

CONTROLLING ABUSE TO MAINTAIN CONTROL: THE EXCLUSIONARY RULE IN CHINA

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I. INTRODUCTION

The headless body was discovered at the bottom of a well. Police swiftly determined that the victim of the grisly murder was Zhao Zhenshang, who went missing about two years before the body’s discovery in 1999.¹ Immediately prior to his disappearance, Zhao Zhenshang had a falling out with his neighbor in the village, Zhao Zuohai, which led to a violent argument.² Police detained Zhao Zuohai on suspicion of murder, and prosecutors relied on his confession when successfully prosecuting the case. The courts sentenced him to a suspended death sentence, which was later commuted to a lengthy prison sentence.³ Ten years later, this seemingly open-and-shut case came crashing open when the alleged “victim” returned home in April 2010, having fled out of fear that he had inflicted such serious injuries on Zhao Zuohai that he might have died. The media and Internet were soon aflame with reports that police tortured Zhao to extract his confession.⁴ Zhao’s formal case

1. For details of the case, see Tini Tran, *Man Who Spent 11 Years in China Jail After Being Tortured Into False Confession Given \$96,000*, GUELPH MERCURY (May 13, 2010), <http://news.guelphmercury.com/article/631953>; Huanyuan Zhao Zuohai Yuan An Xingcheng Guocheng: Xiangcun Daode Shenpan Cheng Tuishou (还原赵作海冤案形成过程:乡村道德审判成推手), *Zhongguo Xinwen Zhoukan* (中国新闻周刊) [CHINA NEWS WEEKLY], June 3, 2010, <http://news.sina.com.cn/sd/2010-06-03/111520403624.shtml>.

2. Chinese names in this Article are written placing the family name first. Zhao Zuohai and Zhao Zhenshang share the same family name but are not related.

3. See Zhao Zuohai Huo 65 Wan Guojia Peichangkuan: Na Qian de Shihou Wo Ke Mei Jugong (赵作海获65万国家赔偿款:拿钱的时候我可没鞠躬), *Zhongguo Wang* (中国网) [CHINA.COM.CN], May 17, 2010, http://www.china.com.cn/news/local/2010-05/17/content_20055952.htm (reporting Zhao’s sentence).

4. See, e.g., Li Hongmei, *Outlawing “Torturing for Confessions”, A Long-Awaited Legal Process*, PEOPLE’S DAILY ONLINE (June 11, 2010), <http://english.people.com.cn/90001/98705/7022279.html> (reporting that Zhao was “beaten with sticks” and other torture); Ng Tze-wei, *Evidence Guidelines Ban*

came to an end when the government released him in May 2010, but the wider implications had only begun to be felt.

Zhao Zuohai's case is the latest in a series of wrongful convictions in the People's Republic of China (China or PRC) that have received tremendous public attention.⁵ Zhao's case, in particular, is credited with accelerating the release of two sets of rules that were announced in late May 2010 and went into effect on July 1, 2010.⁶ Jointly issued by five government bodies, the new rules are (1) "Rules on Certain Issues Relating to Examining and Judging Evidence in Death Penalty Cases" (the Death Penalty Evidence Rules) and (2) "Rules on Certain Issues Relating to the Exclusion of Illegal Evidence in Criminal Cases" (the Evidence Exclusion Rules). Together, these two sets of rules are known as the 2010 Evidence Rules.⁷

Torture in Capital Cases, S. CHINA MORNING POST, May 31, 2010, at 5 ("Zhao had been tortured for an entire month before his confession.").

5. In Chinese, wrongful convictions are commonly called "冤案" or "错案." Although the former emphasizes that the decision was unjust and the latter uses the word "*cuo*" which indicates a mistake or error, this Article uses "wrongful conviction" for both. Sometimes the two phrases are combined. *See, e.g.*, Chen Guangzhong (陈光中), "Lianggui" Pinglun Zhi Yi: Gaige Wanshan Xingshi Zhengju Zhidu de Zhongda Chengjiu ("两规"评论之一:改革完善刑事证据制度的重大成就), *Jiancha Ribao* (检察日报) [PROCURATORIAL DAILY], June 2, 2010, <http://www.spp.gov.cn/site2006/2010-06-01/0005427792.html> (discussing "Yuan An Cuo An" ("冤案错案") and need for evidence reforms). For a discussion of other highly publicized wrongful convictions see Part V.A.1, *infra*.

6. *See* Wo Guo Mingque Xingxun Bigong Quzheng Buneng Zuwei Ding An Zhengju (我国明确刑讯逼供取证不能作为定案证据), May 31, 2010, *Xin Jing Bao* (新京报) [BEIJING NEWS], <http://news.sina.com.cn/c/2010-05-31/023620375631.shtml>; <Guanyu Banli Sixing Anjian Shencha Panduan Zhengju Ruo Gan Wenti De Guiding> He <Guanyu Banli Xingshi Anjian Paichu Feifa Zhengju Ruo Gan Wenti De Guiding> De Tongzhi (《关于办理死刑案件审查判断证据若干问题的规定》和《关于办理刑事案件排除非法证据若干问题的规定》的通知) [Notice Regarding the Issue of "Rules on Certain Issues Relating to Examining and Judging Evidence in Death Penalty Cases" and "Rules on Certain Issues Relating to the Exclusion of Illegal Evidence in Criminal Cases"] (promulgated by the Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, Ministry of State Security, and Ministry of Justice, June 13, 2010), available at <http://www.spp.gov.cn/site2006/2010-06-25/0005428115.html> [hereinafter 2010 Evidence Rules Notice].

7. *Guanyu Banli Sixing Anjian Shencha Panduan Zhengju Ruo Gan Wenti De Guiding* (关于办理死刑案件审查判断证据若干问题的规定) [Rules on Certain Issues Relating to Examining and Judging Evidence in Death Penalty Cases] (promulgated by the Supreme People's Court, Supreme Peo-

The 2010 Evidence Rules are significant because, for the first time, the government has set forth detailed, concrete procedures on the handling of evidence that is allegedly obtained through illegal means. The issuing bodies' joint statement underscores the urgent need for the rules by bluntly admitting "that slack and improper methods have been used to gather, examine and exclude evidence in various cases, especially those involving the death penalty."⁸ Notably, the PRC Government is vocally promoting reforms aimed at stemming abuses in the criminal justice system by constraining the methods used by its own police.⁹ Put starkly, the central government is exerting heightened control over police conduct as a means of maintaining its greater political control. Tension between central and local authorities pervades governance issues in China,¹⁰ and this dynamic is particularly visible when malfea-

ple's Procuratorate, Ministry of Public Security, Ministry of State Security, and Ministry of Justice, June 13, 2010, effective July 1, 2010), *available at* <http://www.spp.gov.cn/site2006/2010-06-25/0005428111.html> [hereinafter Death Penalty Evidence Rules]; Guanyu Banli Xingshi Anjian Paichu Feifa Zhengju Ruo Gan Wenti De Guiding (关于办理刑事案件排除非法证据若干问题的规定) [Rules on Certain Issues Relating to the Exclusion of Illegal Evidence in Criminal Cases] (promulgated by the Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, Ministry of State Security, and Ministry of Justice, June 13, 2010, effective July 1, 2010), *available at* <http://www.spp.gov.cn/site2006/2010-06-25/0005428112.html> [hereinafter Evidence Exclusion Rules]. A translation of the 2010 Evidence Rules and Notice can be found at <http://www.duihua.org/hrjournal/evidence/evidence.htm> and is also available in *Translation of China's New Rules on Evidence*, 43 N.Y.U. J. INT'L L. & POL. 739.

8. Wang Guanqun, *China Clarifies Evidence Law for Criminal Cases to Stem Miscarriages of Justice*, XINHUA NEWS AGENCY (May 30, 2010), http://news.xinhuanet.com/english2010/china/2010-05/30/c_13323861.htm.

9. "Police" is far from a clear, unitary entity in China. Law enforcement officials in China come in a variety of forms (e.g., local public security officers, central Ministry of Public Security forces, People's Armed Police, etc.). See KAM C. WONG, *CHINESE POLICING, HISTORY, AND REFORM* 157 (2009) ("In China the police have been referred to as *gongan* [literally "public peace"] and more recently as *jingcha* (police)."). See generally Murray Scot Tanner & Eric Green, *Principals and Secret Agents: Central Versus Local Control over Policy and Obstacles to "Rule of Law" in China*, 191 CHINA Q. 644 (2008) (detailing structure of public security bodies in China). For the purposes of this Article, "police" is used as shorthand for the various government agents who enforce public security.

10. See generally Carl F. Minzner, *Riots and Cover-Ups: Counterproductive Control of Local Agents in China*, 31 U. PA. J. INT'L L. 53 (2009) (analyzing use of

sance by local police leads to national headlines decrying abuse.

This Article's aims are threefold. First, it situates China's reforms within the comparative criminal procedure literature on legal transplants in general and on the global profusion of exclusionary rules in particular. English-language legal scholarship has discussed various countries' motivations for adopting exclusionary rules, though this has largely been in the European and Commonwealth contexts.¹¹ The view from China is almost entirely lacking.¹² The dearth of English-language scholarship is partly understandable both because this is an emerging issue in China's legal reforms and because relevant materials are predominantly in Chinese.¹³ Non-Chinese academics are generally surprised that the exclusionary rule is even being seriously debated in China.

cadre responsibility systems to address principal-agent problems that the central government faces in governing a large authoritarian bureaucracy). Political science literature has paid great attention to this central-local tension in China. See, e.g., Kenneth Lieberthal, *The Fragmented Authoritarianism Model and Its Limitations*, in BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 1-30 (Kenneth Lieberthal & David M. Lampton eds., 1992) (arguing that authority below the very top of the Chinese government is fragmented and disjointed).

