, 2013), [http://www.nytimes.com/2013/07/14/world/middleeast/government-in-syria-searches-for-answers-as-economy-crumbles.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/14/world/middleeast/government-in-syria-searches-for-answers-as-economy-crumbles.html?pagewanted=all&_r=0) [<http://perma.cc/4WDJ-NUQQ>] (archived Jan. 14, 2014) (explaining how the “pillars of Syria's economy have crumbled” as government and rebel forces clash).

112. See, e.g., Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599 (2000) (approaching analysis of Chinese “Company Law” from the perspective of kinship); see generally HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD (June Abbott trans., 1989) (describing how

transactions increasingly occur between people who do not share close familial or geographic bonds. At this point, the state can step in and impose order, possibly through policy edicts with no basis in formal law passed by the legislature. Alternatively, the state can grant property and contract “rights,” meaning not just general assurances of stability in economic assets but stability because those “rights” are backed up by courts or other vehicles of legal enforcement.<sup>113</sup> Of course, too much order—in the form of a totalitarian state along the lines of North Korea—can inhibit growth by squelching nearly all economic activity.<sup>114</sup> The PRC government’s challenge has been to find the growth-enhancing sweet spot on the continuum between a societal free-for-all and an overwhelmingly repressive state.

This Part explains how, since the reform era began, the PRC government has used criminal law to establish a fundamental sense of security in people’s lives, strengthen people’s ability to obtain and maintain property, and, more generally, nurture an increasingly complex economy. It addresses three layers of stability and argues that China has used criminal law to enhance each type: basic (Part III.A), property (Part III.B), and market (Part III.C). All three of these layers are reflected in the purposes stated in Article 2 of the PRC Criminal Law,<sup>115</sup> which makes apparent the Law’s assumed role as a mechanism for protecting both the political power of the state and state-driven economic development. The stated purposes include defending the security of the socialist system (basic stability);<sup>116</sup> protecting property owned by the state, collectively owned by the working people, and privately owned by citizens (property stability);

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underdeveloped Third World Countries’ internal economies and political alliances function, taking Lima, Peru, as a case study).

113. See Upham, *supra* note 10, at 555 (defining property rights “as claims that are defined by formal legal processes and institutions, that is, through legislation or judicial decision, and that are enforceable by government-provided courts”).

114. Christine Kim, *North Korea Posts 2nd Successive Year of Growth*, REUTERS (July 11, 2013), <http://www.reuters.com/article/2013/07/12/korea-north-economy-idUSL4N0FIOEG20130712> (“Despite the rise in output [in 2012], North Korea remains one of the poorest countries on earth and its economy is around a thirtieth the size of industrial powerhouse South Korea.”).

115. *Zhonghua Renmin Gongheguo Xingfa* (中华人民共和国刑法) [PRC Criminal Law] art. 2 (promulgated by the Nat’l People’s Cong., July 1, 1979, effective as amended Feb. 25, 2011) (China).

116. Security here includes a sense of social order. As Susan Trevaskes notes:

The “social order” is a general term that refers to a state of stability in society characterized by a highly ordered and stable social environment. A sound social order is manifest in orderly and stable economic production and social relations in the community. Violent and contact crimes, such as homicide, rape, arson, assault, kidnapping, and armed robbery, threaten the public’s sense of security.

TREVASKES, *supra* note 99, at 182 n.2.



and maintaining public order and economic order, and safeguarding the smooth progress of socialist construction (market stability).<sup>117</sup>

The focus here is on China's central government and its top-down approach to criminal law. Though implementation may differ on the local level, the formal criminal laws emanate from Beijing.<sup>118</sup> The central leadership has allowed limited local experimentation but has both retained formal lawmaking power and directed macro-policy decisions.<sup>119</sup> Moreover, this Article adopts an instrumentalist view.<sup>120</sup> The primacy of a strong central government and the lack of separation of power leaves little, if any, doubt that legislation reflects the central leadership's priorities. This view of a strong governmental hand in using criminal law for economic gains comports with the conventional account of China in the reform period as pursuing legal reforms in service of economic ends while still holding tightly to societal reins and successfully maintaining a single-party state.<sup>121</sup>

### A. *Basic Stability*

The PRC government first used criminal law to create a fundamental sense of security upon which economic activity can grow. This "basic stability" is necessary for society to function in an orderly manner and not in some variant of a Hobbesian state of nature.<sup>122</sup> In other words, this Article refers to basic stability as a core sense of security that enables people to not need to sleep with one eye open. The law and development literature has recognized the need for a minimal level of social order for economic growth,<sup>123</sup> and this need is universal. What distinguished China in the late 1970s when economic reforms took off was the pressing need for order after decades of turmoil, including a protracted conflict with Japan prior to and during World War II, a civil war, and further domestic upheavals after the founding of the PRC, culminating in the tumultuous years of

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117. PRC Criminal Law, *supra* note 115, at art. 2 (2011 version).

118. See CHEN, *supra* note 110, at 262–66 (charting promulgation of the Criminal Law by the NPC in 1979 and subsequent revisions).

119. The primacy of planning by the central leadership has been recently underscored by the push for "top-level design" that emphasizes macromanaging in hopes that "China would seek to overcome the 'fragmented authoritarianism' that characterized policymaking since reforms began in favor of a more centralized developmental state." Bruce Gilley, *Policy Reform Measures Highlight Potential for Transformation*, CHINA BRIEF, Mar. 28, 2013, at 5.

120. See *supra* note 29.

121. Cf. Peerenboom & Bugaric, *supra* note 59, at 5–8 (China and the East Asian Model).

122. See THOMAS HOBBS, *LEVIATHAN* 174–203 (The Floating Press 2009) (1651).

123. See, e.g., DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* 3–4 (1973) (citing suppression of piracy as example of property protection that helped the rise of the West).

the Cultural Revolution.<sup>124</sup> At the height of the Cultural Revolution, the government-run *People's Daily* went so far as to publish an editorial "In Praise of Lawlessness" that celebrated the chaos into which society had fallen.<sup>125</sup>

Consequently, when Deng took the helm, the leadership was not merely in the position of attempting to replace informal kinship ties with state-provided mechanisms for creating stability, such as policy edicts or laws backed up by credible enforcement. Instead, it needed to chart a path out of the havoc of the Cultural Revolution.<sup>126</sup> Deng himself frequently emphasized the need for stability at all costs, as vividly captured in his 1989 phrase, "stability above everything."<sup>127</sup> To the extent there were structures for social order during the Cultural Revolution that at least kept trains running and electricity flowing,<sup>128</sup> they "would begin to crumble because they had been built upon the political activism of local, Maoist-inspired mass-line organs and been kept in place by a tight system of demographic policing organized around the household register."<sup>129</sup>

A brief historical synopsis is helpful to understanding the disarray prior to the reform period of the late 1970s. After Mao Zedong established the PRC in 1949, the new communist government worked to bring order to a vast country that had been wracked by decades of war and internal strife.<sup>130</sup> This control was without basis in formal laws passed by the National People's Congress (NPC) but

124. See generally JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 437–41 (1990) (detailing the social, political, and economic history of China through 1985).

125. KLAUS MÜHLHAHN, *CRIMINAL JUSTICE IN CHINA: A HISTORY* 191 (2009) ("On February 14, 1967, the *People's Daily* carried an editorial that called for the complete destruction of the bourgeois legal order so that proletarian law could be established."); see ALEXANDER V. PANTSOV, *MAO: THE REAL STORY* 577 (2012) ("At the start of the Cultural Revolution, Mao sent Jiang Qing a letter in which he welcomed 'complete disorder under Heaven.'").

126. See Dai, *supra* note 6, at 157 ("From 1966 to 1976, the Cultural Revolution produced ten years of lawlessness and destruction. These years of havoc tore apart the legal system that had been established in the early days of the People's Republic, leaving the already-immature system utterly destroyed.")

127. Jiangyu Wang, *The Political Logic of Securities Regulation in China*, in *THE DEVELOPMENT OF THE CHINESE LEGAL SYSTEM: CHANGE AND CHALLENGES* 227, 231 (Guanghua Yu ed., 2011).

128. Hungdah Chiu, *Institutionalizing a New Legal System in Deng's China*, in *CHINA IN THE ERA OF DENG XIAOPING* 60, 99 (Michael Y. M. Kau & Susan H. Marsh eds., 1993), reprinted in *OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMPORARY ASIAN STUDIES* 40 (Hungdah Chiu ed., 1994) (comments by William C. Jones) ("Another aspect of the system is that it is rigidly regulated, even during the most violent years of the Cultural Revolution. Trains continued to run, electricity was produced and distributed, crops were sown, and salaries were calculated and paid.")

129. DUTTON, *supra* note 31, at 256.

130. See JEROME ALAN COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949–1963: AN INTRODUCTION* 9 (1968) ("During this period [1949 to 1953] the criminal process served as a blunt instrument of terror, as the Chinese Communist Party proceeded relentlessly to crush all sources of political opposition and to rid society of apolitical but antisocial elements who plagued public order.")

rather was based on Party directives and other informal assertions of the communists' control.<sup>131</sup> The new government rejected the laws put in place by the Republic of China government—laws that were carried by Chiang Kai-shek and his ruling Nationalist Party (also known as the *Kuomintang*) to Taiwan—but failed to supplant them with new laws.<sup>132</sup> Until Deng Xiaoping's rise to power, China operated largely in a legal vacuum, often with ruthless consequences. As documented by historian Frank Dikötter in his book on the period from 1945 to 1957, "[T]he Chinese Communist Party refers to its victory in 1949 as a 'liberation'. . . . [I]n China the story of liberation and the revolution that followed is not one of peace, liberty and justice. It is first and foremost a history of calculated terror and systematic violence."<sup>133</sup>

Although there were glimmers of rhetoric that focused on the need to foster economic growth, the Mao years placed ideology above pragmatic concerns about development. During the early years of the PRC, the government waged campaigns against the "three evils" (corruption, waste, and bureaucratism) and "five poisons" (bribery, tax evasion, stealing state property or obtaining it by fraud, cheating in workmanship and materials, and stealing state economic intelligence).<sup>134</sup> The new government lauded the economic and thought-reform benefits of these campaigns.<sup>135</sup> Early attempts to use the coercive force of the state—even if not formal law—to right China's economic ship were jettisoned in favor of grandiose ideological campaigns. For instance, the Great Leap Forward (1958–1961) and concomitant famine not only failed to be growth supporting but was actually growth destroying, resulting in the deaths of an estimated tens of millions of people.<sup>136</sup>

For decades the PRC operated without a formal criminal law, criminal procedure law, or laws directed at economic activities.<sup>137</sup> Instead, the leadership put in place a patchwork of regulations, such as the 1951 Regulations on the Punishment of Counter-

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131. See CHEN, *supra* note 110, at 261 ("[I]t took some 29 years for the communist authorities to finally produce a comprehensive criminal code.").

132. Chiu, *supra* note 128, at 1–2.

133. FRANK DIKÖTTER, *THE TRAGEDY OF LIBERATION: A HISTORY OF THE CHINESE REVOLUTION, 1945–57*, at ix (2013).

134. COHEN, *supra* note 130, at 312–13.

135. See *id.* at 314 (noting government praise for the programs because they improved the country's economic situation).

136. See JISHENG YANG, *TOMBSTONE: THE GREAT CHINESE FAMINE, 1958–1962*, at 430 (Stacy Mosher & Guo Jian trans., Edward Friedman, Guo Jian & Stacy Mosher eds., 2012) (estimating that thirty-six million people starved to death during the Great Leap Forward).

137. See CHEN, *supra* note 110, at 261, 300 (describing the enactment of the Criminal Law and the Criminal Procedure Law); see also Clarke, Murrell, & Whiting, *supra* note 11, at 381–87 (charting the development of Chinese economic laws from 1978 to 2004).

Revolutionaries, combined with various Party rules and directives.<sup>138</sup> Mao went so far as to openly discourage efforts for a more systematic legal system: people who had the audacity to suggest legal reforms were among the many targets of the Anti-Rightist Movement in the late 1950s.<sup>139</sup> Early efforts to establish even basic stability deteriorated as China entered the traumatic years of the Great Leap Forward.<sup>140</sup> Not long thereafter, any attempts to build a legal system that supported a stable environment were obliterated during the Cultural Revolution (1966–1976). The primacy of fickle ideological battles over reliable laws is illustrated by the Mao-era approach to combating corruption:

[P]rior to 1979, China did not have a formal criminal code that defined corruption and differentiated it from other offenses. During the Cultural Revolution period, the definition of corruption was only ad hoc and tended to involve political criteria linked to the intense factional and class struggles of the times.<sup>141</sup>

Mao himself commented, “[T]he Civil Law, the Criminal Law, who remembers those texts? I participated in the drafting of the Constitution, but even I don’t remember it.”<sup>142</sup>

When Deng reemerged on the scene in the late 1970s, China’s economy was in shambles and the populace was exhausted after years of constant upheavals, culminating in the “disastrous Cultural Revolution”:<sup>143</sup>

Due to the damage caused by the Cultural Revolution, by the end of the 1970s, China’s economy was on the verge of utter disaster. In 1978, China was considered one of the poorest countries in the world, with a per capita [GDP] of only [Renminbi (RMB)] 379. The legal system was a complete wreck. In 1978, the Standing Committee sorted out all the previously promulgated legislation and discovered that out of 134 laws

138. See Kuisong Yang, *Reconsidering the Campaign to Suppress Counterrevolutionaries*, 193 CHINA Q. 102, 105–106 (2008) (discussing the implementation of the campaign); see also MÜHLHAHN, *supra* note 125, at 179 (noting that in the early years of the PRC, “some of the most frequent crimes, including theft, robbery, and rape, were not covered by any laws made public during this period of time”).

139. See COHEN, *supra* note 130, at 14 (describing the targets of the anti-rightist movement); see also PANTSOV, *supra* note 125, at 407 (“During the next two years [1955–57] more than eighty thousand ‘counterrevolutionaries’ were subject to repression. . . . More than four thousand people committed suicide. The ideological campaign among intellectuals also accelerated.”).

140. See generally YANG, *supra* note 136 (analyzing the events that lead to the 1958–1962 famine and the consequences thereof); see also NAUGHTON, *supra* note 70, at 72 (“It was the largest famine of the twentieth century, anywhere in the world.”).

141. ANDREW WEDEMAN, *DOUBLE PARADOX: RAPID GROWTH AND RISING CORRUPTION IN CHINA* 86 (2012).

142. RACHEL E. STERN, *ENVIRONMENTAL LITIGATION IN CHINA: A STUDY IN POLITICAL AMBIVALENCE* 19 (2013).

143. EZRA F. VOGEL, *DENG XIAOPING AND THE TRANSFORMATION OF CHINA* 53 (2011).

and regulations, 111 were already ineffective; only twenty-three were still in effect.<sup>144</sup>

Deng summarily rejected Mao's path and used the state's power to create order instead of revolution: "Deng's vision was that economic prosperity would stabilize society and preserve the state's power. Economic growth, then, became the political purpose of business."<sup>145</sup> A first order of business was to restore a sense of stability that was lacking during the years of revolutionary fervor. Deng looked to law as one means of doing so.<sup>146</sup> Prominent academic and public intellectual, He Weifang, explained the post-1979 period of legal-system construction as "inextricably linked to the 'bitterness of lawlessness' that national leaders like Deng Xiaoping and Peng Zhen experienced during the 'Cultural Revolution.'"<sup>147</sup>

Under Deng's leadership, the NPC quickly enacted a new criminal law and criminal procedure law, and Mao's wife, Jiang Qing, and her cohorts, who were responsible for some of the most vicious attacks during the Cultural Revolution, were brought to trial.<sup>148</sup> This largely ceremonial "Gang of Four" trial (guilty verdicts were never in doubt) received extensive media coverage.<sup>149</sup> Seeing a court lock away people who were accused of destroying thousands of lives finally allowed the Chinese people to see an end to widespread chaos and to believe that the government was restoring a sense of fundamental security to their lives.<sup>150</sup> The members of the Gang of Four were convicted with sentences ranging from 20 years in prison to death, which was later commuted to a lengthy prison sentence.<sup>151</sup>

144. Dai, *supra* note 6, at 158.

145. Spalding, *supra* note 46, at 389.

146. Central Committee of the Communist Party of China, Communique of the Third Plenary Session of the 11th CPC Central Committee (Dec. 22, 1978), available at [http://www.bjreview.com.cn/special/third\\_plenum\\_17thcpc/txt/2008-10/10/content\\_156226.htm](http://www.bjreview.com.cn/special/third_plenum_17thcpc/txt/2008-10/10/content_156226.htm) [<http://perma.cc/97LW-JV7G>] (archived Jan. 19, 2014). ("[T]here must be laws for people to follow, these laws must be observed, their enforcement must be strict and law breakers must be dealt with.")

147. He Weifang, *Reform Itself Changes National Circumstances*. CHINA BUS. VIEW (May 2012), translated in DUI HUA HUM. RTS. J. (June 28, 2012), available at [http://www.duihuahrjournal.org/2012\\_06\\_01\\_archive.html](http://www.duihuahrjournal.org/2012_06_01_archive.html) [<http://perma.cc/79JJ-6PGQ>] (archived Jan. 19, 2014).

148. See CHEN, *supra* note 110, at 262–63 (describing the enactment of the 1979 Criminal Law); *id.* at 300–02 (describing the enactment of the 1979 Criminal Procedure Law); Dai, *supra* note 6, at 165 (noting that Jiang Qing's trial "attracted worldwide attention"); VOGEL, *supra* note 143, at 175–83 (recounting the arrest and trial of the Gang of Four).

149. See Ian Dobinson, *The Criminal Law of the People's Republic of China (1997): Real Change or Rhetoric?*, 11 PAC. RIM L. & POL'Y J. 1, 11–12 (2002) (describing the impact of the Gang of Four trial).

150. See *id.* (explaining that the trial "allowed the Chinese to demonstrate that the lawlessness of the Cultural Revolution was over and that a period of law and order based on specific legislation was now beginning").

151. See *China: Member of China's Notorious Gang of Four Dies* (Zhang Chunqiao), FIN. TIMES (May 10, 2013, 12:33 AM), <http://www.freerepublic.com/focus/f->

Beyond using criminal law to instill confidence in the ability of the new leadership to protect people from the worst excesses of government officials, the emphasis on combating crime served a more general goal of creating a stable base for economic growth. A heavy emphasis on cracking down on crime “promoted social stability as the means for ensuring economic success in this crucial era of unprecedented economic growth.”<sup>152</sup> In part, the government relied on means that were at most thinly cloaked as formal “law.” For instance, the use of “strike hard” campaigns against various types of crime beginning in the early 1980s is well documented by Professor Trevaskes.<sup>153</sup> She recounts how the leadership struggled to respond to the increasing opportunities for crime during the early days of dramatic economic growth.<sup>154</sup> As the leadership adapted to the new reality, “[c]ast as a means to help achieve Reform, campaigns employed the flagrant regulatory potency of ‘severe and swift punishment’ to help secure the social stability on which China’s burgeoning market economy depended. Social stability was elevated as a primary precondition to economic prosperity.”<sup>155</sup> While this campaign approach stretched the bounds of the legal system and sometimes flagrantly flouted the formal law, the government nonetheless maintained a commitment to using the legal system as a primary component of its strategy for establishing basic security:<sup>156</sup> “A significant expectation was placed on police, prosecutors and judges who were to play a key role in guaranteeing a successful transition to economic modernization by ensuring a zero tolerance towards criminal deviance.”<sup>157</sup>

The Deng government could have continued the Mao-era practice of exclusively relying on campaigns based on Party policy, but it did not choose this path. Instead, blackletter criminal laws—as enforced

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news/1400720/posts [http://perma.cc/VG5X-F5E6] (archived Jan. 19, 2014) (“Zhang received a death sentence . . . [which was] commuted to life imprisonment . . . Jiang Qing . . . was sentenced to death . . . [H]er sentence was commuted to life imprisonment . . . Yen Wenyuan . . . was freed in 1996 after serving a 20-year term . . . The fourth and youngest gang member, Wang Hongwen, died of liver cancer . . . while serving a life sentence.”); see also PANTSOV, *supra* note 125, at 576 (retelling the punishments of the Gang of Four and subsequent suicide of Jiang Qing).

152. TREVASKES, *supra* note 99, at 7.

153. See generally *id.* at 3 (“Th[e] rollercoaster ride of successive campaigns against serious crime served to entrench an ethos of harsh punishment in the Chinese context. ‘Strike Hard’ is a term that encapsulates this punitive approach.”).

154. *Id.* at 7.

155. *Id.* at 9; see also *id.* at 25–26 (“The targets of the 1983 [strike hard] campaign were individuals and groups who endangered economic reform and social stability, specifically criminals whose crimes disrupted the public order or the social order.”).

156. See Dai, *supra* note 6, at 162 (listing as a major characteristic of the 1979 Criminal Law the need to “earnestly protect social order, production order, working order, order within science and education, and order for the daily lives of people”).

157. TREVASKES, *supra* note 99, at 7.

by the trifecta of public security forces, procuratorates, and courts—were an increasingly prominent part of the government's strategy to establish basic stability upon which the economy could grow.<sup>158</sup> To be clear, this Article does not argue that early-reform-era government shaped criminal law based on purely instrumental economic goals; concerns like not wanting people to suffer physical and emotional harms from homicides, rapes, and other crimes were surely on the leaders' minds as well. Yet the government's rhetoric and actions indicate that economic goals were a prominent consideration during the legal codification efforts of the early post-Mao years. As stated by the president of the Supreme People's Court in a 1986 speech to the Standing Committee of the NPC: "Combating serious economic crimes is directly defending the struggle of socialist economic system reforms and construction."<sup>159</sup>

In addition to reforms in the early post-Mao years that were more overtly geared toward supporting economic activity,<sup>160</sup> criminal law was an essential part of the government's strategy to bring order out of chaos.<sup>161</sup> The Deng government decisively turned from Mao's emphasis on class struggle and revolution to instead make economic development the paramount goal.<sup>162</sup> As Deng's leadership wore on through the 1980s and lingered in the early 1990s, basic stability became ingrained and concerns faded that a Mao-like revolutionary campaign might again engulf society.<sup>163</sup> People could sleep at night knowing that all was no longer chaos under heaven.<sup>164</sup> They could

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158. Cf. MIKE MCCONVILLE, *CRIMINAL JUSTICE IN CHINA: AN EMPIRICAL INQUIRY* 5 (2011) (noting the shift from the lawlessness of the Cultural Revolution to having police, procuratorate, and courts being "responsible for different stages of the criminal process").

159. Zheng Tianxiang (郑天翔), *Guanyu Daji Yanzhong Jingji Fanzui Huodong de Jige Wenti de Huibao (Zhaiyao)* (关于打击严重经济犯罪活动的几个问题的回报 (摘要)), Jan. 13, 1986, in *LAW Y.B. CHINA (Zhongguo Falü Nianjian, 中国法律年鉴)*, 1987 no. 1 at 659.

160. See LUBMAN, *supra* note 67, at 173–216 (discussing the outpouring of legislation designed to reform the economy).

161. See MCCONVILLE, *supra* note 158, at 5 ("The introduction of a new Criminal Law (CL) and Criminal Procedure Law (CPL) in 1979 was seen by many as constituting a welcome break from a past marked, even discounting the Cultural Revolution, by arbitrariness in decision-making, torture of suspects and 'demonstration trials' in which the outcome had already been decided . . .").

162. See NAUGHTON, *supra* note 70, at 79 ("Finally, at the end of 1978, political factors came together in a way that allowed a fundamental departure from the economic and other policies of the Cultural Revolution era.").

163. See HUANG, *supra* note 77, at 35 ("The Chinese political system circa 1980, as arbitrary and as absent of self-constraints as it was, marked a substantial *marginal* change from the *status quo ante* of the Cultural Revolution. The incentive effects—that the would-be private entrepreneurs felt increasingly assured of the safety of their assets—came from this dynamic development.").

164. Cf. *id.* (describing the Cultural Revolution as "a period during which Chinese politics can be safely described as 'nasty, brutish and short' in the Hobbesian sense").

turn their energy to other pursuits besides meeting basic daily needs and avoiding falling victim to persecution as a class enemy.<sup>165</sup>

### B. Property Stability

Moving a layer beyond the need to provide basic stability, criminal law can be directly targeted at increasing people's confidence in their ability to maintain property, i.e., what this Article terms property stability. "Property" here is meant in its broadest sense to include "real property" (interests in land and improvements on that land), "personal property" (items of tangible movable or immovable property), and money. Criminal law does not define property rights but rather offers a means of protecting those rights once granted.<sup>166</sup> As with basic stability, a property rights regime backed by criminal sanctions—most clearly seen in laws against theft—is not unique to China. What is notable is that China did not have a comprehensive criminal law or criminal procedure law for 30 years (1949-1979), and it instituted these laws at the advent of the economic reform period.<sup>167</sup> Deng and his successors had a challenge: "The post-Mao economic reforms required a legal system for protecting property and contract relations."<sup>168</sup> One means of protection has been through criminal law. Although China's at least nominally communist system has fueled a complicated debate over the concept of property ownership,<sup>169</sup> even the 1979 Criminal Law recognized the stealing of both public and private property as crimes.<sup>170</sup>

More specifically, property stability requires that the lawful holder of property feels secure against two threats: infringement of property rights by private entities and renegeing by the government on its promise to respect private property rights.<sup>171</sup> This second

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165. Cf. Dai, *supra* note 6, at 157 ("Criminal law during the period [of the Cultural Revolution] was frequently used as a tool for attacking people; people used their power to manipulate others and have them thrown into prison. Even the head of state, as defined by the Constitution, was deprived of his freedom and jailed without going through any legal procedures.").

166. See Calabresi & Melamed, *supra* note 19, at 1090 ("Having made its initial choice, society must enforce that choice. Simply setting the entitlement does not avoid the problem of 'might makes right'; a minimum of state intervention is always necessary."); *id.* at 1126 ("In other words, we must impose criminal sanctions as a means of deterring future attempts to convert property rules into liability rules.").

167. See Dai, *supra* note 6, at 159–61 (explaining the passage of the Criminal Law and Criminal Procedure Law at the beginning of the economic reform period).

168. Pitman B. Potter, *The Chinese Legal System: Continuing Commitment to the Primacy of State Power*, 159 CHINA Q. 673, 678 (1999).

169. See Eva Pils, *Chinese Property Law as an Image of PRC History*, 39 HONG KONG L.J. 595, 596 (2009) (noting criticism raised during drafting the law that it would "result in an irretrievable loss of socialist principle").

170. PRC Criminal Law, *supra* note 115, at art. 150 (1979 version).

171. See Posner, *supra* note 62, at 7–8 (property rights enforceable against private parties "may mean little if the state can seize the fruits of successful



threat is the concern that the government will compromise the property rights that it defined in the first place. China has used criminal law to counter both types of threats.

Beginning with the private threat, as the economy grew and there became more to steal, the need for a credible response to theft became all the more pressing. A Ministry of Public Security document from the 1980s warned that “[t]here are increased losses caused by criminal offences to the lives and property of the state and the masses.”<sup>172</sup> Examples ranged from the low-tech method of pickpocketing to more complex methods of stealing property, such as with fake commercial contracts.<sup>173</sup> The government took a straightforward step against property crimes in the 1979 Criminal Law, which provided: “Whoever takes public or private property by force, threat or other methods shall be sentenced to fixed-term imprisonment of not less than three years and not more than ten years.”<sup>174</sup> The government followed up by mobilizing even the harshest of punishments, the death penalty: “Deng called directly for increased use of the death penalty, and advocated extending its use to cases involving major theft, corruption, recidivism, and a range of crimes where it had not been readily used in the past.”<sup>175</sup> In line with Deng’s emphasis on protecting property, the number of death-eligible offenses in the Criminal Law increased from fifteen in the 1979 Criminal Law to sixty-eight in the 1997 version, including use against robbery and theft.<sup>176</sup> Today, Section V of the Criminal Law addresses a variety of crimes involving property violations by private parties, including theft, robbery, and fraud.<sup>177</sup> In line with broader efforts to decrease executions, the most serious thefts can now result in life imprisonment but no longer are subject to the death penalty.<sup>178</sup>

Turning to the threat from the government, especially in light of concerns during the Mao years that no property was safe from state expropriation,<sup>179</sup> people desperately needed credible assurances that

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investment”); Upham, *supra* note 10, at 557 (describing the World Bank view of needing property rights to protect assets from state expropriation).

172. Dangqian woguo xingshi fazui de jiben tedian [The Basic Character of Crime in Contemporary China], Zhongguo xianjieduan fazui wenti yanjiu [Research into Crime in the Current Period in China] (China’s Public Security University Press, 1989), translated in Michael Dutton, *The Basic Character of Crime in Contemporary China*, 149 CHINA Q. 160, 164 (1997).

173. *Id.* at 166–67.

174. PRC Criminal Law, *supra* note 115, at art. 150 (1979 version).

175. Børge Bakken, *Punishment in China*, in ROUTLEDGE HANDBOOK, *supra* note 26, at 38, 43.

176. Natalie N. Martinez, Thomas Vertino & Hong Lu, *The Death Penalty in China*, in ROUTLEDGE HANDBOOK, *supra* note 26, at 130, 132.

177. PRC Criminal Law, *supra* note 115, at sec. V, arts. 263–76 (2011 version).

178. *Id.* at art. 264.

179. See William C. Jones, *Trying to Understand the Current Chinese Legal System*, in UNDERSTANDING CHINA’S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A.

the state would respect their rights to obtain and retain property.<sup>180</sup> One of the early regulations issued by Mao's government was the 1951 Stipulations on Confiscating Property of Counter-Revolutionary Criminals,<sup>181</sup> with the label "counter-revolutionary" applying to people in part based on economic background because it included those who were deemed "feudal landlords, and bureaucratic capitalists."<sup>182</sup> The "commitment problem"<sup>183</sup> arising from this antagonistic history toward private property first required that the post-Mao government not change the rules such that assets were suddenly transferred from private hands to the state, either through a direct nationalization of assets or more subtly by changing tax or fee structures. In 1988, the constitution was amended to allow for the existence of the private sector, which was followed by regulations that allowed for ownership and transfer of property by private businesses.<sup>184</sup> The government took significant steps forward in signaling its respect for private property by acknowledging property rights in 2004 amendments to the PRC Constitution<sup>185</sup> and by passing a comprehensive Property Law in 2007 that clarified people's rights to real property.<sup>186</sup>

The PRC government has likewise signaled its respect for property by enacting criminal laws recognizing that the government itself poses a threat. Not surprisingly, the government has not said that, if it issues an official edict and nationalizes property, it will then

COHEN 7, 35 (C. Stephen Hsu ed., 2003) (Under Mao's rule, "[o]ne of the chief visible uses of the courts was to serve as a vehicle for the confiscation of foreign assets.").

180. See Clarke, *supra* note 19, at 96 ("[T]he fear of confiscation of one's property by government makes a very large number of growth-enhancing investments impossible.").

181. See Jianxiong Zhai, *A Bibliographic Guide to the Criminal Law Literature of the People's Republic of China: 1949-2000*, 36 INT'L J. LEGAL INFO. 118, 123 (2008) (noting that the Stipulations were adopted on June 22, 1951, at the 90th Administrative Meeting of the Government Administration Council and promulgated the same day).

182. COHEN, *supra* note 130, at 299 (quoting the Common Program of the Chinese People's Political Consultative Conference, Sept. 29, 1949).

183. See HUANG, *supra* note 77, at 34 (noting that the "commitment problem" paradoxically did not deter investment when China introduced modest economic reforms); Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 1 (1995) ("A government strong enough to protect property rights and enforce contract rights is also strong enough to confiscate the wealth of its citizens.").

184. See Trebilcock & Veel, *supra* note 61, at 439 (citing Vai Io Lo & Xiaowen Tian, *Property Rights, Productivity Gains and Economic Growth: The Chinese Experience*, 14 POST-COMMUNIST ECON. 245, 249 (2002)).

185. XIANFA art. 13 (1988) (China) ("The state protects the right of citizens to own lawfully earned income, savings, houses and other lawful property.").

186. See Kai Wang, *Whatever-ism with Chinese Characteristics: China's Nascent Recognition of Private Property Rights and Its Political Ramifications*, 6 U. PENN. E. ASIA L. REV. 43, 66-67 (2011) ("By aiming to enhance the much needed clarity and stability of property rights in China, it [2007 Property Law] gives confidence to the real property market . . .").

subject itself to criminal punishment. What China has addressed through criminal law is the concern that individual government officials will unlawfully take property through corrupt dealings, though the government has failed to fully harness the power of criminal law to tackle corruption.<sup>187</sup>

The definition of corruption is much debated.<sup>188</sup> At base, corruption involves public officials using their positions for private gain.<sup>189</sup> In China, corruption is commonly defined to include more than an unlawful seizure of private or public assets,<sup>190</sup> and thus further connects to broader “economic crimes” discussed in Part III.C below.<sup>191</sup> On a general level, corruption can erode confidence in the government’s ability to accomplish its ends since bribery undermines government policies, and it can also foster inequality not based on merit and therefore destabilize the government.<sup>192</sup> In addition, what

187. See *infra* Part IV.B.

188. See, e.g., Franklin E. Zimring & David T. Johnson, *On the Comparative Study of Corruption*, in INTERNATIONAL HANDBOOK OF WHITE-COLLAR AND CORPORATE CRIME 456, 458–59 (Henry N. Pontell & Gilbert Geis eds., 2007) (discussing various types of crimes that might be considered “corruption” and adopting definition of “the illegal use of power for personal gain”).

189. *Helping Countries Combat Corruption: The Role of the World Bank*, THE WORLD BANK, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm#note1> (last visited Feb. 28, 2014) (“We settled on a straightforward definition—the *abuse of public office for private gain*. Public office is abused for private gain when an official accepts, solicits, or extorts a bribe. It is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit. Public office can also be abused for personal benefit even if no bribery occurs, through patronage and nepotism, the theft of state assets, or the diversion of state revenues.”) (internal citations omitted); Hilary K. Josephs, *The Upright and the Low-Down: An Examination of Official Corruption in the United States and the People’s Republic of China*, 27 SYRACUSE J. INT’L & COM. 271, 279 (2000) (“Corruption as the use of public office for private gain is a general definition which adequately describes conduct proscribed by law as well as practices which social scientists identify as ‘corrupt.’”).

190. See WEDEMAN, *supra* note 141, at 124 (defining forms of corruption under Chinese law: “graft (*tanwu*), which involves the theft of state property and assets by officials . . . ; bribery (*huilu*), which [involves] the commodification and sale of public authority; and misappropriation (*nuoyong gongkuan*), which . . . [involves] the illegal lending and investment of public money”).

191. Even once defined, corruption is difficult to measure. One indicator is prosecutions for corruption-related offenses, which provide at least some sense of how seriously the government is taking anticorruption efforts:

The number of economic crime cases “filed” by the procuratorate (i.e., cases in which a criminal indictment was handed down) increased dramatically, rising from 9,000 in 1980, the first year that China’s first Criminal Code was in force, to 28,000 in 1985, and nearly doubling the following year when the Communist Party launched its second post-Mao, anticorruption campaign.

*Id.* at 1–2; see *id.* at 94 (showing economic crime prosecutions, 1980–2007).

192. For example, the U.S. Supreme Court has recognized how corruption can undermine government legitimacy. See *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) (“To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.”).

is of interest with respect to property stability is that officials can misuse their positions to take property that private citizens rightly hold. In other words, if government officials are able to use their positions simply to grab private property without any negative repercussions, people's confidence in their ability to maintain property will decrease.

A glaring example of corrupt dealings undermining property stability occurred in 2011 when villagers in Wukan physically expelled local officials after they reportedly sold village land to developers without providing proper compensation to residents.<sup>193</sup> The Party discipline apparatus punished twenty officials, with the two top officials being expelled from the Party and required to return at most the equivalent of \$30,000.<sup>194</sup> The daughter of a village activist who died while in police custody told reporters: "The illegal gains are much more than these . . . . This is almost an invitation to more corruption."<sup>195</sup> The blackletter criminal law includes provisions that apply to the Wukan officials' activities, such as crimes of dereliction of duty.<sup>196</sup> However, according to public reports, the corrupt officials have yet to face criminal charges despite substantial evidence that the amount of money involved far exceeded the reparations required as part of the Party disciplinary process.<sup>197</sup>

If such a well-publicized instance of official malfeasance results in relatively lenient punishment, one wonders what incentives other corrupt officials will feel to curtail their behavior, especially if they believe that they can continue to shield their misdeeds from public scrutiny. Yet, as Professor Andrew Wedeman has argued, "While imperfect, China's anticorruption efforts have also been significant in that they created resistance against increases in the level of

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193. See Keith Hand, *Constitutionalizing Wukan: The Value of the Constitution Outside the Courtroom*, CHINA BRIEF, Feb. 3, 2012, at 5 ("After months of tension, thousands of villagers angry over the seizure of their land, inadequate compensation and the death of a villager in police custody expelled village officials . . . ."). The Wukan incident is but one example of widespread questionable land takings. See Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 U. PENN. E. ASIA L. REV. 51, 116 (2011) ("A constellation of factors has generated a wave of takings in China over the past two decades. China's rapid economic growth, urban development and expansion, skyrocketing land prices, and local corruption have fueled demand for land and in turn have led to mass displacements.").

194. See Rahul Jacob & Zhou Ping, *Wukan Officials Punished Over Land Sales*, FIN. TIMES (Apr. 24, 2012, 2:03 PM), <http://www.ft.com/intl/cms/s/0/2e0ccec2-8dd7-11e1-b9ae-00144feab49a.html> [<http://perma.cc/TLD8-NPQN>] (archived Jan. 19, 2014) ("Beijing has punished two former officials who ran the village of Wukan for their roles in illegal sales that sparked protests . . . .").

195. *Id.*

196. PRC Criminal Law, *supra* note 115, at ch. IX (2011 version).

197. See *Wukan Former Officials 'Should Stand Trial'*, RADIO FREE ASIA (Apr. 26, 2012), <http://www.refworld.org/docid/4faa70692a.html> [<http://perma.cc/AV6R-77HP>] (archived Jan. 19, 2014) ("Wukan villagers said the punishments were too light, because the officials had disposed of almost all collectively owned village farmland during their 40-year stranglehold on power.").

corruption. If nothing else, they made corruption risky. Officials contemplating corrupt acts face the possibility of severe punishment, including execution, and substantial numbers are punished every year.”<sup>198</sup> At a minimum, if China did not have criminal laws in place that seriously punish officials for using their positions of power to take property, Chinese citizens would likely feel less secure in their ability to protect property against rapacious bad apples in the government’s ranks.

Related to enhancing people’s confidence in their ability to maintain property is confidence that people will not be criminally punished simply for acquiring property. Put another way, shifts in the post-Mao-era criminal justice policy not only moved toward punishing people for stealing the property of others but also shifted toward *not* punishing people for acquiring property through entrepreneurial activities:

The security of the proprietor is the necessary condition for the security of his or her property. China then and now does not have well-specified property rights security. But, China in the early 1980s moved very far and fast toward establishing security of the proprietor. One should never underestimate the incentive effect of not getting arrested.<sup>199</sup>

Especially in the early days of the PRC, aspirations to acquire wealth were viewed disapprovingly, and any entity resembling a private business was tightly constrained by law.<sup>200</sup> Former landlords and rich peasants were among the categories of people discriminated against in the administration of justice.<sup>201</sup> As China’s leaders shifted their focus increasingly from ideology to economic growth, so too did they shift their view of wealth acquisition.<sup>202</sup> Instead of incurring condemnation, entrepreneurial activities gradually became viewed in a more positive light.<sup>203</sup> Reflecting this trend, one creative defense

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198. WEDEMAN, *supra* note 141, at 11; *see id.* at 117 (“China’s ongoing war on corruption may not have greatly reduced the actual level of corruption, but it has had a positive effect. At a very basic level, it appears to have prevented corruption from spiraling out of control.”).

199. HUANG, *supra* note 77, at 36.

200. *See id.* at 94 (offering contrasting scenarios of arrests for engaging in private commerce during the Cultural Revolution and allowance of private entrepreneurial activities in the 1980s: “The incentive effect between being arrested and not being arrested must have been massive.”); *cf.* Donald C. Clarke, *Legislating for a Market Economy in China*, 191 CHINA Q. 567, 572 (2007) (citing the 1999 constitutional amendment that “legitimized income such as interest and dividends (which had not been unlawful before, but lacked such high-level sanction)”).

201. *See* Chiu, *supra* note 128, at 4 (“Persons in one of the five categories—former landlords, former rich peasants, counterrevolutionaries, rightists, and bad elements—or their descendants, were discriminated against in an administration of justice that rejected the principle of equality of all persons before the law.”).

202. *See* HUANG, *supra* note 77, at 35 (noting “incentive effects” in the 1980s as “would-be private entrepreneurs felt increasingly assured of the safety of their assets”).

203. Although the phrase “To get rich is glorious” is commonly ascribed to Deng Xiaoping, the actual source of the phrase remains a mystery. *See* Evelyn Iritani, *Great*

raised by the defendant's wife in a 1983 prosecution of a businessman was "his business activities had benefited the peasants."<sup>204</sup> Liu Chuanzhi, the founder of Lenovo, recalled changes under Deng's leadership that opened the door to entrepreneurial activity without the threat of punishment hanging over one's head:

I remember that it was in 1978. There was an article in People's Daily about raising cows. I got so excited upon reading it. During the Cultural Revolution, every newspaper article was about revolution and class struggle, non-stop, only editorials. At that time, raising chickens or growing vegetables were viewed as capitalist tails to be cut. Now the People's Daily has an article about raising cows. Things have definitely changed.<sup>205</sup>

Indeed, in the early 1980s, the Deng government rehabilitated more than a hundred people who had been persecuted as part of the Cultural Revolutions' "anti-capitalist tail" campaign.<sup>206</sup>

Far from punishing people for acquiring wealth, in 2000 President Jiang Zemin introduced the "Three Represents," which called for the Party to represent advanced social productive forces, advanced culture, and the interests of the overwhelming majority.<sup>207</sup> In practice, this theory opened up Party membership to businesspeople who, in earlier times, would have been viewed as class enemies.<sup>208</sup> Extremely wealthy individuals now have a prominent presence in the leadership. At the 2012 Party Congress, "34 private entrepreneurs [were] chosen as delegates to the Congress, up from just 17 at the 17th Party Congress in 2007."<sup>209</sup> At the March 2013

*Idea But Don't Quote Him*, L.A. TIMES, Sept. 9, 2004, available at <http://articles.latimes.com/2004/sep/09/business/fi-deng9> [<http://perma.cc/NX38-8KSM>] (archived Jan. 19, 2014) ("Deng never actually said 'to get rich is glorious.' Or at least no one can prove it.").

204. Stuart R. Schram, "Economics in Command?" *Ideology and Policy Since the Third Plenum, 1978-84*, 99 CHINA Q. 417, 457 (1984).

205. HUANG, *supra* note 77, at 85 (citing XIAOBO WU, JIDAN SANSHI NIAN [SIGNIFICANT THIRTY YEARS] (2006)).

206. *Id.* at 95.

207. See *The "Three Represents" Theory*, XINHUANET (June 25, 2001), <http://news.xinhuanet.com/english/20010625/422678.htm> [<http://perma.cc/9B2S-M6E5>] (archived Jan. 19, 2014) (citing a February 2000 speech delivered by the CCP General Secretary Jiang Zemin).

208. Hepeng Jia, *The Three Represents Campaign: Reform the Party or Indoctrinate the Capitalists?*, 24 CATO J., no. 3 (Fall 2004), available at [object.cato.org/sites/cato.org/files/serials/files/cato.../11/cj24n3-5.pdf](http://object.cato.org/sites/cato.org/files/serials/files/cato.../11/cj24n3-5.pdf) ("In the speech [highlighting the Three Represents], Jianguo also urged the capitalists and other elites to be allowed to join the party.").

209. Laura He, *The Super Rich Rises as China Begins Leadership Transition*, FORBES (Nov. 7, 2012, 5:18 PM), <http://www.forbes.com/sites/laurahe/2012/11/07/the-super-rich-rises-as-china-begins-leadership-transition/> [<http://perma.cc/VY4N-NDRS>] (archived Jan. 19, 2014) (reporting on statistics revealed by state-run China Economic Weekly).

meeting of the NPC, a reported eighty-three delegates were billionaires.<sup>210</sup>

Today, aspiring for great wealth lacks the perils of the Mao era, but admittedly it is not without risk. In his memoir, famed fiction writer Yu Hua describes the “Rich List” of China’s richest individuals as being “popularly known as the Pigs-for-Slaughter List. In China there’s a saying, ‘People fear getting famous just as pigs fear getting fat,’ reflecting the observation that fame invites a fall just as a fattened pig invites the butcher.”<sup>211</sup> Considering the vast wealth creation of many in leadership positions, fear of a fall from a position of great wealth perhaps has less to do with an orchestrated government policy than some variant on *schadenfreude* or cultural inclinations.<sup>212</sup> What is apparent over the past three decades is that the PRC government has shaped criminal law in hopes of increasing people’s confidence in their abilities to first acquire property and then protect it from both other people and government acquisition. Harkening back to the words of Liu Chuanzhi, you not only can raise a cow without fear of government reprisal, you also can create a global computer company and hang on to it.