11. See, e.g., Erik Luna, *A Place for Comparative Criminal Procedure*, 42 BRANDEIS L.J. 277, 319-21 (2004) (commenting on use in England, Germany, and Canada but noting "the exclusionary rule simply does not exist in socialist nations"). For example, a 2009 symposium at Southwestern Law School addressing international perspectives on the exclusionary rule included experts on European, Canadian, and Israeli legal systems, among others, but did not address developments in China or Asia. Southwestern Law School, *The Future of the Exclusionary Rule: American and International Perspectives* (Oct. 9, 2009) (brochure from symposium) (on file with author).

12. For brief discussions, see Randall Peerenboom, *Out of the Pan and into the Fire: Well-Intentioned but Misguided Recommendations to Eliminate All Forms of Administrative Detention in China*, 98 NW. U. L. REV. 991, 1075 (2004) (examining the feasibility of the exclusionary rule in China); Jennifer Smith & Michael Gompers, *Realizing Justice: The Development of Fair Trial Rights in China*, 2 U. PA. CHINESE L. & POL'Y REV. 108, 132 n.123 (2007) (discussing how a proposed 2007 revision of the Criminal Procedure Law was expected to include articles that "provide the rudiments of an exclusionary rule for some illegally obtained evidence").

13. See Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375, 376 n.7 (2001) ("For the purposes of this article, China and Russia, which do not have well-developed or consistent policies regarding evidentiary exclusion have been eliminated, and Australia has been added.").

Second, this Article examines the contents of the 2010 Evidence Rules and the legal framework in which they sit. Far from being an isolated reform, they build on a preexisting platform of broad pronouncements regarding the use of evidence in criminal trials. The new rules are further intertwined with concurrent developments concerning criminal justice in China, including increased scrutiny of procedures in capital cases and detention conditions.

Third, it examines the motivations behind the push in China to invigorate the previously scattered provisions addressing the use of illegally obtained evidence. Why did China decide to adopt a more robust exclusionary rule? More pointedly, why now? It is not immediately apparent why the PRC Government would endorse rules that openly recognize distrust of its own police. Upon deeper inspection of domestic and international dynamics, however, the rules' adoption is not perplexing.

Part II of this Article clarifies what is meant by "exclusionary rule." To place China's reforms in a larger legal context, the point of departure is a brief examination of exclusionary rules in the United States, Germany, Russia, and the Republic of China on Taiwan (Taiwan) with a focus on why jurisdictions incorporate exclusionary rules into their criminal justice systems. The developments in China did not occur in a vacuum. Chinese scholars and legislative drafters have extensively studied the use of exclusionary rules abroad. Although the Zhao Zuohai case acted as a catalyst for release of the 2010 Evidence Rules, pressure to adopt such rules had been building for years.¹⁴ This Article is not thrusting the term "exclusionary rule" upon the conversation in China. In Chinese, the common phrasing is "illegal-evidence exclusion rule" (*feifa zhengju paichu guize*). Foreign jurisdictions offer helpful comparisons with respect to stimuli for the introduction of exclusionary rules and to changes over time as the need for and contours of the rules are reevaluated.

14. See Guo Zhiyuan & Man Zhiqing (郭志媛 & 满志清), *Feifa Zhengju Ruhe Zhengming? Jian Ping "Feifa Zhengju Paichu Guiding" (非法证据如何证明? 兼评《非法证据排除规定》)*, 5 *Xibu Faxue Pinglun* 16 (西部法学评论) [W. L. REV.] (2010) ("explaining that discussions of the exclusionary rule in the Chinese academic community had already begun ten years ago").

With this comparative context as a backdrop, Part III explains the prior patchwork of documents that addressed the exclusion of illegally obtained evidence in China, and Part IV introduces the contents of the new rules. The structure of the exclusionary rule in China is neither a wholly new construct nor a wholesale cut-and-paste job. Understanding what is even on the table in the current reform effort is a helpful step before delving into the dynamics behind that effort and how the new rules might play out in practice.

Part V then unpacks the forces that led to the recent reforms. Simply put, why would the PRC Government constrain its law enforcement agents on whom it relies so heavily?¹⁵ It is striking that a single-party authoritarian state would support the exclusionary rule. Nonetheless, factors coalesced in favor of China's development of a stronger legal framework for the exclusion of illegally obtained evidence. If the public and government bodies with rulemaking power did not view the police's methods of collecting evidence as crossing the line and the subsequent use of that evidence by prosecutors and courts as flawed, there seemingly would be little if any push for strengthening the exclusionary rule. Likewise, if they simply did not care about the methods used to obtain evidence, there also would likely be little momentum behind the rule. The exclusionary rule is not born of contentment with the handling of criminal cases. Yet reform efforts were successful in realizing the 2010 Evidence Rules. This Part explains how a confluence of domestic pressures, complemented by international influences, facilitated the new rules' adoption.

Finally, Part VI argues that the PRC Government is adding a new chapter to the international diffusion of exclusionary rules as an authoritarian government that is harnessing the rule to bolster its legitimacy. This reform was not prompted by a shift in political power, nor was it the result of an independent push from the judiciary. Rather, sixty years into the continuous leadership of the Chinese Communist Party, the highest ranks in government appear to recognize that endorsing

15. See Fu Hualing, *Zhou Yongkang and the Recent Police Reform in China*, 38 AUSTL. & N.Z. J. CRIMINOLOGY 241, 248 (2005) ("The [Chinese Communist Party], facing a legitimacy deficit, ultimately relies on the police in securing its monopoly of power, and is unwilling and unable to initiate fundamental police reform.").

an exclusionary rule can serve their interests in maintaining power. Often touted as a means of enhancing “judicial integrity,”¹⁶ the exclusionary rule in China is better viewed as holistically addressing “governmental integrity.”

At present, the exclusionary rule in China appears more symbolic than revolutionary. Going forward, a key question will be whether the new declarations from Beijing will be a mere symbolic integrity-enhancing device or, alternatively, actually gain traction and be applied widely in criminal cases. This move will require that assertive actors in the criminal justice system gain a toehold and gradually move the rule from the realm of gloss to substance. Part VI thus also briefly confronts the challenges to implementing the 2010 Evidence Rules. Although it is premature to give a report card on the implementation of rules that are less than a year old, early indications are that efforts to use the new rules are encountering significant challenges. The focus of this Article is not on the nuts and bolts of how China will operationalize the new rules, though it is important to recognize that substantial obstacles stand in the way of meaningful implementation.

II. GLOBAL DIFFUSION OF EXCLUSIONARY RULES

Beginning with a threshold issue, “exclusionary rule” encompasses a variety of legal proscriptions that prohibit the admission of evidence at trial that was gained in violation of a defendant’s rights. Jurisdictions design exclusionary rules in various ways to address an array of prohibited conduct, such as searches conducted without a proper legal basis and incriminating statements obtained in violation of procedural protections.¹⁷ Jurisdictions also vary in how they articulate the ratio-

16. See Robert M. Bloom & David H. Fentin, “A More Majestic Conception”: *The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 48 (2010) (arguing for the importance of judicial integrity as a rationale for the exclusionary rule).

17. The exclusionary rule is an issue both in domestic legal systems and increasingly at the international level. See, e.g., George E. Edwards, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy*, 26 YALE J. INT’L L. 323, 327-28 (2001) (“[T]o comply fully with its human rights mandate, the Court must respect the Rome Statute’s remedy of excluding tainted evidence in order to ensure that full human rights are afforded to all persons.” (footnote omitted)); Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process As-*

nales for adopting and upholding exclusionary rules, though there are strong common threads of enhancing the accuracy of fact-finding,¹⁸ deterring police misconduct,¹⁹ and maintaining judicial integrity.²⁰

China did not surgically “transplant”²¹ the exclusionary rule from any one country, but Chinese scholars and legislative drafters did study exclusionary rules in other jurisdictions.²² The process is thus more aptly described as a form of “legal translation”²³ or “legal irritant,”²⁴ or with another metaphor that emphasizes both borrowing and adaptation.²⁵ As dis-

pirations and Limitations, 45 COLUM. J. TRANSNAT'L L. 635, 657 (2007) (discussing bases for exclusion by the International Criminal Tribunal for Yugoslavia).

18. See MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 14 (1997) (“[T]he prevailing rationale for this prohibition [on the use of illegally obtained evidence] was that information tainted by the improper manner of acquisition compromises the information’s reliability.”); Bradley, *supra* note 13, at 399 (attributing non-U.S. countries’ emphasis on protections surrounding confessions as “add[ing] to the courts’ confidence in the reliability of the confession”).

19. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (“Only last year the Court itself recognized that the purpose of the exclusionary rule ‘is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.’” (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960))).

20. See Bloom & Fentin, *supra* note 16, at 50-59 (tracing the role of judicial integrity in Supreme Court jurisprudence).

21. For background information on legal transplants, see generally ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993).

22. As one example among many projects involving foreign assistance, the American Bar Association Rule of Law Initiative and New York University School of Law have been collaborating with Chinese academics, prosecutors, and judges both to study the exclusionary rule in the United States and to conduct a pilot project in China. Criminal Law Reform and Anti-Human Trafficking Program, ABA RULE OF LAW INITIATIVE, <http://apps.americanbar.org/rol/programs/criminal-law.html> (last visited Feb. 12, 2011).

23. See Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 29 (2004) (explaining why the term “legal translation” is more adequate than “legal transplant” when discussing the circulation of legal institutions).

24. See generally Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

25. See Randall Peerenboom, *What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China*, 27 MICH. J. INT'L L. 823, 825-28 (2006) (discussing pros and cons of various metaphors).

cussed further in Part III below, in China, the legal basis for excluding evidence in criminal cases has been a work in progress for many years, including extensive debates in academic literature.²⁶ It was only last year, however, that this simmering debate crystallized into concrete rules.