### C. Market Stability

Beyond a state effort to protect property from private theft and government corruption, the PRC government has used criminal law to target a broader array of activities that are detrimental to economic growth. In China, this third layer of stability is more precisely understood as promoting stability of the “socialist market economy”—the official terminology adopted by the CCP in 1992—<sup>213</sup>

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210. Jamil Anderlini, *Chinese National People’s Congress Has 83 Billionaires*, *Report Says*, WASH. POST (Mar. 7, 2013), [http://www.washingtonpost.com/world/asia\\_pacific/chinese-national-peoples-congress-has-83-billionaires-report-says/2013/03/07/d8ff4a4e-8746-11e2-98a3-b3db6b9ac586\\_story.html](http://www.washingtonpost.com/world/asia_pacific/chinese-national-peoples-congress-has-83-billionaires-report-says/2013/03/07/d8ff4a4e-8746-11e2-98a3-b3db6b9ac586_story.html) [http://perma.cc/GH84-7M7P] (archived Jan. 19, 2014).

211. YU HUA, *CHINA IN TEN WORDS* 169 (Allan H. Barr trans., 2011); Xianjie He, Oliver Rui & Tusheng Xiao, *The Price of Being a Billionaire in China: Evidence Based on Hurun Rich List 21–22* (July 10, 2012) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2102998](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102998) [http://perma.cc/5UTB-SQUG] (archived Jan. 19, 2014) (“We also find that, after being included on the list, entrepreneurs are far more likely to be investigated, arrested and charged compared to other private entrepreneurs.”).

212. See He, Rui & Xiao, *supra* note 211, at 8 (“Influenced by Confucian culture, the public in China generally hold the attitude of having ‘resentment against the rich.’”).

213. When speaking to the terminology, scholar Barry Naughton notes:

Outside China, the juxtaposition of the two words socialist and market can seem confusing or unclear, but within China the meaning is unambiguous. China has been socialist for forty years, and during that time the word socialist has been drained of all concrete meaning. By contrast, the market economy is

but “market stability” is used here as shorthand. Although the PRC government did not openly embrace the term “socialist market economy” until the early 1990s,<sup>214</sup> as explained below, criminal law was used to support the fledgling market economy far earlier.

As previously noted, a comprehensive criminal law and criminal procedure law were part of the initial legal reforms adopted when Deng ushered in the policy of “Reform and Opening.”<sup>215</sup> Shortly after issuance of these laws in the late 1970s, “the politico-legal authorities began to launch anti-crime drives that targeted crimes against the economic and social order.”<sup>216</sup> Deng himself emphasized the need to attack economic crimes: “In a 1982 speech against economic crime, Deng Xiaoping advocated that the ‘struggle will have to be waged daily for 18 years’ to be won before the end of the millennium.”<sup>217</sup> The term *economic crime* is not defined by law but is generally understood to include at least “graft, bribery, misappropriation of public property, copyright theft and fraud, tax evasion and tax resistance.”<sup>218</sup> The term overlaps with, but is not coextensive with, the term *white-collar crime*, which is fraught with its own definitional issues.<sup>219</sup>

A comprehensive survey of individual provisions in the 1979 Criminal Law is beyond the scope of this Article. Nonetheless, even a few examples illustrate the connection between the formal criminal laws and economic goals in the early days of the reform era. The 1979 law included a chapter on Crimes of Undermining the Socialist Economic Order and specifically criminalized speculation on monetary affairs, smuggling, counterfeiting ration coupons, and tax

new and the meaning of the term is straightforward, so all the stress of the formulation falls on the word “market.”

NAUGHTON, *supra* note 66, at 289.

214. See Clarke, *supra* note 200, at 571 (explaining that the CCP endorsed “the ‘socialist market economy’ at its 14th Congress in October 1992” and added it to the Constitution in 1993).

215. See *supra* notes 66–67 and accompanying text.

216. TREVASKES, *supra* note 99, at 17 (“It is now well established in the literature that in 1979 the PRC’s first Criminal Law and Criminal Procedure Law were introduced, and shortly thereafter the politico-legal authorities began to launch anti-crime drives that targeted crimes against the economic and social order.”).

217. Bakken, *supra* note 175, at 46 (citing Deng Xiaoping, *Combat Economic Crime*, Speech (Apr. 10, 1982), in *SELECTED WORKS OF DENG XIAOPING 1975–1982* (1982)).

218. Andrew Wedeman, *The Intensification of Corruption in China*, 180 *CHINA Q.* 895, 911 (2004).

219. See Cheng & Friedrichs, *supra* note 57, at 239 (“Chinese scholars and legal practitioners have generally invoked the phrase ‘economic crime’ to refer to most white-collar and corporate crimes.”). For a more general discussion, see Stuart P. Green, *A Normative Approach to White-Collar Crime*, in *INTERNATIONAL HANDBOOK OF WHITE-COLLAR AND CORPORATE CRIME*, *supra* note 188, at 223, 223–24 (acknowledging definitional controversy and listing example offenses such as fraud, insider trading, and tax evasion); Zimring & Johnson, *supra* note 188, at 458–59 (discussing problems of definition and classification).



evasion.<sup>220</sup> As early as 1980, media reports stated that “Government officials specifically emphasized that economic crimes threatened the four modernizations” and went so far as to use the colorful language that economic criminals were “maggots that devour the people’s property.”<sup>221</sup>

China, like every other country in the world, has been less than wholly successful in suppressing economic crimes, but issues with efficacy do not undermine the argument that the leadership’s goal when criminalizing activities like monetary speculation was at least in part to support the burgeoning economy. Looking beyond the blackletter law to actual implementation, the government’s efforts to combat economic crimes, though far from perfect, have had bite: “Between 1980 and 2006, the People’s Procuratorate, the judicial institution responsible for investigating and prosecuting criminal activity, has filed criminal charges in more than 1.1 million cases involving ‘economic crime’ and indicted approximately 30,000 senior officials, including roughly 60 officials holding the rank of deputy minister or above.”<sup>222</sup>

As the 1980s wore on, it became increasingly clear that “the deepening of economic reform also led to certain economic crimes that were not anticipated in the 1979 Criminal Law.”<sup>223</sup> This prompted the government to supplement the Criminal Law with subsidiary legislation adopted by the NPC Standing Committee, which is convened between plenary sessions of the NPC.<sup>224</sup> In 1982, the Standing Committee issued the Decision on Severely Punishing Criminals Who Gravely Endanger the Economy.<sup>225</sup> The Decision supplemented the Criminal Law’s provisions on offenses like smuggling and larceny and even allowed for use of the death penalty.<sup>226</sup> Thereafter, “[i]n 1985, the Resolutions of the Supreme People’s Court and the Supreme People’s Procuratorate Concerning Certain Questions on the Practical Application of the Law in the Present Adjudication of Cases of Economic Crimes (Trial Implementation) [(the 1985 Resolution)] expressly affirmed the

220. PRC Criminal Law, *supra* note 115, at arts. 117–19 (1979 version); *see also* Cynthia B. Schultz, *Economic Crimes in the People’s Republic of China: A Swinging Door Policy*, 5 AM. U. J. INT’L L. & POL’Y 161, 177 (1989) (discussing Crimes of Undermining the Socialist Economic Order).

221. Schultz, *supra* note 220, at 186 n.139 (citing *Strike Resolute Blows at Economic Criminals*, NANFANG RIBAO, June 15, 1980, at 1, *trans. in* J.P.R.S.-CHI No. 76014, July 9, 1980, at 94).

222. WEDEMAN, *supra* note 141, at 11 (footnotes omitted).

223. CHEN, *supra* note 110, at 263.

224. *See id.* at 179 (“The [NPC] is responsible for basic laws governing criminal and civil matters, basic economic systems and state structures, and the [Standing Committee] for other laws as well as partial supplementation and revision of basic laws when the NPC is not in session.”).

225. Dai, *supra* note 6, at 173.

226. *Id.*

criminal liability of legal persons guilty of certain economic crimes.”<sup>227</sup> During a press conference, representatives of the issuing bodies noted the importance of using legal measures to strike at economic crimes in order to safeguard the policies of opening China to the world, improving the domestic economy, and supporting the smooth operation of the economic system.<sup>228</sup> Official statements during this period by high-ranking officials involved with criminal justice further highlighted the government’s emphasis on economic crimes: “Over the past year, procuratorial organs at all levels across the country have strengthened their work against economic crimes, there has been new progress in the fight against serious economic crimes, and they have achieved notable results.”<sup>229</sup>

During the 1980s, the government also stepped up its rhetoric regarding corruption. As previously discussed in Part III.B, the detrimental impact of a corrupt seizure on the individual, or collective, who had the lawful right to the seized assets is readily apparent; the loss is often more diffuse, and thus less easily perceived, when officials misappropriate state assets.<sup>230</sup> Put simply, it is generally harder to detect when an official is taking a cookie from the state’s gigantic cookie jar than when he grabs a cookie from a citizen’s hands. Difficulties in drawing lines between what is acceptable grey income and what is a corrupt taking of state assets further complicates matters.<sup>231</sup> And, despite calls for anticorruption drives in various countries as a means of spurring development, “the connection between eliminating corruption and ‘development’

227. CHEN, *supra* note 110, at 275; Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan Guanyu Dangqian Banli Jingji Fanzui Anjian Zhong Juti Yingyong Falü de Ruogan Wenti de Jieda (Shixing) (最高人民法院 最高人民检察院关于当前办理经济犯罪案件中具体应用法律的若干问题的解答 (试行)) (July 8, 1985).

228. Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan Guanyu Dangqian Banli Jingji Fanzui Anjian Zhong Juti Yingyong Falü de Ruogan Wenti de Jieda (Shixing) (hui Zhongguo Fazhibao jizhe wen) (最高人民法院最高人民检察院关于当前办理经济犯罪案件中具体应用法律的若干问题的解答 (试行) (答《中国法制报》记者问)) (July 31, 1985).

229. Yang Yichen (杨易辰), Guanyu Jiancha Jiguan Daji Yanzhong Jingji Fanzui Gongzuo Qingkuang de Baogao (关于检察机关打击严重经济犯罪工作情况的报告), Jan. 13, 1986, in LAW Y.B. CHINA (Zhongguo Falü Nianjian, 中国法律年鉴, no. 1, 660 (1987) (statement by the head of the Supreme People’s Court to the Standing Committee of the NPC); *see also* Zheng, *supra* note 159, at 659.

230. *See e.g.*, Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. ECON. LITERATURE 1320, 1327 (1997), available at <http://www.transparency.org.uk/corruption/resources/economic-growth-a-development> (noting in reviewing impact of corruption on economic growth that “[c]orruption has its adverse effects not just on static efficiency but also on investment and growth”).

231. *See* Mimi Lau, *For Officials, the Colour of Money is Too Often Grey*, S. CHINA MORNING POST (July 30, 2011, 12:00 AM), <http://www.scmp.com/article/974856/officials-colour-money-too-often-grey> [<http://perma.cc/MWY9-FBEE>] (archived Jan. 19, 2014) (“[B]esides high salaries and generous perks which include housing and cars, officials have various ways to embezzle public money and take bribes. That’s where grey income comes in, and it is doled out systematically across the mainland.”).

remains obscure.”<sup>232</sup> While there is debate regarding the actual effect of corruption on economic growth, official statements underscore that the PRC government saw corruption as having a deleterious impact on China’s economic prospects. For instance, a 1989 report by the Supreme People’s Procuratorate emphasized that guiding principles for their work in 1990 included resolutely punishing embezzlement and bribery as well as promoting economic stability and development.<sup>233</sup> In 1988 rules regarding corruption-related offenses, the government included a provision on illicit enrichment—a significant increase in the assets of a public official that he or she cannot explain in relation to lawful income.<sup>234</sup> China later added the crime of illicit enrichment to the 1997 Criminal Law.<sup>235</sup>

Writings by scholars in the China Law Yearbook during the 1980s further emphasize the use of formal criminal law to support economic growth. Professors Gao Mingxuan and Zhao Bingzhi listed the need to combat economic crimes and ensure the smooth operation of the economic system as the first issue of debate among criminal law circles in 1986.<sup>236</sup> An article in the 1989 China Law Yearbook by the secretary-general of the NPC called for using “legal weapons” to strike at economic crimes so as to put the economic environment in

232. David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in *NEW LAW AND ECONOMIC DEVELOPMENT*, *supra* note 37, at 95, 145. In part, the causal link between development and corruption may depend on the type of corruption. See WEDEMAN, *supra* note 141, at 50 (distinguishing between “degenerative corruption” and “developmental corruption” in explaining how different types of corruption may impact economic growth).

233. See Liu Fuzhi (刘复之), *Guanche Shisan Jie Wu Zhong Quanhui Jingshen Yanli Chengchu Tanwu Huilu he Xingshi Fanzui Huodong* (贯彻十三届五中全会精神严厉惩处贪污贿赂和刑事犯罪活动) [Implementing the Spirit of the Thirteenth Plenary Session of the Fifth Central Committee [of the Communist Party of China] to Severely Punish Embezzlement, Bribery and Criminal Activities], in *LAW Y.B. CHINA* (Zhongguo Falü Nianjian, 中国法律年鉴), 1990 no. 1, at 780.

234. See Guanyu Chengzhi Tanwu Zui Huilu Zui de Buchong Guiding (关于惩治贪污罪贿赂罪的补充规定) [Supplemental Provisions Regarding the Punishment of Embezzlement and Bribery] (promulgated by the Standing Comm. Nat’l People’s Cong., effective Jan. 21, 1988) art. 11; see also Zuigao Renmin Jiancha Yuan Guanyu Renzhen Chaban Ju’e Caichan Laiyuan Buming Fanzui Anjian de Tongzhi (最高人民法院关于认真查办巨额财产来源不明犯罪案件的通知) [Notice of the Supreme People’s Procuratorate on Seriously Investigating and Handling Cases of the Crime of Large Amounts of Assets from Unclear Sources], Gaojian Fa Yanzi (高检发研字) [Sup. People’s Proc. Yanzi] (1990) no. 6.

235. PRC Criminal Law, *supra* note 115, at art. 395 (1997 version).

236. See Gao Mingxuan & Zhao Bingzhi (高铭喧 & 赵秉志), *Xingfa Xue* (刑法学) [Criminal Law Studies], in *LAW Y.B. CHINA* (Zhongguo Falü Nianjian, 中国法律年鉴), no. 1, at 740 (1987); see also Yang Dunxian & Zhao Bingzhi (杨敦先 & 赵秉志), *Jingji Tizhi Gaige yu Daji Jingji Fanzui Xueshu Taolunhui* (经济体制改革与打击经济犯罪学术讨论会) [Academic Symposium on Reform of the Economic System and Cracking Down on Economic Crimes], in *LAW Y.B. CHINA* (Zhongguo Falü Nianjian, 中国法律年鉴), no. 1, at 758 (1987).

order.<sup>237</sup> Similarly, a report on a meeting of the Supreme People's Court regarding economic crimes celebrated the courts' contributions in building the economy.<sup>238</sup> Concurrently, growing concerns about crimes committed by business entities—under the general heading of *danwei* (“unit”) crimes—prompted the government to augment the criminal law.<sup>239</sup> The 1985 Resolution further clarified that legal persons could be guilty of certain economic crimes.<sup>240</sup>

Turning to the 1990s, as China ramped up efforts to join the World Trade Organization (WTO), the PRC leadership introduced a number of reforms aimed at expanding the role of market forces and “emphasized the importance of a privatized economy and its inextricable link to China’s modernization and other economic reform efforts.”<sup>241</sup> Professor Fu Hualing explains the impact of these changes: “After China initiated market reform in the 1990s, the rule of law was revived to serve primarily the economic function.”<sup>242</sup> More specifically of interest to this Article, the 1990s brought vocal calls to overhaul the increasingly outdated 1979 Criminal Law.<sup>243</sup> Members of the drafting committee of the 1997 Criminal Law explained, “The guiding principle for the reform has been clear: a new criminal law should serve economic restructuring rather than politics; and it should be democratic, scientific and consistent with international standards.”<sup>244</sup>

237. See Peng Chong (彭冲), Yuyong Falü Wuqi Yanli Daji Yanzhong Jingji Fanzui Huodong, Zhengdun Jingji Zhixu (运用法律武器严厉打击严重经济犯罪活动, 整顿经济秩序) [Use Legal Weapons to Strike Hard Against Serious Economic Crimes and Rectify the Economic Order], in LAW Y.B. CHINA (Zhongguo Falü Nianjian, 中国法律年鉴), no. 1, at 744 (1989).

238. See Yang Wanming (杨万明), Quanguo Fayuan Shenli Jingji Fanzui Anjian Zuotanhui (全国法院审理经济犯罪案件座谈会), [Forum on the Nationwide Courts Adjudication of Economic Crime Cases], no. 1, 936 (1989) (reporting that, from 1986 to September 1989, the courts handled 177,593 cases of economic crimes including a total of 217,862 criminals).

239. See Vincent Cheng Yang, *Corporate Crime: State-Owned Enterprises in China*, 6 CRIM. L. F. 143, 148 (1995) (discussing changes in the criminal law aimed at the prosecution of *danwei*).

240. See CHEN, *supra* note 110, at 276 (“By 1997, no less than 13 Decisions and Supplementary Provisions had provided corporate criminality.”).

241. Ling Zhang & Lin Zhao, *The Punishment of Corporate Crime in China*, in INTERNATIONAL HANDBOOK OF WHITE-COLLAR AND CORPORATE CRIME, *supra* note 188, at 663, 664.

242. Fu, *supra* note 28, at 84.

243. Some scholars were already calling for revisions in the 1980s. See, e.g., Gao Mingxuan & Zhao Bingzhi (高铭喧 & 赵秉志), Xingfa Xue (刑法学) [Criminal Law Studies], in LAW Y.B. CHINA (Zhongguo Falü Nianjian, 中国法律年鉴), no. 1, 982 (1989).

244. Bingzhi Zhao & Suixian Bao, *The Present and Future of Criminal Law Reform in China*, 1 J. CHINESE COMP. L. 1, 133 (1995); see also Dobinson, *supra* note 149, at 29 (noting that “economic reform and Deng’s open-door policy were the driving forces behind the enactment of the 1997 [Criminal Law]”).

The 1997 Criminal Law included a number of new offenses aimed at nurturing the socialist market economy.<sup>245</sup> Among the death-eligible offenses in the 1997 Criminal Law were fifteen under the heading “Crimes of Undermining the Socialist Market Economic Order.”<sup>246</sup> The revised law also included twelve new articles under the heading “Crimes of Undermining Company and Enterprise Administrative Orders.”<sup>247</sup> Originally formulated in an NPC Standing Committee decision following adoption of the PRC Company Law in 1993,<sup>248</sup> the new provisions included possible imprisonment for people in charge of state-owned enterprises who acted deceptively for their own benefit and consequently caused “large damages to the state’s interests”;<sup>249</sup> people who made false declarations regarding registered capital when applying for company registration;<sup>250</sup> and people who concealed material facts when writing share-soliciting prospectuses.<sup>251</sup>

After overhauling the Criminal Law in 1997, China repeatedly revised the Law to address specific areas of economic concern. For example, the first amendment in 1999 sought to strengthen the economic order by imposing more severe punishments on economic crimes.<sup>252</sup> The fifth amendment in 2005 targeted credit card fraud.<sup>253</sup> And the sixth amendment in 2006 revised a number of provisions, including increasing punishments for crimes connected with undermining the financial management of organizations, harming the interests of listed companies, and embezzling from commercial enterprises.<sup>254</sup> In 1998, the Standing Committee issued a separate Decision Concerning Punishment of Crimes against the Company Law “in order to uphold economic and social order as well as protect the legal rights of enterprises and punish illegal behavior . . . .”<sup>255</sup>

Along with these post-1997 amendments to the blackletter criminal law, Chinese leadership has vocally connected criminal law with supporting economic growth. In 2002, the government called for renewed targeting of economic crimes as China continued “its efforts

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245. See Long Zongzhi (龙宗智), *Jingji Fanzui Fang Kong yu Kuanyanxiangji Xingshi Zhengce* (龙宗智, *经济犯罪防控与宽严相济刑事政策*) [Criminal Policy for the Prevention and Appropriate Combining of Leniency and Severity for Economic Crimes].

246. Martinez, Vertino & Lu, *supra* note 176, at 133–34.

247. PRC Criminal Law, *supra* note 115, at arts. 158–69 (1997 version).

248. CHEN, *supra* note 110, at 289.

249. PRC Criminal Law, *supra* note 115, at art. 168 (1997 version).

250. *Id.* at art. 158.

251. *Id.*

252. *Id.* (Amendment I, Dec. 12, 1999, affecting Articles 162(1), 168, 174, 180, 181, 182, 185, and 225(3)).

253. *Id.* (Amendment V, May 28, 2005, affecting Articles 177(1), 196, and 369).

254. *Id.* (Amendment VI, June 29, 2006).

255. Dai, *supra* note 6, at 175.

to rectify and regulate the market and economic order this year.”<sup>256</sup> In line with general policy statements, government bodies that implement the Criminal Law, such as the Supreme People’s Procuratorate and Ministry of Public Security, continued to clarify provisions regarding economic crimes and emphasize their importance.<sup>257</sup> The public security force’s work report in the 2008 *China Law Yearbook* cited striking hard at economic crimes as a focal point of their work the prior year.<sup>258</sup> The Yearbook also regularly reports prosecutions for crimes that have a tight nexus with the economy, such as crimes involving financial management.<sup>259</sup>

Foreign scholars have commented that the Chinese government has in fact followed through on its emphasis on using criminal law for economic ends: “In China, rapid economic growth has coincided with an increase in prosecutions for financial crimes and the creation of new offences.”<sup>260</sup> One popular blog written by foreign lawyers cautioned,

In the U.S. and in Europe, it is quite uncommon for a dispute between two business people to become subject to criminal law enforcement. This is not true in China. In doing business in China, you need to be aware of two things: the scope of economic crime there is far broader than you probably expect and the Chinese party with whom you are conducting business is far more likely to pursue a criminal complaint than you would expect.<sup>261</sup>

The intersection of foreign business and criminal law came to the fore in 2010 when Stern Hu, the chief representative in China for the Anglo-Australian mining company Rio Tinto and an Australian citizen, was convicted of accepting bribes and stealing commercial secrets.<sup>262</sup> Hu and several colleagues allegedly received bribe

256. *China to Continue to Improve Market, Economic Order*, PEOPLE’S DAILY ONLINE (Jan. 24, 2002), [http://english.peopledaily.com.cn/200201/25/eng20020125\\_89311.shtml](http://english.peopledaily.com.cn/200201/25/eng20020125_89311.shtml) [<http://perma.cc/G4X8-PES3>] (archived Jan. 19, 2014).

257. Long, *supra* note 245.

258. Gong’an Gongzuo (公安工作) [Public Security Work], in LAW Y.B. CHINA (Zhongguo Falü Nianjian, 中国法律年鉴), 2008 no. 1, at 251, 252.

259. See, e.g., LAW Y.B. CHINA (Zhongguo Falü Nianjian, 中国法律年鉴), 2010, no. 1, at 184 (reporting that, in 2010, procuratorates “safeguarded the market and economic order to ensure the safety of the government investment. The procuratorial organs prosecuted 42,473 suspects of smuggling, financial fraud and illegal business operations.”).