With volumes devoted to the intricacies of exclusionary rules in a single jurisdiction, this Article can provide only the most cursory of introductions. This Part briefly addresses exclusionary rules in the United States, Germany, Russia, and Taiwan, with a focus on why jurisdictions incorporate exclusionary rules into their criminal justice systems. Exclusionary rules are used in a vast array of jurisdictions,²⁷ and these four present a spectrum with respect to the stimuli for the rules' introduction and the shifting contours over time. The United States provides a common law, judiciary-centric model and is certainly the most familiar jurisdiction to the majority of readers of this journal. Germany stands as a civil law model that, unlike the United States, saw the exclusionary rule introduced via both judicial action and revisions to the country's criminal procedure code. Russia is a more recent proponent of the exclusionary rule, though the country's political reality has challenged robust implementation. Taiwan likewise introduced the exclusionary rule during a time of profound political transition. Unlike Russia, however, Taiwan shares strong historical and cultural ties with China.

26. See, e.g., Zheng Xuzhu (郑旭著), *Feifa Zhengju Paichu Guize* (非法证据排除规则) [THE EXCLUSIONARY RULE] (2009); Lin Xifen (林喜芬), *Feifa Zhengju Paichu Guize: Huayu Jie Mei Yu Zhidu Gou Zhu* (非法证据排除规则: 话语解魅与制度构筑) [EXCLUSIONARY RULE: DIS-ENCHANTMENT OF THE DISCOURSE AND CONSTRUCTION OF THE INSTITUTION] (2008); Guo Zhiyuan (郭志媛), *Xingshi Zhengju Ke Cai Xing Yanjiu* (刑事证据可采性研究) [RESEARCH ON THE ADMISSIBILITY OF EVIDENCE IN CRIMINAL CASES] (2004); Richard Bernstein, *A Scholar's Insight into China's Budding Legal System*, N.Y. TIMES, July 28, 2010, available at http://www.nytimes.com/2010/07/29/world/asia/29iht-letter.html?_r=1 ("Last year a delegation came to study exclusion of illegally obtained evidence, an effort to stop coerced confessions and torture." (quoting Professor Jerome A. Cohen)).

27. See generally Bradley, *supra* note 13 (explaining use of exclusionary rules in ten countries). See also Timothy Webster, *The Rise and Fall of the Exclusionary Rule in Japan and the US 12-25* (unpublished manuscript) (on file with author) (discussing development of Japan's exclusionary rule).

These jurisdictions' stories indicate that exclusionary rules are often adopted when there is a change in government, a judiciary that is asserting the rule based on constitutional principles, or some combination thereof. Regarding the rules' scopes, different forms of exclusionary rules are tailored to enhance the accuracy of fact finding, protect privacy, or safeguard other rights. There is also great variance regarding the types of evidence that rules address (e.g., confessions, identification testimony, physical evidence, etc.). For China, the clear focus of the new rules is coerced confessions with some concern for other oral testimony and little discussion of physical evidence. Regardless of the form of the evidence, the common thread across rules is a concern for police misconduct. Although this concern crosses jurisdictions, the social and political situation in China raises unique issues. As discussed in Part V, China does not neatly fit the existing narratives.

Looking to other jurisdictions further underscores that the exclusionary rule is not simply a case of American exceptionalism.²⁸ Chief Justice Roberts's statement that "the automatic exclusionary rule applied in our courts is still 'universally rejected' by other countries," though technically correct because of the inclusion of the word "automatic," can be misleadingly broad.²⁹ The landscape is much more complex.

A. *United States*

The story of the exclusionary rule in the United States is one of the judiciary articulating bases for exclusion in order to protect certain constitutional rights. Americans are noted for their traditional distrust of government reaching back to the Framers of the Bill of Rights, and this skepticism runs through exclusionary rule jurisprudence.³⁰ The Supreme Court did

28. See, e.g., Walter Pakter, *Exclusionary Rules in France, Germany, and Italy*, 9 HASTINGS INT'L & COMP. L. REV. 1, 56 (1985) ("Exclusion was discussed by European scholars and courts decades before it became a part of United States law.").

29. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 344 (2006) (quoting Bradley, *supra* note 13, at 399-400).

30. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353 (1974) ("The Bill of Rights in general and the fourth amendment in particular are profoundly anti-government documents."); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 571-79

not articulate the exclusionary rule until long after the Framers passed away,³¹ but the rule reflects the Framers' general concern for protecting individual rights at the hands of a potentially overreaching government.

The exclusionary rule reached a high-water mark in *Mapp v. Ohio*, which adopted the exclusionary rule for illegally obtained physical evidence as a national standard.³² A series of decisions after *Mapp* cabined its broad holding.³³ Under current Supreme Court jurisprudence, exclusion may occur in a number of different contexts.³⁴ Perhaps the most famous application is the exclusion of physical evidence obtained in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures.³⁵ However, the Supreme Court has made clear that the Fourth Amendment does not require

(1983) (arguing that the framers drafted the Fourth Amendment because of their distrust of powerful executives); Justice Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1369 (1983) ("Historians who have analyzed the framers' reasons for adopting the fourth amendment have consistently reached the same conclusion. The framers sought to ensure that the newly formed federal government could not employ the two devices used by the British Crown that they believed jeopardized the liberty of every citizen: the general warrant and the writ of assistance."); ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868 at 5 (2006) ("Part of the Revolutionaries' concern with oppressive general searches lay also in the insult of being subjected to actual or threatened state force.").

31. For early cases invoking the exclusionary rule, see, for example, *Boyd v. United States*, 116 U.S. 616 (1886) (ordering exclusion after likening compulsory production of business papers to a search and seizure), and *Weeks v. United States*, 232 U.S. 383 (1914) (articulating exclusionary rule for unconstitutional seizure of evidence by federal, but not state, law enforcement).

32. *Mapp*, 367 U.S. at 644-45 (applying the exclusionary rule against states through the due process clause).

33. See, e.g., *United States v. Calandra*, 414 U.S. 338 (1974) (holding that illegally obtained evidence could be used in grand jury hearings); *United States v. Leon*, 468 U.S. 897 (1984) (incorporating "good faith" exception into Fourth Amendment exclusionary rule).

34. See, e.g. James Boyd White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1279 (1983) ("History thus reveals not one 'exclusionary rule' but several, each resting on a different basis and having a somewhat different scope.").

35. U.S. CONST. amend. IV.

exclusion,³⁶ and, as the aforementioned quote by Justice Roberts reflects, the exclusion of physical evidence is the most controversial, and least used, around the world. Looking beyond physical evidence, exclusion is also used in the United States for certain violations of the Fifth Amendment Self-Incrimination Clause and the Sixth Amendment Right to Counsel, as well as identification testimony obtained in violation of the Fifth and Sixth Amendments.³⁷ The Supreme Court has further held that the Due Process Clauses of the Fifth and Fourteenth Amendments mandate exclusion of evidence acquired by tactics “so brutal and so offensive to human dignity,” such as using physical violence.³⁸

When articulating reasons for the exclusionary rule, particularly in the Fourth Amendment context, the Supreme Court has emphasized the rule’s purported ability to deter unconstitutional police conduct.³⁹ The hope is that, by sending police a clear message that evidence obtained in violation of a defendant’s rights will not be used at trial, police will not engage in the conduct in the first place. In addition, in the Fifth Amendment context, “[C]ourts and commentators have

36. See *Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695, 700 (2009) (“We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.”).

37. See Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 665 (1970) (listing types of violations for which the Supreme Court applies the exclusionary rule).

38. *Rochin v. California*, 342 U.S. 165, 174 (1952); see also *id.* at 172 (describing forced digestion of medicine to expel evidence as “too close to the rack and the screw to permit”); White, *supra* note 34, at 1281 (“In *Rochin* exclusion was imposed not to deter police from behaving badly in other cases, but to insist upon the right of the individual to be treated by officers and the courts in a way that accords with the rule of law, which means in a fundamentally decent way.”).

39. See William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 315 (1991) (“In the decade or so following *Mapp* [decided in 1961], the Court turned to deterrence alone as a justification for exclusion.”). There is debate in academic circles as to whether “influence” is a more apt term than deterrence. See, e.g., Albert W. Alschuler, *The Exclusionary Rule and Causation: Hudson v. Michigan and Its Ancestors*, 93 IOWA L. REV. 1742, 1750 (2008) (encouraging use of “influence” because “the word deterrence refers to discouraging behavior through fear of punishment.”); William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL’Y 443, 446 (1997) (“Suppression is restitutionary: the officer loses the very thing he gained from the illegal search, and no more.”).

stressed that coerced statements are unreliable and that the privilege [against self-incrimination] therefore serves the goal of reliability.”⁴⁰ The judicial integrity rationale makes periodic appearances as well. In 2009, Justice Ginsburg joined her predecessors in looking beyond deterrence to “a more majestic conception” of the Fourth Amendment:⁴¹ “[T]he rule also serves other important purposes: It ‘enabl[es] the judiciary to avoid the taint of partnership in official lawlessness’.”⁴²

One practical reason for looking beyond deterrence is that it is a problematic basis to support the rule. Measuring deterrence is difficult even in relatively transparent systems.⁴³ It is especially difficult in a country like China where statistics related to police work are rarely available and, when available, subject to suspicion.⁴⁴ Despite the lack of hard empirical evidence in support of the exclusionary rule’s influence on police behavior, courts in the United States have thus far been unwilling to discard it: the exclusionary rule may have its faults, but judges and scholars have generally been at a loss to propose viable alternatives.⁴⁵ Yet the durability of deterrence rationale is now in question.