260. Vivienne Bath, *China, International Business, and the Criminal Law*, 13 ASIAN-PAC. L. & POL’Y J. 1, 1 (2011).

261. Steve Dickinson, *Criminal Law and Business in China—A Strong Caution*, CHINA L. BLOG (Mar. 22, 2006), [http://www.chinalawblog.com/2006/03/criminal\\_law\\_and\\_business\\_in\\_c.html](http://www.chinalawblog.com/2006/03/criminal_law_and_business_in_c.html) [<http://perma.cc/R4EF-MGLY>] (archived Jan. 19, 2014); see CONG.-EXEC. COMM’N ON CHINA, 111TH CONG., ANNUAL REPORT 220 (2009) (“The range of economic crime in China is broader than in the United States, and Chinese companies have been known to pursue criminal complaints in their business dealings more frequently than their counterparts in other systems, such as the United States.”).

262. Hejuan Zhao, Jiangnin Yan & Jingying Ma, *Behind the Iron Fist*, CAIXIN WEEKLY, Apr. 21, 2010, at 35. The Stern Hu case received widespread criticism from

payments from steelmakers in Northern China.<sup>263</sup> More recently, in July 2013, senior managers in China for the British pharmaceutical firm GlaxoSmithKline were detained on allegations that they bribed officials,<sup>264</sup> and the government announced a wider crackdown on the pharmaceutical industry.<sup>265</sup> The apparent selective use of harsh criminal sanctions against foreign companies has led some to question whether these companies are becoming scapegoats for broader problems, being targeted in hopes of boosting certain key domestic enterprises, or both.<sup>266</sup>

The primacy of the state in directing economic growth might have its drawbacks,<sup>267</sup> but it is uncontroversially the approach that the Chinese leadership has unwaveringly pursued.<sup>268</sup> One tool in this state-driven approach has been criminal law. Today, there is an array of criminal provisions regarding activities that impact market stability: the current version of the Criminal Law includes nearly one hundred “Crimes of Undermining the Order of the Socialist Market

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the international community for its lack of transparency and procedural deficiencies, in part stemming from the original charges including stealing “state secrets.” Stanley Lubman, *Rio Tinto Trial Shines Harsh Spotlight on Chinese Criminal Justice*, EAST ASIA FORUM (Mar. 29, 2010), <http://www.eastasiaforum.org/2010/03/29/rio-tinto-trial-shines-harsh-spotlight-on-chinese-criminal-justice/> [<http://perma.cc/L2CG-ETLP>] (archived Jan. 19, 2014).

263. Zhao, Yan & Ma, *supra* note 262, at 35.

264. See Michael Martina, *Compliance the Buzzword for Foreign Firms in China After Glaxo*, REUTERS (July 17, 2013, 7:33 AM), <http://uk.reuters.com/article/2013/07/17/uk-gsk-china-compliance-idUKBRE96G0H420130717> [<http://perma.cc/7QE-7AKX>] (archived Jan. 19, 2014) (reporting that Chinese police accused GlaxoSmithKline of bribing officials and doctors); Barry Meier, *Glaxo Sales Fall in China as Inquiry Continues*, N.Y. TIMES (Oct. 23, 2013), [http://www.nytimes.com/2013/10/24/business/international/glaxosmithkline-earnings-hit-by-slumping-shina-sales.html?\\_r=0](http://www.nytimes.com/2013/10/24/business/international/glaxosmithkline-earnings-hit-by-slumping-shina-sales.html?_r=0).

265. See Megha Rajagopalan & Michael Martina, *China Launches Crackdown on Pharmaceutical Sector*, REUTERS (July 17, 2013), <http://www.reuters.com/article/2013/07/17/us-china-multinationals-crackdown-idUSBRE96G06C20130717> [<http://perma.cc/YLN8-7WSX>] (archived Jan. 19, 2014) (reporting that China announced a nationwide crackdown on the sale of illegal medicine).

266. See Simon Denyer, *Amid Attacks by Chinese Government and Media, Foreign Companies Get Mixed Signals*, WASH. POST (Aug. 9, 2013), [http://www.washingtonpost.com/world/asia\\_pacific/amid-attacks-by-chinese-government-and-media-foreign-companies-receive-mixed-signals/2013/08/09/b02eea48-00d6-11e3-8294-0ee5075b840d\\_story.html](http://www.washingtonpost.com/world/asia_pacific/amid-attacks-by-chinese-government-and-media-foreign-companies-receive-mixed-signals/2013/08/09/b02eea48-00d6-11e3-8294-0ee5075b840d_story.html) [<http://perma.cc/BWT5-AM5U>] (archived Jan. 19, 2014) (“It has been open season against foreign multinationals in China this year, with one attack from the government or state-controlled news media followed swiftly by another.”).

267. See Clarke, *supra* note 200, at 568 (explaining state-driven development versus market-driven development and arguing that “China’s path so far has been almost exclusively that of the model of state-driven development, and that more balance is desirable”).

268. *Id.*

Economy.”<sup>269</sup> As discussed in Part IV below, the question now is how the new leadership will use criminal law going forward.<sup>270</sup>

#### IV. THE PROSPECTIVE VIEW

The once-a-decade leadership transition in China presents an opportune time to consider how the interaction between criminal law and economic growth might play out in the future. This Part explores three ways in which criminal law might factor into the leadership’s strategy to sustain growth: (A) a more calculated use of criminal law to target certain types of activities that are detrimental to the long-term,<sup>271</sup> healthy functioning of China’s socialist market economy; (B) a limited embracing of criminal law to address questionable, if not overtly illegal, financial dealings by government officials; and (C) a targeted use of criminal law, including pretextual prosecutions for economic crimes, to silence people who are seen as exposing problems that might engender social unrest and, consequently, derail economic growth.

Regarding the first category (Part IV.A), recent events indicate that the PRC government not only is continuing to use criminal law in service of economic ends but also is doing so in new and varied ways. From a normative perspective, this Article is not advocating a categorical “more is better” approach with respect to criminal law. Instead, it encourages a more thoughtful, targeted use of the state’s coercive power, especially in areas where criminal law might effectively fill gaps in the relatively weak civil and administrative law systems. When addressing the main features of a “Post Washington, Post Beijing Consensus,” Randall Peerenboom and Bojan Bugarcic similarly note, albeit not in the context of discussing criminal law, “What is required now is a smart state with a light touch able to address deficiencies in the market and adopt a long-term perspective

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269. PRC Criminal Law, *supra* note 115, at sec. III, arts. 140–231 (2011 version).

270. There is a further question whether, when using criminal law, the PRC leadership will respect rights guaranteed in China’s formal laws and in international norms to which China subscribes. An in-depth analysis of concerns about the procedures used when the government decides to deprive people of property, liberty, and life is well documented elsewhere. *See, e.g.,* BIDDULPH, *supra* note 32; MCCONVILLE, *supra* note 158 (examining these concerns from an empirical perspective). Nonetheless, it is important to acknowledge the shortcomings of the current system from a human rights standpoint.

271. Although there is no set definition regarding what “long term” means, it is used here to mean at least longer than a one-year period (i.e., beyond the horizon of annual GDP growth and other immediate economic indicators) and, more generally, looking at the extended economic trajectory that extends five or ten years down the road.



that facilitates sustainable growth.”<sup>272</sup> In particular, for areas like intellectual property rights, environmental protection, and employment practices, China is at a critical juncture: historically, a lax regulatory approach appears to have helped fuel China’s economy.<sup>273</sup> The benefits of turning a blind eye to infractions now appear to be waning.<sup>274</sup> Applying a stronger state touch to these areas in the form of strategic use of criminal law could help chart China’s future economic path.

Second, although Xi Jinping himself quickly and vocally targeted lavish spending by government officials after taking office,<sup>275</sup> the new leadership’s actions indicate an ongoing hesitancy to expose financial misdeeds of government officials (Part IV.B). This Article cautions that there are risks to this approach: although many of those misdeeds may at least temporarily be swept under the proverbial rug, a failure to punish corrupt officials threatens the government’s legitimacy. The public is increasingly able to share stories of corruption through social media, and a greater use of criminal law could actually serve to enhance the new leadership’s support. The new leadership faces the challenge of convincing people that the cancer of corruption is not so deeply rooted that it is impossible for the government to surgically remove the diseased elements while still keeping the CCP’s monopoly on power intact.

Finally, the PRC government has not backed away from using criminal law to target people seen as threatening the social stability upon which economic growth depends (Part IV.C). This Article questions the efficacy of this approach: silencing these voices might bolster social stability in the short term but could backfire. Using criminal law against government critics could create public resentment as stories of these cases circulate and dampen China’s economy, since the problems that these perceived destabilizing agents are exposing threaten China’s long-term economic growth. Surely the people who are calling attention to festering problems such as food

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272. Peerenboom & Bugarcic, *supra* note 59, at 9.

273. See Peter Navarro, *The Economics of the “China Price”*, CHINA PERSPECTIVES, no. 68, Nov.–Dec. 2006, at 13 (ascribing China’s economic success in export market to eight major “economic drivers” including low wages, counterfeiting and piracy, minimal worker health and safety regulations, and lax environmental regulations and enforcement).

274. Cf. Junjie Zhang, *Delivering Environmentally Sustainable Economic Growth: The Case of China*, ASIA SOC’Y, Sept. 2012, at 12, available at <http://asiasociety.org/policy/environmentally-sustainable-economic-growth-possible-china> (“Using the adjusted net saving approach at the national level, the World Bank reported that China’s economic loss due to pollution and environmental degradation accounted for 10.51 percent of gross national income in 2008.”).

275. See Pinghui Zhang, *Xi Jinping Calls for Curbs on Lavish Official Banquets*, S. CHINA MORNING POST (Jan. 30, 2013), <http://www.scmp.com/news/china/article/1138864/xi-jinping-calls-curbs-lavish-official-banquets> [<http://perma.cc/CYC5-RQMV>] (archived Jan. 19, 2014) (reporting Xi Jinping’s call to curb wasting of public money on extravagant meals).

safety and corruption would argue that their goals also are to promote development and that a system that continues to have such problems cannot sustain economic growth. In addition to the questionable economic benefits of silencing these voices, the manner in which China is doing so raises serious human rights concerns.<sup>276</sup> China's failure to give full force to protections in the Criminal Procedure Law—and continuing use of police-controlled sanctions that fall outside the law's purview<sup>277</sup>—remains a pressing concern.<sup>278</sup>

### A. *Activities Detrimental to the Socialist Market Economy*

As China's economy has grown larger, it has also grown more complex. For instance, the establishment of China's first stock exchanges in Shanghai and Shenzhen in 1990 opened up the possibility for crimes related to listings on these markets.<sup>279</sup> China added "insider trading" to the 1997 revision of the Criminal Law but failed to elaborate the elements of this crime and basically failed to prosecute.<sup>280</sup> Thus, while China has gradually updated the Criminal Law and supporting rules and regulations to include crimes made possible by China's increasingly complex economy, there is still much work to be done legislatively.<sup>281</sup> Even more pressing than putting more laws on the books is the need to use what is already there. The PRC government is using criminal law to address harmful economic

276. See *supra* note 270 and accompanying text.

277. See generally JEROME A. COHEN & MARGARET K. LEWIS, CHALLENGE TO CHINA: HOW TAIWAN ABOLISHED ITS VERSION OF RE-EDUCATION THROUGH LABOR 6–13 (2013) (explaining failure to follow through on several false starts in eliminating reeducation through labor, a police-controlled sanction that allowed detention of up to four years). Reeducation through labor was abolished at the end of 2013, see *supra* note 32, but concerns about other police-controlled sanctions remain. See "Custody and Education": *Arbitrary Detention for Female Sex Workers in China*, ASIA CATALYST (Dec. 2013), <http://asiacatalyst.org/blog/2013/12/report-custody-and-education-arbitrary-detention-for-female-sex-workers-in-china.html> ("However, largely unknown to the general public, similar administrative penalties [to reeducation through labor] remain in effect, including the Custody & Education (C&E) system targeting commercial sex workers and their clients.").

278. See Jerome A. Cohen, *Criminal Justice in China: From the Gang of Four to Bo Xilai*, HUMAN RIGHTS WATCH (July 25, 2013), <http://www.hrw.org/news/2013/07/25/criminal-justice-china-gang-four-bo-xilai> [<http://perma.cc/9KER-WRW8>] (archived Jan. 19, 2014) ("Yet criminal justice remains the weakest link in China's legal system if one focuses not on laws and appearances, but on implementation and practice.").

279. See generally Benjamin L. Liebman & Curtis J. Milhaupt, *Reputational Sanctions in China's Securities Market*, 108 COLUM. L. REV. 929, 934–40 (2008) (describing the development of China's stock exchanges).

280. Nicholas Calcina Howson, *Enforcement Without Foundation? Insider Trading and China's Administrative Law Crisis*, 60 AM. J. COMP. L. 955, 961, 985 (2012).

281. See, e.g., Zhang & Zhao, *supra* note 241, at 666 ("Corporate crime is a new type of crime which is not clearly defined in China's legal statutes.").

activities,<sup>282</sup> but there remains untapped potential. China has yet to develop resources within the criminal justice system that are adequately prepared and incentivized to apply even existing criminal provisions.<sup>283</sup>

This Part briefly highlights five areas where more strategic use of criminal law could benefit long-term economic growth: (i) crimes related to financial transactions, such as financial fraud,<sup>284</sup> (ii) crimes related to tainted food and other consumer products, (iii) intellectual property violations, (iv) environmental crimes, and (v) crimes related to particularly egregious employer practices.

## 1. Financial Crimes

China has used special task forces to tackle economic crimes in the past,<sup>285</sup> but recent efforts appear qualitatively different in that they are bringing together more substantial expertise and coordination. One prominent example is the 2012 white paper on financial crimes issued by the Pudong Procuratorate (a district in Shanghai). The white paper announced an agreement by seven government bodies involved in financial oversight to work together.<sup>286</sup> The Pudong Procuratorate heralded the new collaboration as a way to more effectively promote the construction of the financial rule of law.<sup>287</sup> Collaboration among the various entities involved in financial oversight bodes well for prosecutors to be able to both ferret out and build cases against people who are engaged in illicit financial dealings. Only time will tell whether the initiative bears fruit, yet

282. See *id.* at 669 (“In 2003, there were a total of 14,755 cases reviewed by courts involving unsafe products, smuggling, securities and fiduciary fraud against the free market, with 19,197 individuals criminally convicted and 15 billion yuan recovered.”).

283. See, e.g., Cheng & Friedrichs, *supra* note 57, at 244 (“Although China has criminalized insider trading by legislation in a more severe way than many other countries, the enforcement has done little to eradicate what has become an entrenched feature of the Chinese securities market.”).

284. For current provisions on financial fraud (金融诈骗罪), see PRC Criminal Law, *supra* note 115, at arts. 192–200 (2011 version). For definitional issues with the term *fraud* more generally, see Green, *supra* note 219, at 229–33.

285. See RODERIC BROADHURST ET AL., BUSINESS AND THE RISK OF CRIME IN CHINA 64–65 (2011) (describing the use of task forces in Shanghai).

286. See Pudong Xinqu Jianchayuan Fabu “Pudong Jinrong Fanzui Anjian Baipishu” (浦东新区检察院发布, 浦东金融犯罪案件白皮书) [Pudong New Area Procuratorate Issues “White Paper on Financial Crimes Cases in Pudong”] (Apr. 21, 2012), <http://www.sh.chinanews.com/pageurl/2012421943597.html>.

287. See Pudong Jinrong Fazhi Jianshe Gongzuo Lianxi Huiyi Zai Xinqu Jianchayuan Zhaokai (浦东金融法治建设工作联席会议在新区检察院召开) [Pudong Joint Meeting on Constructing Financial Rule of Law Convened at the New Area’s Procuratorate] (May 11, 2012), <http://pd.shzfz.net/node2/pudong/node1369/node1372/userobject1ai168011.html>.

even the agreement's establishment signals a government push to more assertively address financial crimes.

Prosecuting complex financial crimes is an example of how the state can play a helpful and unique role in economic development even when there is a strong, well-established civil law system. Some market disruptions can be dealt with through lawsuits between private parties, such as shareholder derivative suits, though that is a limited vehicle in China.<sup>288</sup> When people have flagrantly harmed economic interests, however, criminal law has the benefit of threatening incarceration and other punishments beyond mere civil penalties. In China, where the civil law system remains weak, reliance on criminal law becomes all the more important. The Chinese government has periodically emphasized the need to crack down on illegal financial dealings, such as in a 1998 State Council order banning illegal finance activities.<sup>289</sup> And there are occasional high-profile cases of financial fraud, as seen in the 2012 suspended death sentence handed down to a former bank president who diverted bank funds to his personal use.<sup>290</sup>

In general, however, “[i]nvestors have lost billions investing in Chinese companies, due to fraudulent financial statements and fudged books, as well as outright theft of company assets by insiders. To date, there has been relatively little regulatory oversight in this realm.”<sup>291</sup> What has been lacking thus far is a sustained, rigorous effort to identify and prosecute financial crimes outside of intermittent high-profile cases and campaign-style strike hard initiatives.<sup>292</sup> When a prosecution for financial crimes hits the news, questions arise whether it is the beginning of a true reform campaign,

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288. See generally Donald C. Clarke & Nicholas C. Howson, *Pathway to Minority Shareholder Protection: Derivative Actions in the People's Republic of China* (George Washington Univ. Law School Working Paper, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1968732](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1968732) [<http://perma.cc/7RAV-ACDX>] (archived Jan. 19, 2014) (discussing limitation of shareholder suits to the “closely-held form of corporation”).

289. Feifa Jinrong Jigou he Feifa Jinrong Yewu Huodong Qudi Banfa (非法金融机构和非法金融业务活动取缔办法), Procedures to Ban Illegal Financial Institutions and Illegal Financial Operations and Practices (1998), available at [http://www.law-lib.com/law/law\\_view.asp?id=14025](http://www.law-lib.com/law/law_view.asp?id=14025).

290. Chua Guan Cheong, *China Corruption Blotter*, THE FCPA BLOG (Dec. 28, 2012, 2:22 AM), <http://www.fcpcbog.com/blog/2013/1/25/china-corruption-blotter-january-25-2013.html> [<http://perma.cc/3L6V-YHTE>] (archived Jan. 19, 2014).

291. Cheng & Friedrichs, *supra* note 57, at 244.

292. See *id.* at 247 (“However, white-collar crimes were rarely officially detected except in so-called ‘strike-hard’ campaign periods, when regulatory officials were required to catch and sanction a certain number of violators after crises occurred.”); cf. Denny McMahon, *Investor Scheme Leads to Death Sentence*, WALL ST. J. (May 17, 2013, 12:03 PM), <http://online.wsj.com/news/articles/SB10001424127887323398204578488831032664720> [<http://perma.cc/L4H5-QNRR>] (archived Jan. 19, 2014) (discussing the case of Lin Haiyan who was convicted of “running a Ponzi scheme that defrauded investors of about \$70 million”).

or simply a one-off effort to calm public outcry over a specific incident, or perhaps even evidence of bureaucratic infighting. It is unclear whether the current leadership has resolutely decided to prosecute financial crimes as a way to push, or at least to reinforce, financial reforms, but the Shanghai initiative is an encouraging step. Also promising are recent reports of a new nationally streamlined system of financial and real-asset registration, which could use the consolidation and clarification of asset holdings to complement efforts to expose financial misdeeds.<sup>293</sup> Increased transparency regarding asset holdings is also a crucial step to giving greater force to the Criminal Law's provisions on illicit enrichment.<sup>294</sup>

In addition to the Shanghai example, efforts by the central leadership in Beijing indicate new scrutiny of financial transactions. In spring 2013, several bond fund managers were taken into custody "after speculation that the regulatory authorities, including the central bank, would carry out a massive investigation into illegal bond trading."<sup>295</sup> These investigations have been directly tied to Wang Qishan, the current head of the Party's disciplinary apparatus, who previously served in high-ranking posts covering economic matters.<sup>296</sup> Concerns are also on the rise regarding illegal capital outflows, especially as people attempt to hide the proceeds of illicit activities.<sup>297</sup> The state-run media has further reported an uptick in prosecutions for "illegal fundraising"<sup>298</sup> because, as noted by Liu

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293. See Gilley, *supra* note 119, at 6 ("Alongside this came promises of a new nationally-streamlined system of financial and real asset registration that would bolster both tax and regulatory compliance as well as anti-corruption efforts." (internal citation omitted)).

294. See Margaret K. Lewis, *Presuming Innocence, or Corruption, in China*, 50 COLUM. J. TRANSNAT'L L. 287, 350 (2012) (discussing current challenges to using Article 395 of the Criminal Law).

295. *Financial Firms Admit Police Investigation*, GLOBAL TIMES (Apr. 17, 2013, 11:18 PM), <http://www.globaltimes.cn/DesktopModules/DnnForge%20-%20NewsArticles/Print.aspx?tabid=99&tabmoduleid=94&articleId=775666&moduleId=405&PortalID=0> [<http://perma.cc/U8P5-V5GW>] (archived Jan. 19, 2014).

296. See Simon Rabinovitch, *China Bonds Scandal: Wang Qishan Rides Again*, FIN. TIMES (Apr. 24, 2013, 8:39 AM), <http://blogs.ft.com/beyond-brics/2013/04/24/china-bonds-scandal-wang-qishan-rides-again/#axzz2tinOsjxR> [<http://perma.cc/5W5R-3LH5>] (archived Jan. 19, 2014) ("The bond market scandal has shaken China's financial industry over the past week.").

297. See Clark Gascoigne, *Chinese Economy Lost \$3.79 Trillion in Illicit Financial Outflows Since 2000, Reveals New GFI Report*, GLOBAL FIN. INTEGRITY (Oct. 25, 2012), <http://www.gfintegrity.org/content/view/581/70/> [<http://perma.cc/66TH-22C7>] (archived Jan. 19, 2014) ("The Chinese economy hemorrhaged [USD] 3.79 trillion in illicit financial outflows from 2000 through 2011 . . ."); James Pomfret & Matthew Miller, *On China's Border, Underground Banking Flourishes*, N.Y. TIMES (May 20, 2013), [http://www.nytimes.com/2013/05/21/business/global/on-chinas-border-underground-banking-flourishes.html?\\_r=0](http://www.nytimes.com/2013/05/21/business/global/on-chinas-border-underground-banking-flourishes.html?_r=0) [<http://perma.cc/N7Z3-KQAG>] (archived Jan. 19, 2014) (reporting estimates "that about a third of the capital moving through underground banking channels is dirty money being laundered").