A rethinking of the exclusionary rule in the Fourth Amendment context is under way. In short, is the dominant

40. Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 895 (1995).

41. *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting), (quoting *Arizona v. Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting)).

42. *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)).

43. *See, e.g.*, Heffernan & Lovely, *supra* note 39, at 355 (“Our data also indicate that exclusion does not stand as a strong deterrent against police illegality.”). One indicator that the exclusionary rule has in fact influenced police behavior is in the increase in the use of search warrants. *See* 1 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 1.2 (b) (4th ed. 2010) (asserting that rule’s influence is apparent “in the use of search warrants where virtually none had been used before”).

44. For example, crime statistics are extremely difficult to decipher in China. *See* WONG, *supra* note 9, at 9-10 (listing reasons for “dark figures” that are not reflected in the official crime rate).

45. *See* David Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 582 (2008) (“The exclusionary rule remains what it has always been—irreplaceable and by itself inadequate.”); Oaks, *supra* note 37, at 756 (“Despite these weaknesses and disadvantages, the exclusionary rule should not be abolished until there is something to take its place and perform its two essential functions.”).

rationale of deterrence still convincing today? The Supreme Court's 2006 opinion in *Hudson v. Michigan* signaled that the answer may be "no." Justice Scalia wrote for the majority that "increasing professionalism" of the police over the last half-century assuages past concerns regarding violations of constitutional rights.⁴⁶ In *Hudson*, the Court held that the police's violation of the "knock-and-announce" rule did not require suppression of evidence found during a search of the defendant's home.⁴⁷ In 2009, the Supreme Court drilled another hole into the increasingly Swiss-cheese-like Fourth Amendment exclusionary rule by declaring in *Herring v. United States* that evidence need not necessarily be excluded if it was obtained because of mistakes in police databases.⁴⁸

Now, Court-watchers are speculating whether the Roberts Court will go so far as to overrule the foundational case *Mapp v. Ohio* and jettison the exclusionary rule for illegally obtained physical evidence as a national standard.⁴⁹ That being said, it is important to recognize the limits of the Supreme Court's increasing hesitation to invoke the rule. The Court's focus is curbing its use in the Fourth Amendment context. There is certainly no indication that the Court would overturn *Rochin v. California* and permit use of evidence that was obtained through "coercion, violence or brutality to the person."⁵⁰ Nor has the Court indicated that it will jettison the exclusionary rule in the Fifth or Sixth Amendment contexts, though the Court's recent chipping away at *Miranda* rights leaves the rule's scope in doubt.⁵¹ The current state of flux has invigo-

46. *Hudson v. Michigan*, 547 U.S. 586, 598 (2006).

47. *Id.* at 599 ("Resort to the massive remedy of suppressing evidence of guilt is unjustified.").

48. *Herring*, 129 S. Ct. at 698.

49. *Mapp*, 367 U.S. 643. See generally James J. Tomkovicz, *Hudson v. Michigan and the Future of Fourth Amendment Exclusion*, 93 IOWA L. J. 1819 (2008) (discerning and interpreting *Hudson's* significance for the future of the Fourth Amendment suppression remedy).

50. *Irvine v. California*, 347 U.S. 128, 133 (1954) (distinguishing *Rochin* from a case involving a hidden microphone in defendant's home); see also *Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) (explaining that *Rochin* still "poin[t]s the way" to courts when identifying when police abuse violates the Constitution) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (Friendly, J.)).

51. See *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2264 (2010) (holding that "a suspect who has received and understood the *Miranda* warnings, and

rated debates over the future of the exclusionary rule in various contexts and underscores the fundamental question of what mix of deterrence, reliability, judicial integrity, and perhaps even other rationales will undergird the exclusionary rule in the future.

B. *Germany*

For Germany, a rejection of the devastating human rights abuses by the Nazi regime motivated the post-World War II government to engage in a period of intense legal reform. The rise of the exclusionary rule is intimately connected with a deep rethinking of criminal procedure as both judicial decisions and legislative action shaped the rule's contours.

Scholars have uncovered antecedents to the exclusionary rule,⁵² but its modern use can be directly traced to the German experience in World War II. At the beginning of the twentieth century, a German legal scholar advocated "evidentiary use prohibition" whereby the search for the truth would be limited "by evaluating interests extraneous to criminal procedure more highly than interests in criminal procedures which is truth-finding."⁵³ This proposal lay dormant and was completely squelched by the Nazi regime.⁵⁴

Following the war, Germany entered a period of profound reflection coupled with continuing distrust of the police.⁵⁵ As is common in civil law countries, criminal proce-

has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police"). Of course, just because members of the Court are increasingly vocal in claiming that improvements in police practices are diminishing the importance of the exclusionary rule does not mean that people who work in the criminal justice system, academics, or the American public in general agree. However, because the Court is the primary vehicle by which the exclusionary rule is structured in the United States, the Justices' views are decisive.

52. Pakter, *supra* note 28, at 5 (noting exclusion of evidence obtained from an illegal search and seizure as early as 1889).

53. Kuk Cho, "Procedural Weakness" of German Criminal Justice and Its Unique Exclusionary Rules Based on the Right of Personality, 15 TEMP. INT'L & COMP. L.J. 1, 15 (2001) (quoting ERNST BELING, DEUTSCHES REICHSSTRAF-PROZESSRECHT 284 (1928)).

54. *Id.* ("Once established, the Nazi regime totally suffocated the concept of [*Beweisverbote*, "evidentiary use prohibition."]).

55. Pakter, *supra* note 28, at 16 ("[T]he Germans themselves did not have complete confidence in their own police forces after the War.").

dure in Germany is set forth in a code, rather than the heavily case-based articulation of procedural rights seen in the United States. In 1950, the legislature added a provision on excluding coerced confessions to the German Criminal Procedure Code (German CPC) “in reaction to the judicial system created under the National Socialists.”⁵⁶

While the initial motivation to adopt an exclusionary rule was closely linked to the profound political shift after the war, the intervening decades have added texture and nuance to the rule. In addition to legislative changes following the war, the judiciary has been key in articulating the rule’s contours.⁵⁷ As a result, the current exclusionary rule has been shaped both by the judiciary’s interpretation of the Constitution as well as by provisions in the more detailed German CPC.⁵⁸

Today, Germany generally takes a tougher stance on interrogation violations than search and seizure violations, thus showing more kinship with the reliability concerns in American Fifth Amendment jurisprudence than the privacy concerns of Fourth Amendment jurisprudence.⁵⁹ “There is no general exclusionary rule which would make illegally obtained evidence inadmissible,”⁶⁰ but the German CPC provides for the exclusion of statements obtained by violence, illegal threats, and other forbidden means.

56. *Id.* at 15; see also STRAFPROZESSORDNUNG [StPO] [Code of Criminal Procedure], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] at 1034, as amended by the Act of Oct. 31, 2008, art. 2, § 136 (a) (Ger.).

57. Cho, *supra* note 53, at 29-30 (describing development by German courts of the exclusionary rule); Pakter, *supra* note 28, at 18-19 (discussing use of exclusionary rule by German courts, including a “remarkable extension” of the provision in German CPC. Section 136(a), by the German Supreme Court).

58. See Thomas Weigend, *Germany*, in CRIMINAL PROCEDURE: A WORLD-WIDE STUDY 243, 251-54 (Craig M. Bradley ed., 2d ed. 2007); Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1037 (1983) (describing role of German CPC as fleshing out broad pronouncements in the constitution).

59. See Craig M. Bradley, *Reconceiving the Fourth Amendment and the Exclusionary Rule*, 73 L. & CONTEMP. PROBS. 211, 223-25 (2010); Pakter, *supra* note 28, at 38 (“Historically, Germany has resisted exclusion of evidence obtained through illegal searches and seizures.”). *But see* Bradley, *supra* note 59 at 224 (noting 2007 Federal Court of Appeals case that “ordered the suppression of evidence found in the defendant’s apartment due to the failure of police to obtain a search warrant”).

60. Weigend, *supra* note 58, at 251.

Germany emphasizes the rule's role in preserving the purity of the judicial process and places relatively little stress on deterrence.⁶¹ Accordingly, for many types of violations, the courts invoke a balancing test whereby the seriousness of a violation is weighed against the public interest in determining the truth.⁶² Possibly further tempering the exclusionary rule in practice, "an 'excluded' confession will still be in the file available to the judges at trial, even though they are supposed to ignore it."⁶³

C. *Russia*

Like in Germany, the origins of the exclusionary rule in Russia were tied to a dramatic political shift. Russia introduced the rule as part of a massive overhaul in criminal procedure brought about by the collapse of the Soviet era coupled with the rise of a more independent and assertive judiciary.⁶⁴

In 2001, the Russian Federation replaced the Soviet-era code with a new Criminal Procedure Code (Russian CPC) that marked a sharp break with past practice:⁶⁵ "[T]his Code represents a fundamental and revolutionary shift in Russia's criminal justice paradigm—away from an inquisitorial system with a prosecutorial bias and the Soviet primacy of the state over the individual to an adversarial system based on equality and fairness."⁶⁶ The Russian CPC also introduced a range of reforms that aligned Russian law with the country's obligations under the European Convention for the Protection of Human Rights

61. Bradley, *supra* note 58, at 1047 ("[T]he principal justification for exclusion is not to punish the police, but to maintain the integrity of the judicial process.").

62. Weigend, *supra* note 58, at 251; *see also* Bradley, *supra* note 58, at 1034 (explaining balancing test).

63. Weigend, *supra* note 58, at 261.

64. *See generally* Miranda Lathrop Barber, *Reforming Criminal Justice in Russia: Progress Report for the Twenty-First Century*, 13 *TRANSNAT'L LAW* 319 (2000) (tracing overhaul of Russian criminal justice system).