298. See Zhang Yan, *Number of Illegal Fundraising Cases Rises*, CHINA DAILY (Apr. 27, 2013), [http://usa.chinadaily.com.cn/china/2013-04/27/content\\_16454639.htm](http://usa.chinadaily.com.cn/china/2013-04/27/content_16454639.htm)

Wenxi, deputy director of the economic crime investigation bureau under the Ministry of Public Security, “Illegal fundraising severely disrupts the country’s economic and financial order, and harms the interests of the public, and we should resolutely crack down on such crimes.”<sup>299</sup> Taken together, these developments indicate a possible turn to a sustained, sophisticated, and resolute response to financial crimes instead of the sporadic crackdowns that have thus far punctuated the decades of China’s rapid economic growth.

If indeed the PRC government steps up use of criminal law to rein in financial crimes, a concurrent challenge will be to create accessible legal channels for financing so that private businesses can flourish. For example, underground or “shadow” banking has come under increasing scrutiny.<sup>300</sup> The exact scale of this practice of bypassing normal lending procedures is unknown precisely because it is done in the proverbial “shadows,” but it is widely recognized that a substantial amount of lending in China does not conform to banking regulations.<sup>301</sup> While a portion of shadow lending is no doubt being used to facilitate projects with little benefit to the overall economy,<sup>302</sup> it has also been a vital source of capital for private enterprises that do not have access to standard bank loans.<sup>303</sup> The government appears

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[<http://perma.cc/Z825-H62S>] (archived Jan. 19, 2014) (“Chinese courts have sentenced 1,449 people to prison terms of more than five years for involvement in illegal fundraising . . .”).

299. *Id.*

300. See Gabriel Wildau, *Three Chinese Bankers Arrested for Bribery in Shadow Bank Case-Report*, REUTERS (July 19, 2013, 4:28 AM), <http://uk.reuters.com/article/2013/07/19/china-banks-investigation-idUKL4NOFP0QT20130719>

[<http://perma.cc/4ECU-NUHB>] (archived Jan. 19, 2014) (reporting that Chinese authorities “stepped up efforts in recent months to curtail lending channelled [sic] through the burgeoning shadow banking system”); Dong Yuxiao, Qu Yanli & You Xi, *Colossal Default Exposes WMP Risk Blind Zone*, CAIJING (Dec. 18, 2012, 1:52 PM), <http://english.caijing.com.cn/2012-12-18/112372881.html> [<http://perma.cc/S5VH-7U4Y>] (archived Jan. 19, 2014) (reporting on a wealth-management product default that led to a criminal investigation); *China Securities Watchdog Orders More Shadow-Banking Disclosure*, BLOOMBERG NEWS (Jan. 10, 2014), <http://www.bloomberg.com/news/2014-01-10/china-securities-watchdog-orders-more-shadow-banking-disclosure.html>

(“Authorities have sought greater control over less-regulated types of financing known collectively as shadow banking on concern they may destabilize the economy as slowing growth spurs defaults.”).

301. See Charles Riley, *China Targets Shadow Bankers in Credit Squeeze*, CNN MONEY (June 25, 2013, 6:21 AM), <http://money.cnn.com/2013/06/25/news/economy/china-shadow-banking/> [<http://perma.cc/8KBB-9P9A>] (archived Jan. 19, 2014) (“This is no small operation. The shadow banking sector’s exact reach is unknown, but the Fitch ratings agency estimates its size has reached roughly 60% of China’s GDP.”).

302. See Liyan Qi, *China’s Shadow Bankers Seek Their Place in the Sun*, WALL ST. J. (Sept. 17, 2013, 11:30 AM), <http://blogs.wsj.com/chinarealtime/2013/09/17/chinas-shadow-bankers-seek-their-place-in-the-sun/> [<http://perma.cc/UDB2-QEK3>] (archived Jan. 19, 2014) (“[M]uch of the money goes into real estate—which the government sees as still too speculative—and to industries that are struggling with overcapacity—like steel.”).

303. See *China Shadow Banking Returns as Growth Rebound Adds Risk*, BLOOMBERG (Sept. 11, 2013, 2:48 AM), <http://www.bloomberg.com/news/2013-09->

to have tolerated shadow banking to date in part because it is needed for economic growth.<sup>304</sup> If access to unregulated loans is curtailed, the government will need to either reform the banking sector to create expanded opportunities for private enterprises or risk dampening the vibrancy of the burgeoning private sector.

## 2. Tainted Consumer-Product Crimes

The PRC government has occasionally used criminal law to address flagrant, intentional meddling with consumer products, as conspicuously seen in cases like the 2008 milk powder scandal when people were executed for taking bribes that led to infants dying from melamine-tainted formula.<sup>305</sup> Similarly, “Zheng Xiaoyu, former head of the [State Food and Drug Administration], was executed in 2007 for accepting \$850,000 in bribes in exchange for granting approval for hundreds of medicines, some later found to be dangerous.”<sup>306</sup> In light of continuing reports of people dangerously altering consumer products, the time is ripe to consider whether China should put more resources toward prosecuting the culprits, though use of the death penalty is an excessively harsh penalty that is out of step with international trends.<sup>307</sup>

One explanation for the use of harsh punishments in the tainted food and medicine examples is a retributive sense of moral indignation for the physical harm that the perpetrators’ conduct caused. The criminal charges in the aforementioned cases were not framed as murders based on the theory that the tainted products

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10/china-shadow-banking-returns-as-growth-rebound-adds-risks.html

[<http://perma.cc/74XM-28JM>] (archived Jan. 19, 2014) (“Shadow lending, which allows banks to bypass controls and capital requirements, is flourishing in China because an estimated 97 percent of the nation’s 42 million small businesses can’t get bank loans, according to Citic Securities Co.”).

304. See CONG. EXEC. COMM’N ON CHINA, ANNUAL REPORT 148 (2013), available at <http://www.cecc.gov/publications/annual-reports/2013-annual-report> (“Faced with difficulties securing financing, some smaller businesses in recent years reportedly have relied on lending outside the regulated banking system, some forms of which are referred to as ‘shadow banking.’ A May 2013 report by JP Morgan Chase Bank, Hong Kong, estimated ‘shadow banking’ in China at 69 percent of GDP and 27 percent of bank assets at the end of 2012.”) (internal citations omitted).

305. See Sharon LaFraniere, *2 Executed in China for Selling Tainted Milk*, N.Y. TIMES (Nov. 24, 2009), <http://www.nytimes.com/2009/11/25/world/asia/25china.html> [<http://perma.cc/F4EA-GFWZ>] (archived Jan. 19, 2014) (reporting on the scandal and criminal case).

306. Cheng & Friedrichs, *supra* note 57, at 242 (internal citation omitted).

307. Cf. DAVID T. JOHNSON & FRANKLIN E. ZIMRING, THE NEXT FRONTIER: NATIONAL DEVELOPMENT, POLITICAL CHANGE, AND THE DEATH PENALTY IN ASIA, at xi (2009) (“Over half the world’s nearly 200 nations have abolished the death penalty, and another 44 have stopped executing in practice . . . .”); see generally SUSAN TREVASKES, THE DEATH PENALTY IN CONTEMPORARY CHINA 14 (2012) (analyzing how PRC Government policy has ensured “continued use of the death penalty as a mainstay of criminal punishment in rapidly transforming China”).

caused the death of people who ingested them.<sup>308</sup> Rather, the charges were generally based on accepting money for putting the tainted products in the supply chain.<sup>309</sup> Today, prosecutors may also charge for the food safety violations themselves, with the 2011 revision to the Criminal Law including several new offenses.<sup>310</sup> However, it was only in May 2013 that the Supreme People's Court and Supreme People's Procuratorate issued the "Interpretation on Certain Issues Concerning the Application of Law in Food-Related Criminal Cases," which provides much-needed concrete guidance on how prosecutors and courts should apply the criminal provisions.<sup>311</sup> It is too early to know how this guidance will shape the courts' handling of individual cases.

At a minimum, indications are that prosecutions are on the rise. An article in *China Daily* noted that figures on the number of food safety cases are not publicly available, but, "[i]n 2012, cases concluded by the courts rose 224.62 percent compared with 2011, and 257.48 percent more suspects were convicted."<sup>312</sup> The problem is that, without actual numbers, these seemingly dramatic percentage increases could mean that only a small number of cases are actually being prosecuted. A 2012 article analyzing the Food Safety Law questioned whether "prosecutions will serve as a consistent deterrent of perverse conduct, rather than a mere way to set an example of severe consequences."<sup>313</sup> From a utilitarian perspective, harsh, well-publicized punishments might deter others from distributing tainted products, especially if prosecutions are prevalent enough to be a

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308. LaFraniere, *supra* note 305.

309. *Id.*

310. PRC Criminal Law, *supra* note 115, at arts. 142–44 (2011 version) (part of larger section on "Crimes of Manufacturing and Selling Fake and Shoddy Goods"); see also GLOBAL FOOD SAFETY FORUM, THE CHINA PATH TO GLOBAL FOOD SAFETY 57–58 (Aug. 2011), available at <http://a-capp.msu.edu/sites/default/files/files/GFSFWHITE PAPER.pdf> [<http://perma.cc/QJ38-KC3N>] (archived Jan. 19, 2014) (describing 2011 amendments addressing food-safety related crimes).

311. See *China Releases Punishment Standards for Food-Related Crimes*, CHINA BRIEFING (May 28, 2013), <http://www.china-briefing.com/news/2013/05/28/china-releases-punishment-standards-for-food-related-crimes.html> [<http://perma.cc/PD54-YRHH>] (archived Jan. 19, 2014) (reporting on the release of the Interpretation, officially known as *fashi* [2013] No. 12).

312. See Zhang Yan, *Crackdown on Food Crimes*, CHINA DAILY (May 4, 2013), [http://www.chinadaily.com.cn/china/2013-05/04/content\\_16474636.htm](http://www.chinadaily.com.cn/china/2013-05/04/content_16474636.htm) [<http://perma.cc/8JR4-7HL4>] (archived Jan. 19, 2014) (reporting on food crimes between 2010 and 2012); see also Zhang Yan & Cao Yin, *Police in Major Crackdown on Tainted Meat*, PEOPLE'S DAILY ONLINE (May 3, 2013), [http://europe.chinadaily.com.cn/china/2013-05/03/content\\_16470411.htm](http://europe.chinadaily.com.cn/china/2013-05/03/content_16470411.htm) [<http://perma.cc/6K5Q-L5V5>] (archived Jan. 19, 2014) ("Police have arrested 904 suspects over the past three months who are accused of manufacturing and selling 20,000 metric tons of tainted and substandard meat products . . .").

313. John Balzano, *China's Food Safety Law: Administrative Innovation and Institutional Design in Comparative Perspective*, 13 ASIAN-PAC. L. & POL'Y J. 23, 38 (2012).



credible threat as compared with the legal equivalent of being struck by lightning. If potential wrongdoers are deterred, that will help protect people's physical wellbeing. Taking the utilitarian goals one step further, severe punishment in these cases may also serve a positive end of supporting the economy: people are hesitant to buy milk powder on the Mainland because of fears that even apparently reputable brands might be fake.<sup>314</sup> As a result, Hong Kong faced a shortage of infant formula that prompted legal limits on the amount of formula that could be taken from the territory.<sup>315</sup> Despite the PRC government's assurances that it is addressing problems in the formula industry, parents in the Mainland have good reason to be concerned.<sup>316</sup>

This is not to say that the PRC government does not care about the physical harm caused by tainted products. Instead, it merely posits that the harsh punishments are better understood as also serving the derivative goal of bolstering consumer confidence and, in turn, benefiting the economy. In light of the widespread concerns about consumer products,<sup>317</sup> sporadic prosecutions and assurances from government officials that the food safety situation is "overall stable and getting better" are unlikely to be sufficient to quell concerns:<sup>318</sup> a more comprehensive response is needed. Yanzhong Huang, Senior Fellow for Global Health at the Council on Foreign Relations, cites the lack of regulatory capacity in China today as a key problem with food safety.<sup>319</sup> Criminal law presents an alternative means of addressing tainted consumer products until such time as the administrative law system is up to the task. Seeing as the

314. Zhao Xu, Peng Yinying & Yang Yang, *Bribery Claims Feed Milk Scandal*, CHINA DAILY (Oct. 22, 2013), [http://usa.chinadaily.com.cn/china/2013-10/22/content\\_17049396.htm](http://usa.chinadaily.com.cn/china/2013-10/22/content_17049396.htm) ("Not only has the long-cultivated prestige of these brands been hit hard, but the confidence of millions of Chinese consumers who believed in, and indeed almost seemed to worship, the products, has been destroyed.").

315. See Li Yao, *HK Sets Baby Formula Limits*, CHINA DAILY (Mar. 4, 2013), [http://www.chinadaily.com.cn/china/2013-03/04/content\\_16271673.htm](http://www.chinadaily.com.cn/china/2013-03/04/content_16271673.htm) [<http://perma.cc/WYA2-JVA7>] (archived Jan. 19, 2014) (discussing the shortage).

316. See Qi Yue, *Why It's Still So Hard to Find Safe Baby Formula*, ECON. OBSERVER (Laura Lin trans., June 13, 2013), <http://www.eeo.com.cn/ens/2013/0613/245231.shtml> [<http://perma.cc/HQ74-GV8E>] (archived Jan. 19, 2014) (discussing the continuing difficulty of finding safe local baby formula in China due to low safety standards and corruption).

317. See Yanzhong Huang, *China's Worsening Food Safety Crisis*, THE ATLANTIC (Aug. 28, 2012, 11:52 AM), <http://www.theatlantic.com/international/archive/2012/08/chinas-worsening-food-safety-crisis/261656/> [<http://perma.cc/K6MY-2UQX>] (archived Jan. 19, 2014) (noting that a 2012 survey in sixteen major Chinese cities found 81.8 percent of respondents listed food safety as "the most worrisome safety concern[ ]").

318. Yanzhong Huang, *Fatal Misperception: How Unsafe Is Chinese Food?*, COUNCIL ON FOREIGN REL. (July 10, 2013), <http://blogs.cfr.org/asia/2013/07/10/fatal-misperception-how-unsafe-is-chinese-food/> [<http://perma.cc/N879-BQC5>] (archived Jan. 19, 2014) (quoting Zhang Yong, Director of the China Food and Drug Administration).

319. See *id.* ("China does not have the regulatory capacity to conduct systematic, random sampling of its food products.").

number of criminal prosecutions for food and safety cases is not even publicly available,<sup>320</sup> it is hard to see how the threat of prosecution can act as a credible deterrent. One option to consider is developing specialized units within the police and procuratorates that would systematically investigate instances of people adulterating products. Such efforts could help to assuage concerns not only within China but outside as well, as highlighted by the vocal opposition in the United States to the proposed purchase by China's Shuanghui International of the United States' Smithfield Foods.<sup>321</sup>

To be sure, the government's choices with respect to using criminal law in service of economic ends is complex: if punishing people who sell tainted consumer products increases consumer confidence, then one might predict that the government would welcome efforts to expose the intentional selling of unsafe products so it could swiftly prosecute and punish the culprits. Yet, if the problem is widespread enough that candid reports of safety violations would make consumers lose faith in the system entirely, then the incentives shift toward punishing those offenders who are in the public eye while trying to squelch reports that might still be kept under wraps. This latter possibility is discussed in Part IV.C below.

### 3. Intellectual Property Crimes

A third area where more prominent use of criminal law could benefit long-term growth is intellectual property violations. China has long been a source of counterfeit goods, as vividly illustrated by the flood of fake "Beanie Baby" stuffed animals emanating from China in the 1990s, several dozen of which then-U.S. Trade Representative Charlene Barshevsy embarrassingly brought back from an official trip to China.<sup>322</sup> The historical lack of offenses concerning intellectual property is understandable because China traditionally did not share the Western concept of "intellectual

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320. See *supra* note 312 and accompanying text.

321. See, e.g., *Senator Raises Food Safety Concerns over Smithfield, Shuanghui Deal*, CHI. TRIB. (June 5, 2013), [http://articles.chicagotribune.com/2013-06-05/business/chi-senator-raises-food-safety-concerns-over-smithfield-shuanghui-deal-20130605\\_1\\_food-safety-smithfield-foods-shuanghui-deal](http://articles.chicagotribune.com/2013-06-05/business/chi-senator-raises-food-safety-concerns-over-smithfield-shuanghui-deal-20130605_1_food-safety-smithfield-foods-shuanghui-deal) [<http://perma.cc/CB2Z-DM4K>] (Jan. 19, 2014) (reporting on a statement by Senator Debbie Stabenow, head of the U.S. Senate Agriculture Committee, that federal agencies investigating the merger "must take China's and Shaughui's troubling track record on food safety into account, and do everything in their power to ensure our national security and the health of our families is not jeopardized").

322. See ANDREW C. MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* 1 (2005) (discussing the 1998 "Beaniegate" scandal, in which Barshefsky, who played a "pivotal role in pressuring Beijing to strengthen China's intellectual property rights (IPR) regime," purchased forty counterfeit toys in Beijing, violating a U.S. customs rule that prohibited purchasing more than one Beanie Baby abroad).

property,”<sup>323</sup> and because it served economic development goals not to enforce intellectual property rights.<sup>324</sup> Admittedly, the emphasis on intellectual property rights by the United States and other Western countries has limited historical roots: the United States’ economic development benefited from intellectual property theft early in its history.<sup>325</sup> Foreign pressure<sup>326</sup> and China’s desire to join the WTO<sup>327</sup> have helped push the Chinese government to introduce legal protections for intellectual property, though reports of rampant violations persist.<sup>328</sup> In 2009, in response to a claim brought by the United States, a WTO dispute settlement panel found that China’s intellectual property rights regime was inconsistent with its

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323. See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 15 (1995) (“Although prior to the twentieth century, the Chinese state oversaw matters of commerce and industry more closely than has typically been recognized, it did not develop comprehensive, centrally promulgated, formal legal protection for either proprietary symbols or inventions.”).

324. See, e.g., Alan Cox & Kristina Sepetys, *Intellectual Property Rights Protection in China: Litigation, Economic Damages, and Case Strategies*, in *DOING BUSINESS IN CHINA* § 11.403 (Thompson/West, Supp. 4, 2006) (“From an economic point of view, it may be optimal (in a social welfare sense) for a government to provide only weak IPR early in a country’s development, given the substantial consumer surplus costs to IPR protection.”).

325. See Kal Raustiala & Christopher Sprigman, *Fake It Till You Make It: The Good News About China’s Knockoff Economy*, *FOREIGN AFF.*, July–Aug. 2013, at 25, 29, available at <http://www.foreignaffairs.com/articles/139452/kal-raustiala-and-christopher-sprigman/fake-it-till-you-make-it> [<http://perma.cc/F9HN-R3PW>] (archived Jan. 19, 2014) (“When the United States was just beginning its rise to wealth and power, it was every bit as much a pirate nation as China is today. In the eighteenth and nineteenth centuries, the United Kingdom was the primary target of thieving Americans, who focused their economic espionage on the British textile industry.”).

326. See ALFORD, *supra* note 323, at 30–55 (exploring efforts by foreigners and Chinese reformers to introduce Western ideas of intellectual property in a chapter entitled “Learning the Law at Gunpoint: The Turn-of-the-Century Introduction of Western Notions of Intellectual Property”); RANDALL PEERENBOOM, *CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST?* 76 (2007) (“Implementation of intellectual property rights remains a concern, although China has now bowed to pressure from the US and other developed countries to rely more heavily on criminal punishments to deter IP violations.”).

327. See Donald C. Clarke, *China’s Legal System and the WTO: Prospects for Compliance*, 2 *WASH. U. GLOBAL STUD. L. REV.* 97, 111–12 (2003) (discussing the requirements of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)).

328. See Bryan Mercurio, *The Protection and Enforcement of Intellectual Property in China Since Accession to the WTO: Progress and Retreat*, *CHINA PERSP.*, no. 2012/1, 2012, at 23, 24, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2152429](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152429) [<http://perma.cc/6MXC-KHKK>] (archived Jan. 19, 2014) (“Membership in the WTO has done nothing to curtail the infringements; ironically, liberalised trade policies . . . coupled with the rise of the Internet and e-commerce has led to a dramatic rise in counterfeiting and piracy over the last decade.”); Raustiala & Sprigman, *supra* note 325, at 25 (“Although estimates of the cost of Chinese piracy to the U.S. economy vary widely and are sensitive to assumptions, the U.S. International Trade Commission has estimated that in 2011 alone, the figure was nearly \$50 billion.”).

obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights.<sup>329</sup>

The Chinese government's hesitancy to use the full force of criminal law against intellectual property violations is understandable because this approach has historically benefited economic growth: "The China State Council in 2003 estimated that the market value of counterfeit goods was \$19–24 billion annually. Based on the \$7 trillion worth of total retail sales of consumer goods in China, counterfeiting is a very sizeable activity in the nation's economy."<sup>330</sup> This calculus may finally be changing: if China succeeds in turning itself into an innovation economy and in developing name brands with domestic and global appeal,<sup>331</sup> then the government may have greater incentives to suppress counterfeit goods.<sup>332</sup> Beyond counterfeit consumer goods, as China continues its push to increase the number of patents and to develop other forms of intellectual property held by Chinese firms,<sup>333</sup> greater incentives to use criminal law might follow.<sup>334</sup> In the United States, the Department of Justice

329. See Press Release, Office of the United States Trade Representative, United States Wins WTO Dispute over Deficiencies in China's Intellectual Property Rights Laws (Jan. 2009), <http://www.ustr.gov/about-us/press-office/press-releases/2009/january/united-states-wins-wto-dispute-over-deficiencies-c> [<http://perma.cc/V83Q-SZDB>] (archived Jan. 19, 2014) (discussing the dispute and WTO ruling); see also Donald P. Harris, *The Honeymoon Is Over: The U.S.-China WTO Intellectual Property Complaint*, 32 FORDHAM INT'L L.J. 96, 97 (2008) (discussing the WTO complaint and its implications for the U.S.-China relationship).

330. Cheng & Friedrichs, *supra* note 57, at 240.

331. See KIRSTEN BOUND ET AL., NESTA, CHINA'S ABSORPTIVE STATE: RESEARCH, INNOVATION AND THE PROSPECTS FOR CHINA-UK COLLABORATION 7 (2013), available at [http://www.nesta.org.uk/sites/default/files/chinas\\_absorptive\\_state\\_0.pdf](http://www.nesta.org.uk/sites/default/files/chinas_absorptive_state_0.pdf) ("Accelerating the shift to a more innovative economy remains a core priority of China's new leadership, yet equally important is a new focus on quality, efficiency and evaluation."); Craig Simons, *Generic Giants*, NEWSWEEK INT'L (July 27, 2009), <http://www.highbeam.com/doc/1G1-204187562.html> [<http://perma.cc/X5SZ-CG5B>] (archived Jan. 19, 2014) ("Huawei may be the best company you've never heard of, and that's a big problem for China."); see generally Chen Wang & Jon Sallet, *Collaborative Innovation and Economic Growth: A Comment on China's Innovation Policies*, 2013 CARDOZO L. REV. DE·NOVO 148 (2013) (examining China's steps to encourage creation of intellectual property by Chinese companies).