65. *See* Leonard Orland, *A Russian Legal Revolution: The 2002 Criminal Procedure Code*, 18 *CONN. J. INT'L L.* 133, 133 (2002) (explaining the goal of changing an oppressive criminal justice system to one based on the rule of law); Barber, *supra* note 64, at 321 ("This Comment focuses on the post-Soviet reforms designed to end terror and prioritize the rule of law within the Russian criminal justice system.").

66. Catherine Newcombe, *Russia*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 397, 397 (Craig M. Bradley ed., 2d ed. 2007) (citations omitted).

and Fundamental Freedoms (ECHR) and other international human rights instruments.⁶⁷ In addition to the Russian CPC, Russian criminal procedure is shaped by decisions of the Constitutional Court of the Russian Federation and, via its participation in the ECHR, the decisions of the European Court of Human Rights (ECtHR).⁶⁸

In the years following collapse of the Soviet Union, the Constitutional Court asserted itself by declaring that courts could directly apply the Constitution to issues before them, a power which courts have since used to exclude evidence obtained in violation of the Constitution.⁶⁹ Likewise, the Russian CPC provides for suppression of confessions obtained without the presence of counsel and contains a burden-shifting provision whereby the prosecution must establish that the evidence was obtained legally.⁷⁰

Despite these promising reforms, the extent to which the Russian CPC has permeated the system and spurred genuine change is a matter of debate, with points of positive and negative news. On the one hand, Russia's traditional reliance on confessions has reportedly continued, including use of coercion and even torture.⁷¹ In fact, the first ECtHR case from Russia, *Kalashnikov v. Russia*, held Russia liable for pretrial detention conditions that were tantamount to torture.⁷² On the other hand, one academic reports, "[I]n general, Russian judges are suppressing evidence obtained via illegal searches and seizures in both the first instance and on appeal. Fearing

67. See *id.* at 399; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

68. Newcombe, *supra* note 66, at 399.

69. See Stephen C. Thaman, *Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, 40 CORNELL INT'L L.J. 355, 376 (2007) (discussing judicial enforcement of the exclusionary rule).

70. UGOLOVNO-PROTSESSUAL'NYI KODEKS ROSSIISKOI FEDERATSII [UPK RF] [Criminal Procedure Code] art. 75, 234-35 (Russ.); Orland, *supra* note 65, at 150-53 (explaining exclusionary rule provisions in Russian CPC).

71. Thaman, *supra* note 69, at 375 ("[U]p to an estimated 50% of all criminal defendants are subject to torture or ill-treatment, and up to 80% of those who refuse to admit guilt are subject to such techniques.").

72. *Kalashnikov v. Russia*, 2002-VI Eur. Ct. H.R. (2002).

the exclusion of valuable evidence, by and large prosecutors are also fulfilling the other new requirements in the [Russian CPC].”⁷³ In sum, after the exclusionary rule swept in on a wave of reforms following the end of Soviet rule, the initial reform fervor has given way to a difficult slog of changing actual practice.

D. *Taiwan*

Looking to China’s neighbor Taiwan, judicial embracing of the exclusionary rule occurred after a break with four decades of authoritarian rule, followed by explicit legislative adoption in a heavily revised Republic of China Criminal Procedure Code. As in Germany and Russia, the exclusionary rule in Taiwan came about at a time that the new government was distancing itself from the previous government’s perceived abuse of power. In short, the post-martial-law government made a definitive statement that “we are not them.”

During the martial law era, government-proffered evidence was almost always admissible at trial. There was only a narrow exception for excluding confessions obtained in violation of the Criminal Procedure Code, but proving a violation was a daunting feat under the heavily politicized criminal justice system of Chiang Kai-shek’s authoritarian regime.⁷⁴

Adoption of a more vigorous exclusionary rule occurred during Taiwan’s shift toward an adversarial system.⁷⁵ Since the mid-1980s, Taiwan has transformed from a repressive, martial law state into a multi-party democracy, and dramatic reforms to the legal system have accompanied these political changes. Up until the turn of the century, the criminal justice system had an overwhelmingly inquisitorial flavor. Taiwan then adopted a “reformed adversarial system.” While recognizing the limits of the inquisitorial/adversarial labels,⁷⁶ the structure

73. Newcombe, *supra* note 66, at 432.

74. See generally Ming-Woei Chang, *The Exclusionary Rule in Taiwan: Lessons from the United States*, 8 AUSTL. J. ASIAN L. 68 (2006) (explaining history of exclusionary rule in Taiwan).

75. See generally Margaret K. Lewis, *Taiwan’s New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 VA. J. INT’L L. 651 (2009) (analyzing criminal justice reforms in post-martial-law Taiwan).

76. See John D. Jackson, *The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?*, 68 MOD. L. REV. 737, 740-47 (2005) (exploring “The Adversarial and Inquisitorial Dichotomy”).

of the new system is adversarial in that it is rooted in the idea that the criminal process is seen as a contest between the competing views of the defense and prosecution, and the case is ultimately resolved by a neutral adjudicator. These reforms have had a rocky time in practice because of institutional structures that are holding on to the former model. For instance, despite the equality of prosecutors and lawyers in theory, prosecutors and judges still train together. The defense bar is generally underfunded, less respected, and at a procedural disadvantage when preparing cases.⁷⁷

In Taiwan, the push for the exclusionary rule came from the post-martial-law judiciary, evidencing a desire to emphasize human rights and distance the judicial system from police abuses. In 1998, Taiwan's Supreme Court declared that judges could exclude illegally obtained evidence when they believed that admitting the evidence would impair justice and fairness.⁷⁸ This judicially created rule was later made explicit through a series of reforms to the Criminal Procedure Code in 2001, 2002, and 2003.⁷⁹ Taiwan now has a discretionary rule under which, in deciding the admissibility of evidence, the court is called on to balance the protection of human rights and the public interest.⁸⁰ This type of flexible approach is more common globally than the more rigid requirements for exclusion used in the United States.⁸¹ Furthermore, the balancing approach is understandable in light of Taiwan's tradition of drawing on Continental civil law models.

77. See, e.g., Legis. Yuan, 5th Term, 2d Sess., Judicial Comm., 11th Full Comm. Meeting Rec., 92 LEGIS. YUAN GAZ. 102 (2003) (Taiwan) (statement by the Secretary-General of the Judicial Yuan) (stating that Taiwan needs to strengthen defense representation in order to establish relative equal status with prosecutors).

78. See Jaw-perng Wang, The Great Leap in Taiwan's Criminal Justice Reform, Address Before the Asian Law Institute Inaugural Conference: The Role of Law in a Developing Asia 10 (May 27-28, 2004) (on file with author).

79. See *id.* at 10-11.

80. Zhonghua Minguo Xingshi Susong Fa (中华民国刑事诉讼法) [Republic of China Criminal Procedure Code] art. 158-4 (promulgated by the Legislative Yuan, July 28, 1928, effective Sept. 1, 1928, as amended June 1, 2010) (Taiwan).

81. See Luna, *supra* note 11, at 320 ("Probably a more accurate description is that no other country utilizes a *mandatory* rule of evidentiary suppression.").

The exclusionary rule in Taiwan, like the other jurisdictions discussed above, is far more of a work in progress than a static concept. The comparative perspective gained from this overview is not intended as an argument that one country's system should be transplanted to another. Nor is the point to describe some sort of cross-jurisdictional convergence whereby, for example, exclusion in the United States is watered down and exclusion in China is simultaneously fortified and both land somewhere in the middle. Instead, developments in these jurisdictions highlight both what stimulates the adoption of exclusionary rules and how societies tussle with their scope.

III. PRIOR BASES FOR EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE IN CHINA

Before release of the 2010 Evidence Rules, a patchwork of documents addressed evidence in criminal cases, but these were largely vague, scattered pronouncements. The 2010 Evidence Rules advanced and crystallized the protracted debate. This Part traces developments leading to the new rules.

As an initial clarification, in contrast to the heavily constitutionalized debate in the United States,⁸² the discussion surrounding the exclusionary rule in China is largely one of policy.⁸³ The crux of the issue is not what China's Constitution demands (a document that has little direct effect on criminal procedure) but rather what rules make sense for China's conditions—the oft-cited *guoqing* (country conditions) that are seen as constraining the scope of possible reforms.⁸⁴ Nonethe-

82. See Bradley, *supra* note 59, at 27 (“Currently, all of the ‘rules’ [in the United States] are cast in terms of the Constitution.”).

83. For thoughtful discussions of China's emergent constitutionalism, see generally BUILDING CONSTITUTIONALISM IN CHINA (Stephanie Balme & Michael W. Dowdle eds., 2009), and Cai Dingjian, *Social Transformation and the Development of Constitutionalism*, in CHINA'S JOURNEY TOWARD THE RULE OF LAW 51 (Cai Dingjian & Wang Chenguang, eds., 2010) (detailing the historical processes underlying changes in the interpretation of the Chinese constitution).