332. Here, Taiwan's experience might be instructive: Taiwan expanded intellectual property protections over the past two decades in part because of foreign pressure but also because of domestic constituents' concerns. See ALFORD, *supra* note 323, at 108 ("Taiwan's explosive economic expansion, increasing awareness of the need for indigenous technology, ever-more-pluralistic political and intellectual life, growing commitment to formal legal processes, and international aspirations have made evident the need for intellectual property law and nurtured domestic constituencies with good reasons for supporting it.")

333. Cf. Steve Lohr, *When Innovation, Too, Is Made in China*, N.Y. TIMES (Jan. 1, 2011), <http://www.nytimes.com/2011/01/02/business/02unboxed.html> [<http://perma.cc/86TH-TWKP>] (archived Jan. 19, 2014) (discussing innovations in production and patents in China).

334. See, e.g., NAUGHTON, *supra* note 70, at 365 ("[C]hinese inventors are beginning to find it worthwhile to start protecting their own intellectual property.");

has stepped up protection of trade secrets by using the Economic Espionage Act.<sup>335</sup> As China deepens its domestic intellectual property, perhaps a Chinese version of the Economic Espionage Act will be on the not-so-distant horizon.

Avenues for protecting intellectual property rights will become increasingly of concern as China cultivates indigenous intellectual property. As in other countries, private suits might become an important channel for resolving disputes. China's 2012 white paper on intellectual property rights protection reports that, in 2012, there were 87,419 civil cases involving intellectual property issues, an increase of 46 percent year-on-year.<sup>336</sup> Yet the relatively weak civil courts may not be fully up to the task. The 2012 white paper further reports that the number of criminal cases involving intellectual property hit 13,104 in 2012, up 130 percent year-on-year.<sup>337</sup>

The PRC government already has the ability to subject intellectual property violations to extremely harsh punishments, as seen in the case of Xiao Zhenjiang, who was sentenced to life in prison in 2012 for counterfeiting Hermès bags.<sup>338</sup> The sentence appears to be based on a violation of Article 140 of the Criminal Law, which criminalizes "Producing and Marketing Fake or Substandard Commodities" and calculates the length of sentence based on the estimated value of the goods.<sup>339</sup> Nonetheless, the attention paid to this case suggests that such prosecutions remain relatively rare. If the significant percentage increase in criminal intellectual property cases in 2012 continues, criminal law may play an increasingly prominent role in a long-term strategy to protect intellectual property rights.

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Cox & Sepety, *supra* note 324, § 11.403 ("Although a weak IPR regime may support technological growth and development in the short run through imitation, it also serves to discourage domestic innovation, which is a long-run driver of economic growth.").

335. See CHARLES DOYLE, CONG. RESEARCH SERV., R42681, STEALING TRADE SECRETS AND ECONOMIC ESPIONAGE: AN OVERVIEW OF 18 U.S.C. 1831 AND 1832 (2013), available at <https://www.fas.org/sgp/crs/secretcy/R42681.pdf> [<http://perma.cc/HZ5C-U4JY>] (archived Jan. 19, 2014) (explaining the law under 18 U.S.C. 1831 and 1832, including penalties for violation).

336. See *China Issues White Paper on Intellectual Property Protection*, CHINA BRIEFING (Apr. 29, 2013), <http://www.china-briefing.com/news/2013/04/29/china-issues-white-paper-on-intellectual-property-protection.html> [<http://perma.cc/3VF2-XS9C>] (archived Jan. 19, 2014) (discussing the Paper's summary of progress in Chinese intellectual property strategy in 2012).

337. *Id.*

338. See Fengkuang Zhi Shou Jiamao "Aimashi" Pibao Huo Zhi 1 Yi Duo Yuan Heyuan Zhong Yuan Yishen Panchu Zhufan Wuqi Tuxing (疯狂制售假冒“爱马仕”皮包价值1亿多元 河源中院一审判处主犯无期徒刑) [Heyuan City Intermediate Court of First Instance Sentences Main Offender to Life in Prison for Madness Over Manufacturing and Selling Fake "Hermes" Handbags Valued at Over 100 Million Yuan], (Aug. 7, 2012), <http://www.hycourts.gov.cn/ONEWS.asp?id=703>.

339. PRC Criminal Law, *supra* note 115, at art. 140 (2011 version).

#### 4. Environmental Crimes

Environmental harms are ripe for more thoughtful use of criminal penalties because of their nexus with economic growth. As with intellectual property violations, this is an area where a lax approach might have actually benefitted economic growth to date:

As has been long true in the United States, Canada, and other Western nations, Chinese industrial enterprises have privileged maximizing productivity and profit over protecting citizens from the harmful consequences of exposure to pollution. In the Western nations, however, more egregious forms of industrial and business-related polluting have been criminalized since the 1970s. In China, legal constraints on polluting have been largely absent. Environmental crime law has only been adopted in China fairly recently.<sup>340</sup>

However, the era of “pollute first, control later” is waning, and the push to develop at the expense of the environment is shifting.<sup>341</sup> Reports that living in Beijing’s noxious air is at times worse than living in a smoking lounge are but one example of the severe environmental strain that threatens the health of China’s citizens, China’s production capabilities (e.g., pollution as threatening production processes that require clean water), and China’s ability to retain and draw human capital.<sup>342</sup> The PRC government can no longer convincingly say that environmental protection must wait until China reaches some future benchmark of economic development. The dire state of China’s environment even threatens to erode progress made to date.<sup>343</sup>

China has adopted various environmental laws and regulations since the draft version of the Environmental Protection Law was first

340. Cheng & Friedrichs, *supra* note 57, at 241.

341. See STERN, *supra* note 142, at 25 (“The 1980s and 1990s was the era of ‘pollute first, control later’ (*xian wuran, hou zhili*) and, especially in rural areas, industrialization was key to economic expansion.”).

342. See *id.* at 17 (citing reports that “[n]inety percent of urban river water is polluted, and environmental groups estimate that a quarter of the population lacks access to safe drinking water”); Tania Branigan, *Yuan Drain as China’s Rich Move West*, THE GUARDIAN (Nov. 11, 2011, 2:01 PM), <http://www.theguardian.com/world/2011/nov/11/china-rich-emigrate> [<http://perma.cc/VL2G-BVDT>] (archived Jan. 19, 2014) (reporting on incentives to emigrate from China to countries with better environmental quality); *Beijing Air Akin to Living in Smoking Lounge: Chart of the Day*, BLOOMBERG NEWS (Jan. 30, 2013, 4:00 PM), <http://www.bloomberg.com/news/2013-01-30/beijing-air-akin-to-living-in-smoking-lounge-chart-of-the-day.html> [<http://perma.cc/B46U-P2RF>] (archived Jan. 19, 2014) (showing “Beijing’s daily peak and average concentrations of PM2.5, the airborne particulate matter that raises risks for lung and heart diseases, as measured by the U.S. Embassy”).

343. See Elizabeth Economy, *The Great Leap Backward? The Cost of China’s Environmental Crisis*, 86 FOREIGN AFF., no. 5, Sept.–Oct. 2007, at 38 (“As Pan Yue, a vice minister of China’s State Environmental Protection Administration (SEPA), warned in 2005, ‘The [economic] miracle will end soon because the environment can no longer keep pace.’”); see also Zhang, *supra* note 274.

implemented in 1979.<sup>344</sup> Yet, it was not until the Hu-Wen government that the PRC leadership stepped up environmental rhetoric with, for example, former Premier Wen Jiabao stressing in a 2006 speech “the importance of moving ‘from a mindset of cleaning up after economic development to a simultaneous emphasis on environmental protection *and* economic growth.’”<sup>345</sup> The mindset is slow to change in part because evaluation systems for local officials continue to prioritize economic growth over environmental protection, though environmental targets have been elevated in the evaluation system.<sup>346</sup> Consequently, while there is no shortage of environmental laws on the books, implementation of those laws remains limited.<sup>347</sup>

The 1979 Criminal Law did not use the term environmental crimes, though broad provisions like Crimes of Endangering Public Security could include environmental damage, such as spreading poisonous materials.<sup>348</sup> The current Criminal Law includes a section on “Crimes of Impairing the Protection of Environment and Resources,” which provides for up to 7 years in prison for people who discharge pollutants.<sup>349</sup> A separate section, under “Crimes of Endangering Public Security,” even permits use of the death penalty for anyone who “sets fire, breaches dikes, causes explosions, and spreads poison; employs other dangerous means that lead to serious injuries or death; or causes public or private property major losses . . . .”<sup>350</sup> The first reported conviction under this provision occurred in 2011 when the chairman of Biaoxin Chemical Company was sentenced to 11 years in prison for “spreading poison.”<sup>351</sup> A provision under “Crimes of Dereliction of Duty” authorizes prison time for “[w]ork personnel of state organs in charge of environmental protection and supervision, whose serious irresponsibility has

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344. See STERN, *supra* note 142, at 38 (listing topic-specific environmental laws, such as the 1982 Marine Pollution Law and the 1984 Water Pollution Law).

345. *Id.* at 33 (emphasis in original).

346. See *id.* at 27 (“The nub of the problem is an evaluation system that ties officials’ career prospects to goals that prioritize economic growth and tamping down protest.”); Alex L. Wang, *The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China*, 37 HARV. ENVTL. L. REV. 365, 365 (“[E]xamining why and how Chinese leaders have elevated environmental priorities through the cadre evaluation system.”).

347. Wang, *supra* note 346, at 367 (“Although China has constructed an expansive environmental law framework over the past 30 years, implementation of laws and regulations in practice has been notoriously weak.”); see also *id.* at pt. 3 (explaining recent elevation of environmental priorities that have “expanding, however modestly, environmental protection as a stand-alone normative value”).

348. See Chun-xi Yang, John W. Head & Sheng-rong Liu, *China’s Treatment of Crimes Against the Environment: Using Criminal Sanctions to Fight Environmental Degradation in the PRC*, 8 J. CHINESE L. 145, 154–55 (1994) (illustrating the construction of the Criminal Code wording that addresses environmental crimes).

349. PRC Criminal Law, *supra* note 115, at arts. 338–46 (2011 version).

350. *Id.* at art. 115.

351. STERN, *supra* note 142, at 41.

resulted in serious consequences, including severe environmental pollution that causes serious damages to public and private property or human casualties . . . .”<sup>352</sup> References to criminal sanctions are also found in laws directed at environmental protection.<sup>353</sup>

The pressing question is whether these laws are being strategically used against serious large-scale polluters or rather only in a scattershot manner against small-scale polluters. As with food safety cases, the nationwide number of criminal environmental cases is unclear, though the Ministry of Public Security noted in July 2013 that it has “finished investigating 112 environmental pollution cases since January.”<sup>354</sup> A study by Professor Rachel Stern of court decisions from an environmental court in Guiyang City found that “the typical environmental criminal had no more than a middle school education and lacked legal representation.”<sup>355</sup> Based on this snapshot of one court, Stern raised the concern that “[t]he majority of defendants are not hardened polluters, but some of China’s least educated, most disadvantaged citizens.”<sup>356</sup> While recognizing the limits of extrapolating from this one data point, the findings at least raise concerns regarding whether China is effectively using criminal law in the environmental sphere. If China is to seriously address its brewing environmental catastrophe and work toward true environmental, and in turn economic, sustainability, a more assertive use of criminal law could well be in order. But the focus should be on the major polluters, like the Biaoxin Chemical Company chairman, not on poor, rural residents who accidentally set fires or engage in small-scale illegal logging.

Developments in the summer of 2013 indicated that the PRC government may step up its use of criminal law against polluters. A July 17, 2013, opinion piece in the *Legal Daily* called for the revised Environmental Protection Law to “grow teeth” by including clearer punishments besides fines.<sup>357</sup> On June 17, 2013, the Supreme

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352. PRC Criminal Law, *supra* note 115, at art. 408 (2011 version).

353. See Yang, Head & Liu, *supra* note 348, at 157 (“Several of these environmental laws include provisions for criminal sanctions. Typically, however, the provisions do not specify in detail either the elements of the crime or the punishment to be imposed.”).

354. *Chinese Police Continue to Crack Down on Polluters*, XINHUANET (July 8, 2013, 11:09 PM), [http://news.xinhuanet.com/english/china/2013-07/08/c\\_132523219.htm](http://news.xinhuanet.com/english/china/2013-07/08/c_132523219.htm) [<http://perma.cc/N4MU-VM5Q>] (archived Jan. 19, 2014).

355. Rachel E. Stern, *Poor Rural Residents in China Seen as Easy Target for Environmental Lawsuits*, CHINA DIALOGUE (Apr. 24, 2013), <https://www.chinadialogue.net/article/show/single/en/5937-Poor-rural-residents-in-China-seen-as-easy-target-for-environmental-lawsuits> [<http://perma.cc/YXL4-FUPH>] (archived Jan. 19, 2014) (examining “103 publicly available decisions from the Qingzhen District environmental court’s 2010 criminal docket, roughly 80% of the criminal cases that year”).

356. *Id.*

357. See Liu Wujun (刘武俊), Rang Xin Huanbao Fa Zhang Chu “Yachi” Lai (让新环保法长出“牙齿”来), Fazi Ribao (法制日报) [Let the New Environmental Protection



People's Court and Supreme People's Procuratorate jointly issued an interpretation detailing standards for handling criminal cases of environmental pollution.<sup>358</sup> When releasing the interpretation, an official from the Supreme People's Court stated, "At present, environmental pollution is very serious across the country, which seriously harms the ecological environment and poses a great threat to people's health and property safety."<sup>359</sup> The interpretation clarifies the evidentiary standards for proving serious environmental harms, which indicates a move to make it easier for prosecutors to use the Criminal Law in pollution cases.<sup>360</sup> Regarding property damage, the interpretation clarifies that the phrase "especially serious consequences" in Articles 338 and 339 of the Criminal Law regarding dumping of hazardous or solid waste includes when public economic losses are more than 300,000 Renminbi (\$49,000).<sup>361</sup> The most serious incidents of pollution are even subject to the death penalty.<sup>362</sup> While it is questionable whether the death penalty is ever an appropriate punishment, imposing severe punishments short of execution is understandable in light of increasing evidence that pollution is significantly reducing people's lifespans.<sup>363</sup> Even if a polluter's intent is not to cause physical harm, Should it be criminal

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Law Grow Teeth], (July 17, 2013), available at <http://opinion.people.com.cn/n/2013/0717/c1003-22223279.html>.

358. Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan Guanyu Banli Huanjing Wuran Xingshi Anjian Shiyong Falu Ruogan Wenti de Jieshi (最高人民法院、最高人民检察院关于办理环境污染刑事案件适用法律若干问题的解释) [Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Application of Law in the Handling of Criminal Cases of Environmental Pollution], (June 18, 2013) [hereinafter *Environmental Interpretation*].

359. Zhang Yan, *Legal Weapons' Against Pollution Offenses*, CHINA DAILY (June 19, 2013), [http://www.chinadaily.com.cn/china/2013-06/19/content\\_16635407.htm](http://www.chinadaily.com.cn/china/2013-06/19/content_16635407.htm) [<http://perma.cc/7QHQ-EUG2>] (archived Jan. 19, 2014).

360. See *Interpretation for Criminal Cases of Environmental Pollution*, CHINA WATER RISK (June 18, 2013), <http://chinawaterrisk.org/notices/interpretation-for-criminal-cases-of-environmental-pollution-released/> [<http://perma.cc/9LBC-7BX3>] (archived Jan. 19, 2014) (discussing the use of Chinese criminal law in environmental cases).

361. *Environmental Interpretation*, *supra* note 358, at art. 3.

362. See *Pollution Crimes to Be Severely Punished*, CHINA DAILY (June 19, 2013), [http://usa.chinadaily.com.cn/china/2013-06/19/content\\_16638624.htm](http://usa.chinadaily.com.cn/china/2013-06/19/content_16638624.htm) [<http://perma.cc/JAK3-VL6Y>] (archived Jan. 19, 2014) ("In the most serious cases the death penalty could be handed down.").

363. See Yuyu Chen et al., *Evidence on the Impact of Sustained Exposure to Air Pollution on Life Expectancy from China's Huai River Policy*, PROC. OF THE NAT'L ACAD. OF SCI., May 28, 2013, at 1 (stating in a study of suspended particulates air pollution that, "the analysis suggests that long-term exposure to an additional 100 µg/m<sup>3</sup> of TSPs is associated with a reduction in life expectancy at birth of about 3.0 y"); see also Darren Weedarren, *Ex-Health Minister Endorses Finding China's Smog Kills 350,000 a Year*, S. CHINA MORNING POST (Jan. 7, 2014) ("Air pollution causes 350,000 to 500,000 premature deaths on the mainland a year, according to an article co-written by a former health minister.").

homicide based on negligence or recklessness to end someone's life prematurely as a result of pollution?

## 5. Employment-Related Crimes

Lax enforcement of wage and workplace standards may have helped China's economic growth to date, but more stringent standards could now benefit the sophisticated, higher-value-added economy that China's leaders are working to build.<sup>364</sup> Turning a blind eye to unsafe working conditions allows for cost cutting in the production process, which in turn arguably helped fuel China's economy, particularly with respect to the export market.<sup>365</sup> At the same time, failing to take stern measures to discourage egregious employer practices can lead to disastrous consequences, as when over a hundred people died in a fire at a poultry processing plant.<sup>366</sup> That fire was reminiscent of the 1911 Triangle Shirtwaist Factory fire in New York City<sup>367</sup> where reportedly all but one exit was locked and managers had failed to hold required safety drills.<sup>368</sup> In early June 2013, high-level employees were taken into criminal custody in

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364. Cf. Karel Eloot, Alan Huand & Martin Lehnich, *A New Era for Manufacturing in China*, MCKINSEY & CO. (June 2013), [http://www.mckinsey.com/insights/manufacturing/a\\_new\\_era\\_for\\_manufacturing\\_in\\_china](http://www.mckinsey.com/insights/manufacturing/a_new_era_for_manufacturing_in_china) ("As labor costs rise and slowing growth dampens the ability of China's steadily rising industrial output to deliver regular productivity gains, manufacturers there will need to strive for global levels of operational excellence.").

365. See *supra* note 273 and accompanying text.

366. See Jilin Bao Yuan Feng Qin Ye Youxian Gongsu Huozai Yi Queren Zaocheng 119 Ren Siwang (吉林宝源丰禽业有限公司火灾已确认造成 119 人死亡) [119 People Already Confirmed Dead in Fire at Jilin Bao Yuan Feng Poultry Co. Ltd.], (June 3, 2013), <http://www.infzm.com/content/91201>. As a separate, less expansive, example, at the time of writing, labor groups were raising allegations that workplace conditions were responsible for deaths at facilities in China that manufactured iPhones, though the manufacturers contend that the deaths were not work related. See Eva Dou & Paul Mozur, *iPhone-Factory Deaths Dog Apple and Supplier*, WALL ST. J. (Dec. 11, 2013), <http://online.wsj.com/news/articles/SB10001424052702304202204579251913898555706>.

367. See *Triangle Shirtwaist: The Birth of the New Deal*, THE ECONOMIST (Mar. 17, 2011), <http://www.economist.com/node/18396085> [<http://perma.cc/Y7L7-HTVK>] (archived Jan. 19, 2014) (retelling legal impact of fire that resulted in deaths of 146 workers). Today, it is unusual for workplace accidents in the United States to lead to criminal prosecutions. See David Barstow & Lowell Bergman, *Deaths on the Job, Slaps on the Wrist*, N.Y. TIMES (Jan. 10, 2003), <http://www.nytimes.com/2003/01/10/us/deaths-on-the-job-slaps-on-the-wrist.html> [<http://perma.cc/SN66-M3A3>] (archived Jan. 19, 2014) ("Of some 200,000 workplace deaths since OSHA's creation in 1972, OSHA has referred just 151 cases to the Justice Department, records show. Federal prosecutors declined to act on more than half of those referrals; 11 people have been sentenced to prison.").

368. *China Says Short Circuit Caused Jilin Poultry Fire That Killed 121*, S. CHINA MORNING POST (June 22, 2012, 12:08 PM), <http://www.onenewspage.com/n/Asia-Pacific/74vw2e4wo/China-says-short-circuit-caused-Jilin-poultry-fire.htm> [<http://perma.cc/L3M6-8NBC>] (archived Jan. 19, 2014).

connection with the deaths from the poultry processing plant fire.<sup>369</sup> In another extreme case from 2007, forced labor in brick kilns that was enabled by lax, if not blatantly corrupt, officials led to only a handful of prosecutions and resulted in public outrage.<sup>370</sup>

Workers' more common complaints involve less severe grievances regarding health and safety conditions as well as unpaid wages.<sup>371</sup> Grievances against employers have generally not resulted in criminal cases, though the tides may be turning: a new provision on malicious failure to pay wages was introduced to the Criminal Law in 2011.<sup>372</sup> In January 2013, the Supreme People's Court issued an interpretation clarifying language in the new provision, including what circumstances are serious enough to warrant the most severe penalty of 7 years in prison.<sup>373</sup> In part, a new push for greater labor protection might come from rising expectations of workers who are no longer satisfied to simply have a job, even if it entails poor working conditions.<sup>374</sup> Perhaps criminal law will act as a temporary backstop if the current cumbersome process of settling labor disputes through mediation and arbitration is not satisfying increasing worker demands.<sup>375</sup> And, if China is to fulfill its leaders' stated goals of

369. See Jilin Bao Yuan Feng Qin Ye Gongsì Dongshi, Zong Jingli Bei Xingju (吉林宝源丰禽业公司董事、总经理被刑拘) [Director and General Manager of Jilin Bao Yuan Feng Poultry Co. Ltd. Have Been Criminally Detained], XINHUANET (June 6, 2013), [http://news.xinhuanet.com/legal/2013-06/06/c\\_116061055.htm](http://news.xinhuanet.com/legal/2013-06/06/c_116061055.htm).

370. See Howard W. French, *Beijing's Lack of Penalties in Labor Cases Stirs Outrage*, N.Y. TIMES (July 17, 2007), [http://www.nytimes.com/2007/07/17/world/asia/17china.html?\\_r=0&gwh=BE9D6A03B7A5D697F763D035F9ADF2A2&gwt=pay](http://www.nytimes.com/2007/07/17/world/asia/17china.html?_r=0&gwh=BE9D6A03B7A5D697F763D035F9ADF2A2&gwt=pay) [<http://perma.cc/Z8U3-H96T>] (archived Jan. 19, 2014) (discussing international reactions to Chinese labor laws); Ching-Ching Ni, *China Slavery Verdicts Anger Victims' Families*, L.A. TIMES (July 19, 2007), <http://articles.latimes.com/2007/jul/19/world/fg-china19> [<http://perma.cc/EQ7N-YKXX>] (archived Jan. 19, 2014) (reporting anger when kiln owner "was sentenced to nine years in prison even as two aides received far harsher punishment").