84. See, e.g., Chen Weidong & Liu Ang (陈卫东 & 刘昂), *Wo Guo Jianli Feifa Zhengju Paichu Guize De Zhang Ai Toushi Yu Jianyi* (我国建立非法证据排除规则的障碍透视与建议), 6 *Falv Shiyong* 10 (法律适用) [J. L. APPLICATION], at 12-13 (2006) (articulating the goal of fashioning an exclusionary rule that fits China's conditions).

less, the PRC Constitution does act as a backdrop to reforms by providing macro policy aspirations. China amended its Constitution in 1999 to state that the PRC is “a socialist country ruled by law.”⁸⁵ In 2004, the Constitution was amended again to include the phrase, “The State respects and guarantees human rights.”⁸⁶ Scholars have invoked the constitution when encouraging use of an exclusionary rule in China.⁸⁷

However, the power to interpret the Constitution rests in the hands of the National People’s Congress, and walking into court waving the Constitution could appeal to a judge’s sense of justice but will not serve as a sufficient, stand-alone basis for a judgment. Consequently, it is not a question of waiting for a Chinese Justice Earl Warren to lead the charge and invigorate dormant constitutional guarantees.⁸⁸ The courts must first be handed the reins to interpret the Constitution.⁸⁹ Even if the courts did have this power, their historically weak position vis-à-vis the police suggests that any rule emanating from the courts that was aimed at policing the police would likely have limited traction.⁹⁰ In short, for the foreseeable future, the ex-

85. XIANFA art. 5 (1999) (China).

86. XIANFA art. 33 (2004) (China).

87. See Xu Henan (徐鹤喃), *Wo Guo Feifa Zhengju Paichu Guize Zhi Duoshijiao Tuidong* (我国非法证据排除规则之多视角推动), 1 Faxue 149 (法学) [LEGAL SCIENCE], at 150-51 (2007) (citing PRC Constitution’s protection of human rights as a basis for the exclusionary rule in China); Yang Yuguan (杨宇冠), *Lun Feifa Zhengju Paichu Guize De Jiazhi* (论非法证据排除规则的价值), 20 Zhengfa Luntan 111 (政法论坛) [TRIB. OF POL. SCI. & L.], at 115 (2002) (connecting exclusionary rule to constitutional provisions on human rights).

88. Cf. Symposium, *The Warren Court Criminal Justice Revolution: Reflections a Generation Later*, 3 OHIO ST. J. CRIM. L. 1 (2005) (commenting on the Warren Court’s progressive extension of the constitutional guarantees available to individuals).

89. The SPC’s 2001 judicial interpretation in the Qi Yuling case was heralded as a breakthrough because the court used the constitution as an adjudicative norm (*xianfa sifahua*) (宪法司法化). See Ji Weidong, *Legal Discourse in Contemporary China*, in BUILDING CONSTITUTIONALISM IN CHINA 125, 139 (Stephanie Balme & Michael W. Dowdle eds., 2009). However, the SPC officially withdrew this interpretation in December 2008 thus dampening hopes for increased judicial interpretation of the constitution. *Id.* In contrast, Taiwan’s Supreme Court relied explicitly on the Constitution when endorsing the exclusionary rule. See Wang, *supra* note 78, at 10.

90. See Benjamin Liebman & Tim Wu, *China’s Network Justice*, 8 CHINA J. INT’L L. 257, 269 (2007) (“For much of the reform period (1978-present),

clusionary rule is expected to remain in the form of rules or laws, not constitutional decisions.

A. *Framework for Use of Evidence in Criminal Cases: 1996-2009*

The current reform effort grows out of extended debates regarding the overall direction of criminal procedure. In China, the starting point for black-letter law governing criminal cases is the Criminal Law and the Criminal Procedure Law (CPL).⁹¹ The two laws are at the pinnacle in the hierarchy of legislation shaping the criminal justice system and are supported by more detailed provisions issued by various government bodies.⁹² As part of the 1996 revisions to the CPL, China began shifting towards an adversarial process.⁹³ It has proven difficult to graft reforms onto a system that bore strong resemblance to an inquisitorial model, combined with decades of socialist law or even the stark absence of formal law. At present, the situation is more like an inquisitorial system in adversarial clothing than one where the reforms have truly altered the everyday workings of the criminal justice system.

Another layer of the debate in China that requires explanation is the distinctive status of prosecutors. Prosecutors in China play a complex role. As the procuracy (or procuratorate), their formal role extends to legal supervision over criminal proceedings.⁹⁴ This role on paper is a bit misleading because the procuracy's supervisory powers are restrained in practice. Prosecutors have served more as a bridge

China's courts have remained relatively minor actors in the Chinese political system.”).

91. *Zhonghua Renmin Gongheguo Xingshi Susong Fa* (中华人民共和国刑事诉讼法) [PRC Criminal Procedure Law] (promulgated by the Nat'l People's Cong., Jul. 1, 1979, amended Mar. 17, 1996, effective Jan. 1, 1997) (China) [hereinafter CPL]; *Zhonghua Renmin Gongheguo Xing Fa* (中华人民共和国刑法) [PRC Criminal Law] (promulgated by the Nat'l People's Cong., Jul. 1, 1979, amended Mar. 14, 1997, effective Oct. 1, 1997) (China). Both laws, including recent amendments, are available in English at <http://florasapio.blogspot.com/>.

92. *See generally* *Lifa Fa* (立法法) [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective Sept. 1, 2000) (China) (providing hierarchy of sources of law).

93. *See* Peerenboom, *supra* note 25, at 844-49 (describing China's "Rocky Road to an Adversarial System").

94. XIANFA art. 5 (1982) (China); CPL, *supra* note 91, art. 8.

between the police investigation and court procedures than as a discriminating screen.

Prior to the 1996 revisions, the CPL provided only that evidence should be gathered “according to legal procedures.”⁹⁵ There was paltry guidance as to what constituted “legal procedures,” and there was no requirement that a finding of illegal actions actually lead to exclusion.⁹⁶ Even after significant revisions in 1996, the amended CPL only briefly addresses the use of evidence in criminal cases.⁹⁷ Article 43 of the CPL prohibits the extraction of confessions through force,⁹⁸ as well as the collection of evidence through threats, inducements, deception or other illegal means.⁹⁹ Article 247 of the Criminal Law provides prison time for officials who extract confessions or witness testimony through force.¹⁰⁰

The broad wording in these laws left gaping holes concerning how to apply them. As is often the case in China, government bodies stepped in with interpretations, rules, and other supplemental documents to flesh out the laws. The Supreme People’s Court (SPC), for example, does not directly set precedent through its decisions in individual cases, but it has the power to issue interpretations that provide guidance to lower courts.¹⁰¹ In 1998, the SPC issued a judicial interpreta-

95. See LAWYERS COMM. FOR HUM. RTS., OPENING TO REFORM? AN ANALYSIS OF CHINA’S REVISED CRIMINAL PROCEDURE LAW 67-68 (1996) (explaining Article 32 of the 1979 CPL).

96. *Id.*

97. See Chen Guangzhong (陈光中), *supra* note 5 (noting limited references to evidence in the CPL); see also JEROME A. COHEN, THE CRIMINAL PROCESS IN THE PEOPLE’S REPUBLIC OF CHINA 1949-1963: AN INTRODUCTION 32-33 (1968) (commenting on the lack of restrictions on kinds of evidence that can be used to determine guilt).

98. In this Article, “Xingxun Bigong” (“刑讯逼供”) is translated as “extracting confessions through force.” Although sometimes translated as “extracting confessions through torture,” this Article reserves the English word “torture” for the Chinese word “Ku Xing” (“酷刑”) as used, for example, in United Nations’ conventions. See CAT, *supra* note 67; see also MICHAEL DUTTON, POLICING CHINESE POLITICS: A HISTORY 40-41 (2005) (exploring origin of “forced confession technique, bi-gong-xin”).

99. CPL, *supra* note 91, art. 43.

100. PRC Criminal Law, *supra* note 91, art. 247.

101. See Fu Hualing, Institutionalizing Criminal Process in China 7 (Apr. 13, 2010) (unpublished manuscript), available at <http://www.ssrn.com/abstract=1588733> (claiming that the SPC is “becoming more assertive in legal interpretation by interpreting criminal law on its own.”).

tion covering a number of issues touched on in the revised CPL, including a provision that any witness testimony, victim statement, or defendant's confession that is extracted through force, threats, inducements, deception or other illegal means cannot be the basis of a verdict.¹⁰² Similarly, 1999 rules issued by the Supreme People's Procuratorate's (SPP) provide that any witness testimony, victim statement, or criminal suspect's confession that is extracted through force, threats, inducements, deception or other illegal means cannot be the basis of a criminal charge.¹⁰³

In the years following release of these documents, enthusiasm for the legal developments on paper was dampened by the acknowledgment that the reforms lacked detailed provisions for implementation.¹⁰⁴ It was unclear, for example, when an application to exclude evidence could be brought, what evidence was needed to support such an application, whether the defense was entitled to a live hearing on the application, who bore the burden of proof, and what standard of proof would be used to evaluate the application.¹⁰⁵ It remained common knowledge that there was widespread use of

102. Zuigao Renmin Fayuan Guanyu Zhixing "Zhonghua Renmin Gongheguo Xingshi Susong Fa" Ruo Gan Wenti De Jieshi (最高人民法院关于执行《中华人民共和国刑事诉讼法》若干问题的解释) [Interpretation on Several Issues in the Implementation of the Criminal Procedure Law] art. 61 (issued by the Supreme People's Court, June 29, 1998), <http://cecc.gov/pages/selectLaws/criminalJustice/supremeCourtInterpretation.php>.

103. Renmin Jianchayuan Shishi "Zhonghua Renmin Gongheguo Xingshi Susong Fa" Guize (人民检察院实施《中华人民共和国刑事诉讼法》规则) [Rules on Implementation of the Criminal Procedure Law] art. 265 (issued by the Supreme People's Procuratorate, Jan. 18, 1999), <http://www.spp.gov.cn/site2006/2006-02-22/00024-98.html>.

104. The government issued occasional pronouncements during this period. See, e.g., People's Republic of China, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Comments by the Government of the PRC Concerning the Concluding Observations and Recommendations of the Committee against Torture* 5, Comm. Against Torture, U.N. Doc. CAT/C/CHN/C0/4/Add.2 (Dec. 18, 2009) [hereinafter 2009 CAT Report] (reporting a 2004 government notice that makes "clear that no verdict shall be based on confessions . . . obtained by torture.").

105. Xu Henan (徐鹤喃), *supra* note 87, at 149 (commenting on the lack of clear implementation provisions for exclusion of illegally obtained evidence).

coercive techniques to obtain confessions, and courts relied heavily on confessions as the basis for guilty verdicts.¹⁰⁶

This remained the situation for the last decade with rumors ebbing and flowing regarding release of either targeted rules aimed at evidentiary issues or a large-scale reform of the CPL that incorporated such reforms. The SPP itself announced in 2009 that it was preparing to release rules regarding the use of evidence in capital cases.¹⁰⁷ Touted as a step toward “improving the evidentiary system and preventing wrongful convictions in criminal cases,”¹⁰⁸ the rules were never issued publicly, though the announcement buttressed the expectation that reforms would be forthcoming. This emphasis on capital cases continued in the subsequent Death Penalty Evidence Rules. The close relationship between evidence reforms and capital cases thus requires a brief detour.

B. *Death Penalty Reforms*

It is no secret that China continues to execute large numbers of people. What *is* secret is the actual number.¹⁰⁹ Prior to May 2011 China’s Criminal Law contained sixty-eight capital

106. See Yang Yuguan (杨宇冠), Lun Bu Qiangpo Zi Zheng Qi Zui (论不强迫自证其罪), “Gongmin Quanli Yu Zhengzhi Quanli Guoji Gongyue” Yu Xingshi Fazhi Gaige Guoji Yantaohui Wenji, 《公民权利与政治权利国际公约》与刑事法制改革国际研讨会文集, presented at International Seminar on ICCPR and Criminal Legal System Reform 72, 82 (Dec. 5-6, 2009) (on file with author) (explaining reasons for continuing reliance on confessions).

107. See Zuigao Renmin Jianchayuan: Sixing An Quzheng Jin Xingxun Bigong (最高人民法院:死刑案取证禁刑讯逼供), Xin Jing Bao (新京报) [BEIJING NEWS], Aug. 11, 2009, <http://news.bjnews.com.cn/2009/0811/40934.shtml> (reporting new rules).

108. Zuigao Jian Shouci Guifan Sixing An Zhengju Shencha Yunyong Biaozhun (最高检首次规范死刑案证据审查运用标准), Zhongguo Guangbo Wang (中国广播网) [CHINA NATIONAL RADIO NET], Aug. 10, 2009, http://www.cnr.cn/newscenter/gnxw/200908/t20090810_505425496.html.

109. The number of people executed each year remains a state secret. DAVID T. JOHNSON & FRANKLIN E. ZIMRING, *THE NEXT FRONTIER: NATIONAL DEVELOPMENT, POLITICAL CHANGE, AND THE DEATH PENALTY IN ASIA* 233 (2009). As a result, “the currency of discourse about executions in this country is adjectives rather than numbers.” *Id.* For 2009, Amnesty International gave a conservative estimate that “a minimum of 7,000 death sentences were handed down and 1,700 executions took place.” Amnesty Int’l, 2009 Annual Report for China 108 (2009), available at <http://www.amnestyusa.org/annualreport.php?id=ar&yr=2009&c=CHN>.

offenses, including many non-violent offenses such as counterfeiting currency, fraud, and embezzlement when large amounts are involved.¹¹⁰ The number of capital offenses decreased to fifty-five when the most recent amendment to the Criminal Law took effect on May 1, 2011, though the death penalty is reportedly seldom imposed for the offenses being removed.¹¹¹ In 1983, the SPC delegated the power to conduct final review of death penalty cases to provincial high courts.¹¹² In 2007, in line with the policies of “kill few and kill cautiously”¹¹³ and “justice tempered with mercy,”¹¹⁴ the SPC took back this power.¹¹⁵

Today, all death sentences are reviewed by the SPC prior to execution. Despite this reform, the official media has recognized continuing problems with the quality of judgments in

110. Zhao Lei (赵蕾), Xingfa Yunnian Di Ba Ci Da Xiu: Sixing Shao Le, Zuolao Jiu Le (刑法酝酿第八次大修: 死刑少了, 坐牢久了), Nanfang Zhoumo (南方周末) [SOUTHERN WEEKLY], July 21, 2010 (discussing current capital crimes and proposals for reform); Cao Li, *China Mulls to Cut Down Executions*, CHINA DAILY ONLINE (July 24, 2010), http://www.chinadaily.com.cn/china/2010-07/24/content_11044407.htm.

111. See Jianshao Sizui, Buzi Keyi Zai Da Yixie (减少死罪, 步子可以再大一些), Nanfang Zhoumo (南方周末) [SOUTHERN WEEKLY], Aug. 26, 2010 (interview with Tsinghua University Professor Zhou Guangquan), available at <http://nf.nfdaily.cn/epaper/nfzm/content/20100826/ArticleA05002FM.htm>; Shouquan Fabu: Zhonghua Renmin Gongheguo Xingfa Xiuzheng An (Ba) (授权发布: 中华人民共和国刑法修正案(八)) [Promulgated Pursuant to Authorization: People's Republic of China Criminal Law Amendment Act (No. 8)], Xinhua Wang (新华网) [XINHUA NET], Feb. 25, 2011, http://news.xinhuanet.com/2011-02/25/c_121124346.htm.

112. See Kandis Scott, *Why Did China Reform Its Death Penalty?*, 19 PAC. RIM L. & POL'Y J. 63, 65-67 (2010) (noting delegation of power to provincial courts in 1980s).

113. See Xu Aimin (徐爱民), “Shao Sha Shen Sha” Yichu Duo (“少杀慎杀”益处多), Zhongguo Fayuan Wang (中国法院网) [CHINACOURT.ORG], Nov. 1, 2006, <http://www.chinacourt.org/html/article/200611/01/222106.shtml> (explaining the policy).

114. See Wang Guanqun, *China Issues Guidelines to Limit Death Penalty Use*, XINHUA GEN. NEWS SERV., Feb. 9, 2010, http://news.xinhuanet.com/english2010/china/2010-02/09/c_13169980.htm. (explaining the policy). See generally Margaret K. Lewis, *Leniency and Severity in China's Death Penalty Debate*, 24 COLUM. J. ASIAN L. (forthcoming 2011) (exploring use of guiding principle “kuanyan xiangji” (宽严相济) in China's death penalty debate and suggesting translation “appropriately combine leniency and severity”).

115. See Scott, *supra* note 112, at 66 (explaining return of SPC review in 2007).

capital cases, and the reform debate continues.¹¹⁶ Evidentiary deficiencies earlier in a case's development no doubt hamper the SPC's ability to undertake a searching, comprehensive review, yet at least the relatively well-trained body of SPC judges brings fresh eyes to the case.

The reforms called for by the 2010 Evidence Rules will not receive this same scrutiny. It is impossible for the SPC to review every evidentiary ruling. Even the requirement that the SPC review capital cases has proven to be a considerable burden.¹¹⁷ With the 2010 Evidence Rules, a key question is how the new requirements will filter down without persistent oversight by higher-level courts. The government recognizes the need for training to implement the rules:¹¹⁸ as early as June 2010, China Daily reported "a teleconference attended by over 10,000 judges from across the country" to discuss the new rules.¹¹⁹

The bifurcation of the 2010 Evidence Rules with the more ambitious reforms limited to capital cases is logical in light of this backdrop of prior reforms. The reform project with respect to capital cases is already well under way with an official policy of executing fewer people and deciding whom to execute more carefully. Moreover, the stakes are simply higher in capital cases. The common phrase in American jurisprudence that "death is different"¹²⁰ finds its Chinese counterpart in the

116. See Neidi Mingque Yi Xingxun Bigong Suo Huo Kougong Bu Neng Zuowei Ding An Genju (内地明确以刑讯逼供所获口供不能作为定案根据) Xinhua Wang, (新华网) [XINHUA NET], May 30, 2010, available at http://news.ifeng.com/mainland/detail_2010_05/30/1566576_0.shtml (noting continuing problems with the system for handling capital cases despite 2007 reforms).

117. JOHNSON & ZIMRING, *supra* note 109, at 272-73 (reporting need for hundreds of new SPC judges to review death sentences).

118. 2010 Evidence Rules Notice, *supra* note 6 ("Care must be taken to arrange specialized training sessions for relevant personnel.").

119. Wang Jingqiong, *Evidence Core in Criminal Cases*, CHINA DAILY ONLINE (June 10, 2010) http://www.chinadaily.com.cn/cndy/2010-06/10/content_9958828.htm.

120. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) ("This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976))); see also Jeffery Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 117 n.1 (listing Supreme Court quotes expressing this concept).

idiom “*ren ming guan tian*.” Literally meaning “human life and death is a matter that concerns the heavens,” this phrase expresses that a case involving human life is to be treated with the utmost care.¹²¹ Mao Zedong expressed this more colloquially: “[C]utting off heads isn’t like cutting up chives. Chives regrow, heads don’t.”¹²²

C. *Other Complementary Reforms*

Three additional related developments deserve note as bearing on the new rules: (1) detention conditions; (2) the official human rights action plan; and (3) broader developments regarding evidence rules.