371. See Hilary K. Josephs, *Production Chains and Workplace Law Violations: The Case of Apple and Foxconn*, 3:2 GLOBAL BUS. L. REV. 211, 215 (2013) (exploring the issue of compulsory overtime at Foxconn facilities in China and noting that "[f]orced labor is not only an issue of employment law but also of criminal law"); see generally CONG. EXEC. COMM'N ON CHINA, *supra* note 304, (reporting various complaints of workers in China).

372. See PRC Criminal Law, *supra* note 115, at art. 276 (2011 version).

373. Zuigao Renmin Fayuan Guanyu Shenli Ju Bu Zhifu Laodong Baochou Xingshi Anjian Shiyong Falü Ruogan Wenti de Jieshi (最高人民法院关于审理拒不支付劳动报酬刑事案件适用法律若干问题的解释) [Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law when Adjudicating Criminal Cases of Refusal to Pay Labor Remunerations] (Jan. 14, 2013).

374. See Yukon Huang & Clare Lynch, *Where Have China's Workers Gone?*, BLOOMBERG NEWS (Mar. 6, 2013, 6:55 PM), <http://www.bloomberg.com/news/2013-03-06/where-have-china-s-workers-gone-.html> [<http://perma.cc/Q7FK-8V6H>] (archived Jan. 19, 2014) (analyzing labor market in China and noting that "young workers are demanding more satisfying jobs").

375. Cf. Cynthia L. Estlund & Seth Gurgel, *Will Labour Unrest Lead to More Democratic Trade Unions in China?*, in CHINA AND ILO FUNDAMENTAL PRINCIPLES AND

becoming a “moderately prosperous society” by 2020,<sup>376</sup> perhaps greater emphasis on satisfactory working conditions is needed as China moves up the value chain from labor-intensive to more skill-intensive activities.

## 6. Summary: Supporting the Socialist Market Economy

With all of the above five areas, criminal law provides a direct mechanism for the government to deter activities that threaten to impede China’s economic prospects. Despite occasional use of criminal law, there appears to be significant room for China to mount a more assertive attack on these areas, which will require greater resources and willpower. A lax approach toward regulating financial markets, poor environmental controls, unpunished intellectual property violations, and unregulated workplace conditions might have helped China’s economic success story over the last 35 years. Recent trends suggest that this recipe for success may have run its course and a new approach might be warranted.

If China seeks to rethink its use of criminal law, foreign examples could be useful. Although the wholesale transplantation of foreign laws has proven problematic at best, China’s exploration of new ways to target economic misdeeds is an area where foreign assistance could be helpful. For example, in 2011, China enacted a law that bars bribery of foreign officials.<sup>377</sup> This new law has parallels in the U.S. Foreign Corrupt Practices Act (FCPA).<sup>378</sup> The U.S. Department of Justice has decades of experience with prosecutions under the FCPA and has used the law with renewed vigor in recent years.<sup>379</sup> Similarly, perhaps prosecutors from the

RIGHTS AT WORK 91 (Roger Blanpain ed., forthcoming 2014) (noting that, despite reforms that “sought to afford workers an official avenue for peaceful redress of ‘rights disputes’[,] [t]he result has been a dramatic rise in labour-related complaints through official arbitral and judicial channels, but not a decline in street-level labor protest. That is partly because of the persistence of many of the problems that workers faced before the reforms . . .”).

376. 17th CPC Central Committee Sets Targets for 12th Five-Year Program, XINHUA NEWS (Oct. 27, 2010), [http://news.xinhuanet.com/english2010/china/2010-10/27/c\\_13578425.htm](http://news.xinhuanet.com/english2010/china/2010-10/27/c_13578425.htm) [<http://perma.cc/7UGJ-TUW3>] (archived Jan. 19, 2014).

377. Eric Carlson, Ellen Eliasoph & Tim Stratford, *China Amends Criminal Law to Cover Foreign Bribery: Bribery of Non-PRC Government Officials Criminalized*, 3 FIN. FRAUD L. REP. 517, 517 (2011), available at <http://www.cov.com/files/Publication/0baa275b-3642-47b7-a815-f3f80f5ed84c/Presentation/PublicationAttachment/bd24e59e-cb6e-4651-ba9c-06883a8a9050/China%20Amends%20Criminal%20Law%20to%20Cover%20Foreign%20Bribery%20-%20Bribery%20of%20Non-PRC%20Government%20Officials.pdf> [<http://perma.cc/G2N4-PYGG>] (archived Jan. 19, 2014).

378. 15 U.S.C. §§ 78m et. seq. (2006).

379. See, e.g., Benjamin Gruenstein, *Upswing in FCPA Cases Results in Increased Judicial Oversight*, N.Y. L.J. (SPECIAL SECTION), July 8, 2013 (noting the frequency of FCPA cases).

Southern District of New York, which includes the financial hub of Manhattan, could be of help to their counterparts in Shanghai.<sup>380</sup> Academic exchanges offer another fruitful avenue for cooperation. For example, in March 2013, “Emory Law faculty traveled to Shanghai to train the financial crimes unit of the Shanghai prosecutor’s office on the investigation of insider trading claims.”<sup>381</sup> At a minimum, greater consideration of how foreign experience can be helpful to China in discrete areas of law, as opposed to wide-scale legal reforms, is worth further study.

### B. Limited Exposing of Financial Misdeeds by Officials

Despite indications of increased interest in targeting financial crimes, the government has stopped far short of using the full capabilities of criminal law to address financial misdeeds by those in its ranks.<sup>382</sup> Chinese leaders are not alone in having amassed significant wealth after taking office,<sup>383</sup> but there are serious questions about whether that wealth is from entirely legal dealings.<sup>384</sup>

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380. For a recent indictment that shook the U.S. business world, see *Charging & Supporting Documents: U.S. v. S.A.C. Capital Advisors, L.P.*, U.S. ATT’Y, S.D.N.Y. (July 25, 2013), <http://www.justice.gov/usao/nys/pressreleases/July13/SACChargingAndSupportingDocuments.php> [<http://perma.cc/W4US-8RL8>] (archived Jan. 20, 2014).

381. Lisa Ashmore, *Chinese Judges Visit Emory Law to Study American Justice System*, EMORY NEWS CENTER (June 4, 2013), [http://news.emory.edu/stories/2013/06/upress\\_chinese\\_judges\\_studying\\_law/campus.html](http://news.emory.edu/stories/2013/06/upress_chinese_judges_studying_law/campus.html) [<http://perma.cc/F8U7-V88Q>] [J?type=source] (archived Jan. 20, 2014).

382. Andrew Wedeman, *Xi Jinping’s Anti-corruption Campaign and the Third Plenum*, UNIV. OF NOTTINGHAM (Nov. 15, 2013), <http://blogs.nottingham.ac.uk/chinapolicyinstitute/2013/11/15/xi-jinpings-anti-corruption-campaign-and-the-third-plenum/> (reviewing prosecutions for corruption in 2012 and the first 8 months of 2013 and commenting that, “[i]f the two sets of data are comparable, . . . the more recent data would suggest that Xi’s anti-corruption campaign has not produced much of an increase in the number of officials charged with corruption.”); *id.* (“At the Third Plenum in November 2013, corruption received surprisingly little attention. . . . The lack of attention to corruption during the plenum likely signals Xi’s anti-corruption campaign has run its course and that it will be allowed to quietly die down.”).

383. For U.S. presidents, the most significant gains appear to occur after they leave office. See *Richest Presidents from Washington to Clinton*, USA TODAY (Feb. 18, 2013), <http://www.usatoday.com/story/money/business/2013/02/16/richest-usapresidents/1923739/> [<http://perma.cc/XBF5-B48R>] (archived Jan. 20, 2014) (“One thing remains clear: it pays to be president, especially after leaving office.”).

384. For example, the N.Y. Times published a detailed account on the wealth of Premier Wen Jiabao’s family. David Barboza, *Billions in Hidden Riches for Family of Chinese Leader*, N.Y. TIMES (Oct. 25, 2012), <http://www.nytimes.com/2012/10/26/business/global/family-of-wen-jiabao-holds-a-hidden-fortune-in-china.html> [<http://perma.cc/MH3Y-XQ63>] (archived Jan. 20, 2014). After publication, the journalist suspiciously encountered delays in his visa renewal. *Visa Issue in China Forces out Times Reporter*, N.Y. TIMES (Dec. 31, 2012), <http://www.nytimes.com/2013/01/01/world/asia/times-reporter-in-china-is-forced-to-leave-over-visa-issue.html> [<http://perma.cc/N6KM-CTFQ>] (archived Jan. 20, 2014).

As discussed in Part III.B above, corruption is by its nature difficult to measure because, when successful, it is conducted in the dark. Despite the lack of accurate data, the general perception among the PRC populace is that the prevalence of corruption is on the rise.<sup>385</sup> The scale of corruption might also be in flux.<sup>386</sup> The leadership understandably fears that exposing corrupt officials might backfire and, instead of enhancing public support, lead people to conclude that the government is rotten to the core.<sup>387</sup> Recent rhetoric nonetheless suggests that the new leadership might take a harder stance. Xi Jinping has talked of using a “cage of regulations” to curtail corrupt dealings.<sup>388</sup> And initial moves to curb extravagant banquets and other perquisites of government jobs signal that President Xi’s words might have real force.<sup>389</sup> Nevertheless, the Party’s hesitancy about exposing misdeeds among its own counsels that his words should be taken with cautious enthusiasm.

This is not to say that the PRC leadership has been completely lax with respect to corruption:

In sum, the data on cases handled by the judicial system reveal that on average 20,000 individuals are convicted on corruption-related charges each year and that about half of these go to prison. Furthermore, we have evidence that hundreds of officials have either been executed or sent to prison for life after being convicted of corruption. The claim that corrupt officials get off with a mere slap on the wrist is thus unsustainable.<sup>390</sup>

385. See *Growing Concerns in China About Inequality, Corruption*, PEW RESEARCH GLOBAL ATTITUDES PROJECT (Oct. 16, 2012), <http://www.pewglobal.org/files/2012/10/Pew-Global-Attitudes-China-Report-FINAL-October-10-2012.pdf> [<http://perma.cc/82JK-MAUE>] (archived Jan. 20, 2014) (“[H]alf [of the Chinese public] say corrupt officials are a major problem, up from 39% four years ago.”).

386. See Wedeman, *supra* note 218, at 895 (“Corruption thus ‘intensified’ in the sense that high-level, big-stakes corruption increased more rapidly than ‘ordinary’ corruption and other forms of official malfeasance.”).

387. Wedeman, *supra* note 382 (quoting Xi Jinping as stating that “[a] mass of facts tells us that if corruption becomes increasingly serious, it will inevitably doom the party and the state. We must be vigilant. In recent years, there have been cases of grave violations of disciplinary rules and laws within the party that have been extremely malign in nature and utterly destructive politically, shocking people to the core.”).

388. *Xi Jinping Vows “Power Within Cage of Regulations,”* CHINA DAILY (Jan. 22, 2013, 8:16 PM), [http://www.chinadaily.com.cn/china/2013-01/23/content\\_16157933.htm](http://www.chinadaily.com.cn/china/2013-01/23/content_16157933.htm) [<http://perma.cc/5J9G-MVY3>] (archived Jan. 20, 2014) (“Xi asked [at a meeting of the CCP’s Central Commission for Discipline Inspection] for efforts to strengthen national anti-corruption legislation and relevant intra-Party regulations to ensure national organs exercise their power within the boundary of laws.”).

389. See Andrew Jacobs, *Elite in China Face Austerity Under Xi’s Rule*, N.Y. TIMES (Mar. 27, 2013), <http://www.nytimes.com/2013/03/28/world/asia/xi-jinping-imposes-austerity-measures-on-chinas-elite.html> [<http://perma.cc/ULR9-V9FB>] (archived Jan. 20, 2014) (discussing Chinese President Xi’s attempts to curb conspicuous government overconsumption by public officials).

390. WEDEMAN, *supra* note 141, at 152.

Then-Premier Zhu Rongji made this point bluntly when responding to a question by a German journalist at a 2000 press conference: “The Chinese have made tremendous achievements in its anti-corruption fight in recent years. Did your countries execute as many corrupt criminals as we did?”<sup>391</sup> In the limited cases where the PRC government decides to prosecute its own, it arguably does so with greater vigor than cases against government officials in other countries.<sup>392</sup> That said, a basic premise of deterrence is that not only must the threatened punishment be severe enough to deter criminal behavior, but the would-be criminal must also believe that there is a credible threat that his behavior will be discovered and prosecuted.<sup>393</sup> The Chinese idiom expressing deterrence, “killing the chicken to scare the monkey” (*sha ji jing hou*, 杀鸡儆猴), only works when the monkey actually believes he too might share the chicken’s fate. As the Wukan example discussed in Part III.B indicates, at present, the proverbial monkeys do not seem particularly scared.

The failure of the government to use criminal law aggressively against its own members is not due to a lack of legal tools by which to do so.<sup>394</sup> For instance, as previously mentioned, the Criminal Law criminalizes illicit enrichment—a significant increase in the assets of a public official that he cannot explain in relation to his lawful income.<sup>395</sup> The law even gives prosecutors a helping hand by partially shifting the burden of proof: if the government shows there are disproportionate assets, the defendant must explain the sources of these assets.<sup>396</sup> The government has used this provision sparingly.<sup>397</sup> Nor has the government made substantial use of prophylactic measures such as requiring that officials and close family members

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391. Zhu Rongji, Premier, Press Conference (Mar. 16, 2000) (transcript available at <https://www.fas.org/news/china/2000/eng20000316N107.htm> [<http://perma.cc/SE4-A9EF>] (archived Jan. 20, 2014)).

392. See PEERENBOOM, *supra* note 77, at 133 (“In some ways, China takes corruption more seriously in that corrupt officials are more likely to be prosecuted based on the core offense rather than ancillary crimes such as fraud or tax evasion, and serious offenses carry the death penalty, whereas in the USA the worst punishment is a definite term of imprisonment.”).

393. See, e.g., Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME AND JUSTICE 1, 2–3 (1998) (explaining literature “on the link between perceptions of sanction risk and severity to self-reported crime and delinquency” and noting that, “[w]ith few exceptions, the perceptual studies find that self-reported criminality is lower among people who perceive that sanction risks and costs are higher”).

394. See PRC GOVERNMENT, WHITE PAPER: CHINA’S EFFORTS TO COMBAT CORRUPTION AND BUILD A CLEAN GOVERNMENT, INFORMATION OFFICE OF THE STATE COUNCIL (Dec. 29, 2010), available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan043696.pdf> [<http://perma.cc/Y7WP-7J4Z>] (archived Jan. 20, 2014) (including Part III, “Legal Framework for Combating Corruption and Building a Clean Government” and other sections that provide legal enforcement tools).

395. See *supra* notes 234–35 and accompanying text.

396. Lewis, *supra* note 294, at 338–40.

397. *Id.* at 334 n.187.

publicly disclose assets.<sup>398</sup> When the chief editor of the *Global Times*, a government-run newspaper, posted on his weibo microblog that he thought “it is unrealistic to immediately have all officials publicly disclose their assets,” a slew of angry comments followed.<sup>399</sup> The post was deleted by the following morning.<sup>400</sup>

It must be highlighted that, in addition to the formal criminal law, the Party’s own disciplinary process serves as a quasi-criminal justice system for Party members, as mentioned with regard to the Wukan example. It is common practice for misdeeds by Party members, especially high-ranking ones, to be dealt with first, and potentially exclusively, by the Party apparatus.<sup>401</sup> The strong Party-state can supplement and even supplant the formal legal system.<sup>402</sup> The Party can revoke Party membership and official posts (*shuangkai*, 双开) and detain members for questioning at a designated time and place (*shuanggui*, 双规) for months or even longer.<sup>403</sup> Formal criminal punishment requires transferring the case to the procuratorate for handling.<sup>404</sup> If and when this transfer occurs, the suspect’s fate is largely a foregone conclusion.<sup>405</sup> The intersection of Party and criminal measures received international attention in 2012 when Bo Xilai, the former head of Chongqing municipality and rising star in the Party, was ousted from his government posts and stripped of his high-ranking positions because of allegations of

398. Even the official media indicates that disclosure rules have been lax, though there are new calls for stepped up enforcement. See *China to Strengthen Supervision of Officials’ Assets Reports*, XINHUA (Dec. 29, 2013), [http://news.xinhuanet.com/english/china/2013-12/29/c\\_125929754.htm](http://news.xinhuanet.com/english/china/2013-12/29/c_125929754.htm) (“A revised regulation issued in 2010 requires officials to report their marriage status, property, and their children’s and spouses’ earnings, overseas business dealings and other investment activities. But some corrupt officials have circumvented the regulation by transferring their illegal gains overseas, or to their spouses or children to avoid punishment.”).

399. Anne Henochowicz, *Netizen Voices: Financial Disclosure Never?*, CHINA DIGITAL TIMES (Jan 24, 2013, 9:07 AM), <http://chinadigitaltimes.net/2013/01/netizen-voices-financial-disclosure-never/> [<http://perma.cc/4E2S-MHGW>] (archived Jan. 20, 2014).

400. See *id.* (describing the chief editor’s post and the events that followed).

401. See Flora Sapio, *Shuanggui and Extralegal Detention in China*, 22 CHINA INFO. 7, 7 (2008) (highlighting the fact that the CCP has the power to detain officials suspected of corruption).

402. See *id.* at 7–8 (discussing the use of *shuanggui* by the CCP as a form of extralegal detention).

403. *Id.* at 12–15 (explaining how and when *shuanggui* is conducted by the Party).

404. See Stanley Lubman, *Double Jeopardy: Crime and China’s Communist Party*, CHINA REALTIME (May 30, 2012), <http://blogs.wsj.com/chinarealtime/2012/05/30/double-jeopardy-crime-and-chinas-communist-party/> (explaining the transfer of cases to the formal criminal justice system after the conclusion of the Party’s investigation).

405. See *id.* (“Party officials have the final say over the courts’ dispositions of those cases—a stark illustration of the Party’s influence over the criminal justice system.”).



corruption and abuse of power.<sup>406</sup> Bo was not formally indicted until July 2013.<sup>407</sup> Following his August trial, Bo was convicted of taking bribes, embezzlement, and abuse of power and was sentenced to life in prison.<sup>408</sup> The Party discipline procedures were also invoked in the high-profile cases of a former Shanghai Party secretary, Chen Liangyu, and a former Beijing Party secretary, Chen Xitong.<sup>409</sup> Outside of such high-profile cases that receive protracted media attention, it is difficult to know how Party disciplinary procedures are used because of the lack of transparency.<sup>410</sup> According to a *China Daily* report, “Nearly 73,000 people were punished for corruption or dereliction of duty in 2012.”<sup>411</sup> The report did not specify how many of those people also faced criminal charges.

It is possible that the current combination of Party sanctions, administrative sanctions, and use of the formal criminal justice system will be enough to placate the Chinese people that the leadership is mounting a sufficient attack against corruption. More likely, however, is that Xi Jinping and his colleagues will face increasingly vocal demands to root out and punish corrupt officials. The leadership’s challenge, and a tricky one at that, will be to do this while simultaneously convincing the public that the CCP’s monopoly on power should continue.<sup>412</sup> The new top leaders are arguably in a better position to do this early in their tenure because, while they were all high-ranking officials before being elevated to top posts, it

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406. See *Bo Xilai Removed from Politburo*, GLOBAL TIMES (Apr. 10, 2012, 11:31 PM), <http://www.globaltimes.cn/NEWS/tabid/99/ID/704168/Bo-Xilai-removed-from-Politburo.aspx> [<http://perma.cc/DXK4-WQVD>] (archived Jan. 20, 2014) (reporting that Bo had been suspended by the CCP’s Central Committee under suspicion of corruption).

407. Liu Sha, *Bo Xilai Indicted on Corruption Charges*, GLOBAL TIMES (July 26, 2013), <http://www.globaltimes.cn/DesktopModules/DnnForge%20-%20NewsArticles/Print.aspx?tabid=99&tabmoduleid=94&articleId=799258&moduleId=405&PortalID=0> [<http://perma.cc/998V-UWZM>] (archived Jan. 20, 2014).

408. Bo Xilai An Yishen Panjueshu Quanwen (薄熙来案一审判决书全文) [Bo Xilai Case, Complete First-Instance Verdict] (Interm. People’s Ct. Crim. Judgement Sept. 22, 2013), available at <http://politics.people.com.cn/n/2013/0922/c1001-22990526.html> [<http://perma.cc/7HDY-7WU2>] (archived Mar. 24, 2014).

409. See RICHARD MCGREGOR, *THE PARTY: THE SECRET WORLD OF CHINA’S COMMUNIST RULERS* 165–68 (2010) (discussing Chen Liangyu and Chen Xitong’s backgrounds and trials).

410. See WEDEMAN, *supra* note 141, at 11 (explaining uncertainties in data regarding CCP disciplinary actions). As another alternative to criminal sanctions for corruption involving state officials, the Ministry of Supervision lacks judicial authority but can impose “various administrative sanctions, with dismissal from office being the harshest.” *Id.* at 146.

411. *Xi Jinping Vows “Power Within Cage of Regulations,” supra* note 388.

412. Cf. Minxin Pei, *China’s Three Challenges in 2014*, THE DIPLOMAT (Jan. 12, 2014), <http://thediplomat.com/2014/01/chinas-three-challenges-in-2014/> (“The second major challenge that Xi faces in 2014 is sustaining his highly popular—and hugely risky—anti-corruption campaign. Given that Xi has ruled out mobilizing the Chinese public to support his reform plans, his only means of forcing the bureaucracy to comply with his agenda is the threat of corruption investigations and prosecutions.”).

was only after rising to the pinnacle of power that they had the stature to mount a more widespread, vigorous campaign.<sup>413</sup>

President Xi himself was quick to state that he would take down both “tigers and flies” (*laohu cangying*, 老虎苍蝇), a reference to high-ranking officials and lowly bureaucrats.<sup>414</sup> Bo Xilai’s conviction was a very high-profile downfall of a tiger, though questions persist as to whether Bo’s fate is more of an indication of a purge of Xi Jinping’s political foes than a broader effort to root out corruption.<sup>415</sup> Even if President Xi’s campaign manifests as a selective political purge rather than a broad-scale attack on corruption, considering the current vacuum when it comes to an alternative to CCP rule, a “better the devil you know” attitude might add to the current government’s resilience in the face of public pressure. What no one knows is how far China’s “resilient authoritarianism” can stretch before it cracks.<sup>416</sup> Before this point, the new leadership needs to convince the public that they are charting a course for continued economic growth in an atmosphere not beset by corruption.

### C. Targeting Potentially Destabilizing Elements

In view of the government’s overriding concern with maintaining social stability as a foundation for stable economic growth, the PRC leadership has leaned on criminal law as a convenient tool to silence people who expose problems that might engender social unrest.<sup>417</sup> There is no indication that the new leadership has renounced this practice and, in light of widespread concerns over issues like pollution and food safety that threaten the government’s legitimacy, there is

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413. For a discussion of the shift in power from the fourth to fifth generation leaders and speculation about the continuing influence of retired leaders, see *China’s New Leadership and Implications for the United States: Hearing Before the U.S.-China Econ. & Sec. Review Comm’n* (Feb. 7, 2013) (statement of Christopher K. Johnson, Senior Advisor and Freeman Chair in China Studies, The Center for Strategic and International Studies) (“Although it is unclear whether Xi will face the same kind of substantial meddling from his retired predecessors that seemingly plagued Hu’s tenure, early indications would suggest otherwise.”).

414. Xi Jinping Qiangdiao Fanfu Yao “Laohu Cangying Yiqi Da” Zhenlongfakui (习近平强调反腐要“老虎苍蝇一起打”振聋发聩) [Xi Jinping Loudly Emphasizes that Anti-Corruption Efforts Require “Striking at Both Tigers and Flies”] (Jan. 21, 2013), <http://cpc.people.com.cn/pinglun/n/2013/0123/c78779-20302118.html> [<http://perma.cc/8TF-6JVP>] (archived Mar. 24, 2014).

415. See *A Chinese Power Struggle: Hunting Tigers*, THE ECONOMIST, Sept. 7, 2013, available at <http://www.economist.com/news/leaders/21585004-cracking-down-corrupt-officials-xi-jinping-must-not-forget-fundamental-reforms-hunting> [<http://perma.cc/Y2NT-JDTJ>] (archived Jan. 19, 2014) (“[T]he tigers being rounded up are Mr Xi’s enemies.”).

416. Cf. Cheng Li, *The End of the CCP’s Resilient Authoritarianism? A Tripartite Assessment of Shifting Power in China*, 211 CHINA Q. 595, 595–96 (2012) (challenging view of the CCP’s “resilient authoritarianism” and calling for intra-Party reforms).

417. See *infra* note 420–31 and accompanying text.

reason to be concerned that the leadership might increasingly invoke criminal sanctions.

Here, criminal law is not necessarily being used to directly target activities that are seen as detrimental to the economy but rather to keep a lid on greater social tensions that might derail growth. Moreover, when used in this fashion, criminal law is not targeting people who are creating the social harm (e.g., the polluted water or poisonous vegetables). Instead, the focus is on people who are exposing the social harm. China is far from alone in bringing specious criminal charges against people who challenge the government,<sup>418</sup> but pressing concerns about a slowing economy and accelerating social unrest make an inquiry into criminal law's relationship with stability and economic growth particularly timely.

Interestingly, in targeting people seen as potentially destabilizing elements, the government has sometimes prosecuted economic crimes in a manner that suggests the real concern is not the defendant's alleged financial misdeeds but rather other activities. This approach was prominently seen in three cases involving economic crimes with the subtext that the government was concerned that the activities were inciting public anger toward the government.<sup>419</sup> First, artist and vocal government critic Ai Weiwei received international attention when he was detained on suspicion of economic crimes.<sup>420</sup> In an interview with the *New York Times*, Ai's mother stated, "Economic crimes! They say one thing now and another later. It's ridiculous."<sup>421</sup>

Second, in 2009, Xu Zhiyong, a public interest lawyer and founder of the Open Constitution (*Gongmeng*) legal group, was

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418. See, e.g., Catherine Belton, *Plea for End to Khodorkovsky 'Persecution'*, FIN. TIMES (Dec. 14, 2010, 12:01 AM), <http://www.ft.com/intl/cms/s/0/72e313e8-06ed-11e0-8c29-00144feabdc0.html#axzz2tdGZSMp> [<http://perma.cc/76YJ-VEAC>] (archived Jan. 19, 2014) (reporting on a letter by Western politicians supporting release of Khodorkovsky because his prosecution was "not truly motivated by law"); Shaun Walker & Philip Oltermann, *Mikhail Khodorkovsky 'Exhausted But Happy to be Free' After Putin's Pardon*, THE GUARDIAN (Dec. 20, 2013), <http://www.theguardian.com/world/2013/dec/20/mikhail-khodorkovsky-free-putin-pardon-berlin> (reporting on the decision by Putin to pardon Khodorkovsky).

419. See *A Lot to be Angry About*, THE ECONOMIST (May 1, 2008, 12:09 PM), <http://www.economist.com/node/11293734> [<http://perma.cc/5NHC-QM74>] (archived Jan. 19, 2014) (analyzing China's tactics of persecuting activists to quell social unrest); see also CONG. EXEC. COMM'N ON CHINA, *supra* note 304, at 87 ("A prominent Guangdong province-based Buddhist leader, Wu Zeheng, also known as Zen Master Xing Wu, has been monitored and harassed since his release from prison for 'economic crimes' in 2010.").

420. Edward Wong, *Chinese Defend Detention of Artist on Grounds of 'Economic Crimes'*, N.Y. TIMES (Apr. 7, 2011), <http://www.nytimes.com/2011/04/08/world/asia/08china.html> [<http://perma.cc/R78A-VS45>] (archived Jan. 19, 2014).

421. *Id.*

arrested for tax evasion.<sup>422</sup> Xu had come under increasing government scrutiny for his involvement in sensitive cases, such as the 2008 milk powder scandal.<sup>423</sup> The charges were eventually dismissed, but Xu later faced other criminal charges, including “inciting subversion of state power,” in connection with his legal advocacy.<sup>424</sup> In 2013, Xu continued to criticize the government’s actions when speaking to reporters while under house arrest: “The party promised to publish officials’ assets 30 years ago, something it has yet to do . . . . Clearly the government is afraid of this demand.”<sup>425</sup> The government was afraid enough to arrest him in July 2013 on trumped up charges of gathering people to disturb public order.<sup>426</sup> In January 2014, Xu was sentenced to 4 years in prison.<sup>427</sup>

Third, in 2007, after exposing severe industrial pollution in Lake Tai, environmental activist Wu Lihong was sentenced to 3 years in

422. Celia Hatton, *China Court Sentences Xu Zhiyong to Four Years in Jail*, BBC NEWS (last updated Jan. 26, 2014), <http://www.bbc.co.uk/news/world-asia-china-25900272> [<http://perma.cc/QQ4S-9CVA>] (archived Mar. 24, 2014).

423. See Tania Branigan, *China Frees Human Rights Lawyer Arrested for Tax Evasion*, THE GUARDIAN (Aug. 23, 2009, 10:24 AM), <http://www.theguardian.com/world/2009/aug/23/xu-zhiyong-china-lawyer-freed> [<http://perma.cc/CZ9D-MTBS>] (archived Jan. 19, 2014) (discussing release of Xu Zhiyong who had represented the parents of children who were injured by tainted baby formula).

424. Mengyu Dong, *Xu Zhiyong: An Account of My Recent Disappearance*, CHINA DIGITAL TIMES (June 20, 2012, 11:21 PM), <http://chinadigitaltimes.net/2012/06/xu-zhiyong-an-account-my-recent-disappearance/> [<http://perma.cc/E69M-725H>] (archived Jan. 19, 2014); Xu Zhiyong, *Advocate of Disclosure of Official Assets, Criminally Detained*, HUMAN RIGHTS IN CHINA (July 16, 2013), <http://www.hrichina.org/en/content/6822> [<http://perma.cc/AN2K-KW52>] (archived Jan. 19, 2014).

425. Andrew Jacobs, *China Presses Crackdown on Campaign Against Graft*, N.Y. TIMES (Apr. 21, 2013), <http://www.nytimes.com/2013/04/22/world/asia/china-expands-crackdown-on-anticorruption-activists.html> [<http://perma.cc/FVK6-AD87>] (archived Jan. 19, 2014).

426. See *Chinese Lawyer Xu Zhiyong Arrested*, THE GUARDIAN (July 17, 2013, 3:04 PM), <http://www.theguardian.com/world/2013/jul/17/china-lawyer-xu-zhiyong-arrested> [<http://perma.cc/G7PH-66Q6>] (archived Jan. 19, 2014) (reporting on the events leading up to Xu’s arrest); Jonathan Kaiman, *The Trial of Chinese Activists Xu Zhiyong May Be Imminent, Says His Lawyer*, THE GUARDIAN (Jan. 14, 2014), <http://www.theguardian.com/world/2014/jan/14/trial-chinese-activist-xu-zhiyong-imminent-lawyer> (“Last month prosecutors formally arrested Xu of ‘assembling a crowd to disrupt order in a public place’, which, according to Zhang, carries a maximum five-year sentence. Xu denies the charge.”). Xu Zhiyong is not the only advocate of greater transparency who has faced criminal charges. See, e.g., *Liu Ping’s Final Statement at Trial*, HUMAN RIGHTS IN CHINA (Dec. 6, 2013), <http://www.hrichina.org/en/press-work/hric-bulletin/liu-pings-final-statement-trial> (translating the statement of an “asset transparency advocate” who was tried for “illegal assembly”, “gathering a crowd to disrupt order in a public place”, and “using an evil cult to undermine law enforcement”).

427. Eva Pils & Joshua Rosenzweig, *Beijing Confronts a New Type of Dissent*, WALL ST. J., Jan. 27, 2014, at A11 (“[T]he Chinese authorities have made it clear that they will not tolerate the New Citizen Movement he helped to launch, because the kind of China it advocates . . . would be a radical departure from what China is now.”).

prison for allegedly extorting money from one of the polluters.<sup>428</sup> According to censorship watchers, Wu's case was on the official list of topics that should be removed from websites.<sup>429</sup> Rather than use criminal law to target polluters, here the government targeted a person exposing pollution. The possibility that others could follow in Wu Lihong's footsteps is very real: a Chinese lawyer was told in 2013 that the extent of soil pollution remains a state secret—<sup>430</sup>simply having state secrets in one's possession can lead to a three-year prison term under the Criminal Law.<sup>431</sup>

In all three of these cases, the government's underlying concern appeared to be that the wheels were going to come off the current governmental structure, and criminal law was a convenient way to quiet people who were vocally challenging the government's lack of action to redress problems. Ai Weiwei may indeed have deprived the state of funds that were legitimately owed and thus have committed the criminal offense of tax evasion.<sup>432</sup> Even if those allegations are true, however, his case is better understood as addressing the destabilizing threat he poses far beyond the dollar amount of the alleged criminal infraction. More recently, a spate of arrests of anticorruption protestors (including Xu Zhiyong) in 2013 indicates that, despite President Xi's calls for a stepped-up response to corruption, criminal law may be used against people who expose corruption rather than people who engage in corrupt activities.<sup>433</sup> There is admittedly the possibility that people are not exposing government misdeeds for altruistic reasons but instead for personal

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428. See William Wan, *The Tale of Tai Lake*, WASH. POST, Oct. 29, 2010, at A1, available at <http://www.highbeam.com/doc/1P2-26086780.html> [<http://perma.cc/V5Z4-N3PX>] (archived Jan. 19, 2014) (reporting on the pollution in Lake Tai and charges against a man who took measures to clean it up).

429. See Anne Henochowicz, *Censorship Vault: One World, One Dream, One Lawsuit*, CHINA DIGITAL TIMES (Jan. 7, 2013, 10:40 AM), <http://chinadigitaltimes.net/2013/01/censorship-vault-6/> [<http://perma.cc/ZT6E-H782>] (archived Jan. 19, 2014) (providing a list of articles that government bodies ordered should be removed from websites).

430. See Christina Larson, *Soil Pollution Is a State Secret in China*, BLOOMBERG BUSINESSWEEK (Feb. 25, 2013), <http://www.businessweek.com/articles/2013-02-25/soil-pollution-is-a-state-secret-in-china> [<http://perma.cc/UML7-8ESE>] (archived Jan. 19, 2014) (recounting the government's denial of a request for soil pollution data because soil pollution data is a state secret and not subject to transparency policies).

431. PRC Criminal Law, *supra* note 115, at art. 282 (2011 version).

432. See Ji Li, *Dare You Sue the Tax Collector? An Empirical Study of Administrative Lawsuits Against Tax Agencies in China*, PACIFIC RIM L. & POL'Y J. (forthcoming 2014) (manuscript at 14), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2256021](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256021) (explaining that tax evasion is common among Chinese businesses and "the actual tax burden of a Chinese taxpayer depends on his relationship with tax collectors").

433. Peter Ford, *With Arrest, China Signals Limits to Anticorruption Campaign*, CHRISTIAN SCI. MONITOR (July 17, 2013), <http://www.csmonitor.com/World/Asia-Pacific/2013/0717/With-arrest-China-signals-limits-to-anticorruption-campaign> [<http://perma.cc/EQ2U-9NQE>] (archived Jan. 19, 2014).

gain—or even that people will fabricate “evidence” to blackmail officials.<sup>434</sup> This possibility is reason to encourage more careful analysis of allegations but should not be used as an excuse to attack a wide swath of people who are voicing what could well be legitimate complaints.

Using criminal law to silence the government’s critics could enhance social stability in the immediate term and, in turn, help economic growth. Completing this feedback loop, economic growth could then help enhance social stability. Deng Xiaoping captured this stability-enhancing function of economic growth in a statement made shortly before the military opened fire on protestors on June 4, 1989, in Tiananmen Square:

The economy is still the base; if we didn’t have that economic base, the farmers would have risen in rebellion after only ten days of student protests—never mind a whole month. But as it is, the villages are stable all over the country, and the workers are basically stable too.<sup>435</sup>

The question is whether, at some point, the general populace will have an “emperor has no clothes” moment and fundamentally question the government’s tactics: Will a critical mass challenge the leadership to explain why they are silencing people who are exposing societal ills that threaten to impede China’s long-term, healthy economic growth? Surely Xu Zhiyong and others who have put themselves personally at risk of government retribution would say that the disclosure they advocate is essential for China’s sustained growth. More generally, a crucial question going forward is to what extent criminal law can serve as a strategic means of perpetuating the Party’s lock on power.

Preliminary statements by Xi Jinping hinted that the new leadership might move away from the prior administration’s emphasis on sternly enforced “stability maintenance.”<sup>436</sup> As with skepticism surrounding the recent anticorruption rhetoric, history cautions that the government is unlikely to relax its tight grip on

434. Dan Levin & Amy Qin, *True or Faked, Dirt on Chinese Fuels Blackmail*, N.Y. TIMES (June 17, 2013), <http://www.nytimes.com/2013/06/18/world/asia/true-or-faked-dirt-on-chinese-fuels-blackmail.html?pagewanted=all> [<http://perma.cc/4NT2-23CY>] (archived Jan. 19, 2014) (“A recent spate of Chinese officials have found themselves ensnared by extortion schemes that leverage the public’s mounting disgust for wayward behavior.”); see also Zuigao Renmin Fayuan, *Zuigao Renmin Jianchayuan Guanyu Banli Qiaozha Lesuo Xingshi Anjian Shiyong Falü Ruogan Wenti de Jieshi* (最高人民法院、最高人民检察院关于办理敲诈勒索刑事案件适用法律若干问题的解释), [Supreme People’s Court and Supreme People’s Procuratorate Interpretation on Questions Regarding the Applicable Law in Blackmail and Extortion Cases], (Apr. 15, 2013).

435. THE TIANANMEN PAPERS 218 (Zhang Liang comp., Andrew J. Nathan & Perry Link eds., 2001).

436. See Willy Lam, *Beijing Plays Up the Carrot While Still Wielding the Stick*, CHINA BRIEF, July 19, 2012, at 3–5 (describing the CCP’s strategy for handling opposition with more conciliatory responses).

society by, for example, allowing for greater freedoms of speech and assembly.<sup>437</sup> Only time will tell whether a myopic focus on short-term growth will slow China from addressing festering problems that will impede long-term economic prospects.<sup>438</sup>

## V. CONCLUSION

In short, criminal law matters in China's story of economic development. This Article has sought to conceptualize criminal law in China as a partial alternative to functioning administrative and civil law systems. In doing so, it is but an opening salvo fired in hopes of broadening the law and development discourse with respect to both China and other countries.

Specifically regarding China's reform path, the 2013 report on China's future economic prospects by the World Bank and the Development Research Center of China's State Council asserts, "Over the past three decades, proactive policy change has been key to China's economic success, and the calls for reforms within the country have never been louder."<sup>439</sup> Accordingly, this Article has argued that policy choices with respect to criminal law have been an underappreciated aspect of China's past economic success.

Turning to the future, if the economy slows, Will the government look more to criminal law to clamp down on dissent if the implicit bargain of a populace accepting limited civil and political rights in exchange for an increased standard of living breaks down? Will prosecutions for economic crimes increasingly become a substitute, albeit a questionable one, for broader reforms? Perhaps only limited reforms are possible under the current CCP-run government and deeper political change is needed before criminal law will sincerely and robustly be used to address areas that threaten long-term economic growth, such as corruption and food safety. Even within the limitations of the current government, there is arguably much that the government can and should do to be smart in using criminal law to encourage a thriving economy. At the same time, there is much that the leadership should not do, including, most notably,

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437. Cf. PEERENBOOM, *supra* note 326, at 7–8 (analyzing China's emphasis on economic growth rather than political rights during the initial stages of development). For a discussion of China's domestic security apparatus, see Yuhua Wang & Carl Minzer, *The Rise of the Security State* (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2365624](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2365624).

438. Cf. Minzner, *supra* note 69, at 960–62 (warning that long-term stability is threatened because of the government's approach of using "a short-term reaction to particular expressions of social unrest or public outrage, not a response to the underlying cause").

439. WORLD BANK, CHINA 2030, *supra* note 8, at 65.

aggressively clamping down on citizens who are exposing problems that threaten to decelerate China's economy.

Forecasting China's future is a tricky business. That said, this Article anticipates that the PRC government will react to public dissatisfaction with the economic environment by pursuing a two-prong approach. First, the government will continue to use criminal law in the ways outlined above to promote economic growth as measured by macroeconomic indicators. Second, as indicated by government statements, China will simultaneously start to pay more attention to a broader conception of development that goes beyond sheer GDP to incorporate distributional concerns.<sup>440</sup> It has been nearly 30 years since Deng Xiaoping said that China should "let some people get rich first" (*rang yibufen ren xian fu qilai*, 让一部分人先富起来).<sup>441</sup> Today, many people are left wondering whether, in reality, the statement is more accurate without the "first."<sup>442</sup> The PRC government is grappling with the difficult task of trying to convince the public that it can deliver not only sustained economic growth but also more balanced economic growth.<sup>443</sup> As China's new leaders chart a path toward more equitable growth, the question remains whether they will harness the power of criminal law against people engaging in corruption, fraud, and other economically detrimental activities while simultaneously giving space for more vocal participation by

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440. See SEN, *supra* note 56, at 3 (promoting a broad view of development "as a process of expanding the real freedoms that people enjoy").

441. See Zhengque Lijie Xiaoping Tongzhi de "Rang Yibufen Ren Xian Fu Qilai" (正确理解小平同志的"让一部分人先富起来") [Correctly Understanding Comrade Xiaoping's "Let Some People Get Rich First"], XINHUANET (July. 21, 2006, 10:20:20 AM), [http://news.xinhuanet.com/comments/2006-07/21/content\\_4863377.htm](http://news.xinhuanet.com/comments/2006-07/21/content_4863377.htm) (noting Deng Xiaoping's first use of the phrase in 1985).

442. Shen Hu, *China's Gini Index at 0.61, University Report Says*, CAIXIN ONLINE (Dec. 10, 2012, 3:44 PM), <http://english.caixin.com/2012-12-10/100470648.html> [<http://perma.cc/F63L-CDG7>] (archived Jan. 19, 2014) (reporting a finding of 0.61 Gini coefficient by Chinese scholars: "The Gini coefficient measures the wealth gap on a scale of 0 to 1. The higher the figure, the greater the inequality. A reading above 0.4 usually marks strong inequality.").

443. Cf. PRC STATE COUNCIL, GUANYU SHENHUA SHOURU FENPEI ZHIDU GAIGE DE RUOGAN YIJIAN (关于深化收入分配制度改革的若干意见) [SEVERAL OPINIONS ON DEEPENING THE REFORM OF THE INCOME DISTRIBUTION SYSTEM], (Feb. 3, 2013), [http://www.gov.cn/zwggk/2013-02/05/content\\_2327531.htm](http://www.gov.cn/zwggk/2013-02/05/content_2327531.htm); Xinhua, *Highlights of China's Income Distribution Reform Plan*, CHINA.ORG.CN (Feb. 7, 2013), [http://www.china.org.cn/business/2013-02/07/content\\_27912180.htm](http://www.china.org.cn/business/2013-02/07/content_27912180.htm) [<http://perma.cc/AM4P-FJJP>] (archived Jan. 19, 2014) ("The reform will focus on how to increase residents' income, narrow the income distribution disparity and regulate the distribution order, said a statement from the State Council."); see also Benjamin L. Liebman, *A Return to Populist Legality? Historical Legacies and Legal Reform, in MAO'S INVISIBLE HAND: THE POLITICAL FOUNDATIONS OF ADAPTIVE GOVERNANCE IN CHINA* 165, 167 (Sebastian Heilmann & Elizabeth J. Perry eds., 2011) ("During the first two decades of legal reforms the policy goal was primarily economic development . . . More recently the creation of new laws focuses on broader goals, most notably addressing rising inequality.").



citizens exposing conduct that is eating at the fabric of China's future economic health.

Widening the lens, China's experience raises the question of whether criminal law has made an underappreciated contribution to other countries' economic development. Even if that contribution is difficult to quantify, at a minimum it is worth exploring in more depth what economic goals might be behind governments' decisions when shaping criminal law. As a historical example, "[i]n England, death was a possible punishment for many thieves; in [colonial] Massachusetts, only for repeaters."<sup>444</sup> To what extent does severe punishment of theft express the community's moral outrage as compared with more instrumental goals of supporting economic ends: "In [colonial] Virginia, hogs were more vital than sheep; stealing hogs, then, was a more serious crime than stealing sheep."<sup>445</sup> In today's world of complex financial transactions far beyond the trading of livestock, the ways in which criminal law may foster economic growth are tremendously textured and varied, as China's example suggests. How countries balance the possible economic benefits of harsh, swift punishments with other values, such as support for procedural due process and concerns about overincarceration, is an ongoing challenge that deserves greater study.

A 2012 legal note by the World Bank indicates that perhaps the conversation may be widening to address criminal law in a direct manner: "Bank interventions in the criminal justice sector are permitted under the Bank's mandate," provided the Bank is satisfied that: "(a) the proposed intervention is grounded in an appropriate and objective economic rationale showing that the intervention is relevant to the overall economic development of the country in which it is to be carried out . . . ."<sup>446</sup> Having now recognized that the World Bank can take a more active role in issues involving criminal law, the more exciting question is whether it will indeed take on this role. The 2013 joint China-World Bank report is ripe for a criminal law addendum.

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444. FRIEDMAN, *supra* note 36, at 33.

445. *Id.* at 37–38.

446. WORLD BANK, *supra* note 91, at 6, 14.