First, as the issue of forced confessions has come under the spotlight, so have the conditions under which those confessions are extracted. Detention is common and often extended in criminal cases,¹²³ with the CPL’s equivalent of bail infrequently granted.¹²⁴ As further discussed in Part V below, a recent spate of unnatural deaths in police custody has helped fuel debates regarding how police collect evidence. Shortly before release of the 2010 Evidence Rules, the Ministry of Public Security issued new rules regarding detention cen-

121. XINHUA NET, *supra* note 116 (expressing concept of “Renming Guantian” (人命关天)); *see also* <Guanyu Banli Sixing Anjian Shencha Panduan Zhengju Ruo Gan Wenti De Guiding> He <Guanyu Banli Xingshi Anjian Zhengju Ruo Gan Wenti De Guiding> Jiang Chutai (《关于办理死刑案件审查判断证据若干问题的规定》和《关于办理刑事案件排除非法证据若干问题的规定》将出台), Anhui Xingshi Bianhu Wang (安徽刑事辩护网) [ANHUI CRIMINAL DEFENSE NET], (May 24, 2010), <http://www.148china.com/display.asp?id=1322> (interview with Professor Fan Chongyi, China University of Political Science and Law, explaining that capital cases were singled out because they are important, complex, and sensitive).

122. DUTTON, *supra* note 98, at 83.

123. Qin Xudong, *Rights of Defendants in Criminal Proceedings: To what extent can suspects defend themselves?*, CAIXIN ONLINE (Feb. 9, 2010), <http://english.caing.com/2010-02-09/100117003.html> (“At least 85 percent [of] criminal cases in China involve detention. Furthermore, long-term periods of custody are common during investigations, prosecutions and trials.”).

124. *See* Jerome A. Cohen, *Bail in China: A Crucial Human Right*, S. CHINA MORNING POST, Sept. 3, 2009, http://www.cfr.org/publication/20140/bail_in_china.html (“Bail applications are seldom granted, even in cases where a long prison sentence is not possible.”); *see also* CPL, *supra* note 91, art. 51 (setting forth provisions regarding obtaining a guarantor pending trial).

ters.¹²⁵ These rules are framed in terms of improving management and emphasizing rehabilitation of offenders. The Ministry of Public Security is not explicitly atoning for any past transgressions of its personnel. That being said, in light of recent reports of abuse in detention centers, the timing of the document's release is telling.

Second, in 2009, the PRC Government issued a National Human Rights Action Plan, which mirrors the CPL in providing that the state prohibits the extraction of confessions through force as well as the collection of evidence through threats, inducements, deception or other illegal means.¹²⁶ The section regarding the rights of detainees reiterates that measures be taken to prohibit the extraction of confessions by force.¹²⁷ The plan does not provide clear steps to back up these admirable yet largely aspirational goals. Issued a year before the 2010 Evidence Rules, it nevertheless underscores the government's growing willingness to publicly address the issue of forced confessions.¹²⁸

Third, the dearth of rules on evidence in criminal cases is tied to the larger issue of evidence reforms across subject-matter areas. Draft uniform provisions of evidence are being debated in China, and include input from foreign scholars.¹²⁹ Currently, however, China has no comprehensive evidence

125. See Gonganbu Jiansuo Guanliju Xiafa <Tuixing Juliusuo Guanli Jiaoyu Zhidao Yijian> (公安部监所管理局下发《推行拘留所管理教育指导意见》) (issued by the Ministry of Public Security, Prison Administration Bureau, Feb. 22, 2010), available at <http://www.mps.gov.cn/n16/n1252/n1777/n2497/2339628.html>.

126. INFORMATION OFFICE OF THE STATE COUNCIL OF THE PRC, NATIONAL HUMAN RIGHTS PLAN OF CHINA 2009-2010, § 2, ¶ 1 (Apr. 13, 2009), available at http://www.gov.cn/jrzq/2009-04/13/content_1283983.htm, translated at http://www.china.org.cn/archive/2009-04/13/content_17595407_12.htm.

127. *Id.* § 2(2).

128. Also in 2009, in response to questions from the United Nations Committee Against Torture, the PRC Government stated, "In recent years, instances of confessions extracted by torture have occurred in sporadic places in China, but this practice is by no means widespread." 2009 CAT Report, *supra* note 104, at 3.

129. See generally John J. Capowski, *China's Uniform Provisions of Evidence of the People's Court and the Convergence of Civil Law and Common Law* (Widener L. Sch. Legal Stud. Res., Working Paper No. 09-10, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1431505 (paper prepared for conference in Beijing on evidence reforms) (discussing the similarities be-

rules, which means that parties and judges must draw on scattered provisions in various laws.¹³⁰ Likewise, until promulgation of the 2010 Evidence Rules, only the above-described vague legal bases existed to challenge the use of illegally obtained evidence. The next Part sets out the main contents of this long-awaited realization of reform efforts.

IV. 2010 EVIDENCE RULES

In early 2010, speculation continued that rules would be forthcoming, though the contents of the rumored draft were known only by government officials and a select group of academics involved in the process.¹³¹ The government announced the new rules in late May but did not release the full text until June 13, presumably because the five issuing government bodies were finalizing the rules' contents.¹³²

As previously noted, the 2010 Evidence Rules consist of two discrete sets of rules that were issued simultaneously and accompanied by a joint notice heralding their release.¹³³ The Death Penalty Evidence Rules are considerably more detailed than the Evidence Exclusion Rules, which apply across the board to criminal cases. Because the drafting process was not transparent, it remains subject to conjecture to what extent debate centered on whether to place provisions in one set of rules or the other. The fact that reforms to capital cases have already been at the forefront of the government's criminal procedure reform agenda for several years likely made the more narrow Death Penalty Evidence Rules an easier sell. The bifurcation of the new rules indicates that throwing open in-

tween PRC's draft Uniform Provisions of Evidence and the United States' Federal Rules of Evidence).

130. See, e.g., Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [PRC Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008) art. 116 (China) ("The judicial personnel must carefully examine the case materials and carry out investigation and collection of necessary evidence.").

131. For example, prior to promulgation but after the initial announcement, Professor Fan Chongyi gave a detailed interview describing the contents of the new rules. See ANHUI CRIMINAL DEFENSE NET, *supra* note 121.

132. See XINHUA NET, *supra* note 116 (announcement of rules prior to full release).

133. See *supra* text accompanying notes 6-7 discussing the issuance of the 2010 Evidence Rules.

creased procedural protections to the full panoply of criminal cases without regard to possible sentences simply is not politically feasible at this time. That being said, the issuing notice accompanying the 2010 Evidence Rules concludes with the intriguing phrase that the Death Penalty Evidence Rules “may be used as a reference for implementation in handling other criminal cases.”¹³⁴

A. *Death Penalty Evidence Rules*

The more extensive document regarding capital cases is composed of three main parts with a total of forty-one articles. The first part on “General Provisions” includes seemingly banal statements such as, “[t]he facts used to determine guilt in a case must be based on evidence.”¹³⁵ It goes on to list characteristics of evidence that are sufficiently credible and abundant to support the facts of the defendant’s crime in a capital case.¹³⁶ These provisions target the crucial question of the standard of proof for criminal cases. Article 162 of the CPL provides, “If the facts of a case are clear, the evidence is reliable and sufficient, and the defendant is found guilty in accordance with law, he shall be pronounced guilty accordingly.”¹³⁷ However, the abstract nature of this phrase has left questions about how judges should apply it.¹³⁸ Article 5 of the Death Penalty Evidence Rules is more precise and requires, in part, that each item of evidence used as a basis for conviction has undergone a legal process by which it has been examined and verified to be true and there is no contradiction between items of evidence or between an item of evidence and the facts of the case, unless the contradiction can be reasonably ruled out.¹³⁹

The second part of the Death Penalty Evidence Rules turns to the “Examination and Determination of Different Types of Evidence,” which are compartmentalized into seven different forms: (1) physical and documentary evidence, (2)

134. 2010 Evidence Rules Notice, *supra* note 6.

135. Death Penalty Evidence Rules, *supra* note 7, art. 2.

136. *Id.* art. 5.

137. CPL, *supra* note 91, art. 162(1).

138. XINHUA NET, *supra* note 116 (noting that evidence provisions in CPL are hard to grasp in practice).

139. Death Penalty Evidence Rules, *supra* note 7, art. 5.

witness testimony, (3) victim statements, (4) defendant declarations and defense statements, (5) expert opinions, (6) records of on-site investigation and inspection, and (7) audiovisual materials.¹⁴⁰ For each type, the rules provide a list of factors that courts should consider when evaluating evidence, such as whether the physical evidence has been damaged or altered, and whether an expert witness has the relevant legal qualifications.¹⁴¹

Reliability, accuracy, and relevance are key themes that span across the different types of evidence. The rules express concerns regarding evidence based on conjecture, opinion, and inference, and emphasize the need for firsthand evidence and improved evidence collection.¹⁴² Of specific relevance to the exclusion of evidence because of the manner in which it was obtained: article 12 provides, “Witness statements obtained through violence, threats, or other illegal means may not serve as a basis for conviction.”¹⁴³ Similarly, article 19 provides, “If a defendant’s declaration has been obtained through illegal means such as extracting a confession through force, it may not serve as a basis for conviction.”¹⁴⁴ A government spokesperson explained that the Death Penalty Evidence Rules mark an innovation in Chinese law by clearly specifying that illegally obtained evidence may not be used as a basis for conviction.¹⁴⁵ Professor Bian Jianlin of China University of Political Science and Law similarly noted, “[N]o previous law or regulation clearly stated that when evidence may have been acquired through forced confession it must be excluded”¹⁴⁶

The third and final part, titled “General Examination and Use of Evidence,” addresses issues that stretch across different forms of evidence, including the extent to which courts can

140. *Id.* arts. 6-27.

141. *Id.* arts. 6, 23.

142. *Id.* art. 12.

143. *Id.*

144. *Id.* art. 19. There is some debate whether this phrasing requires that the evidence not be used at all or rather cannot be the *basis* for conviction. Regardless, a concern is that, because the judges deciding admissibility will be the same judges who decide guilt, they could be influenced by the excluded evidence.

145. XINHUA NET, *supra* note 116.

146. *China Adjusts Law System After Torture Scandal*, XINHUA GEN. NEWS SERV., May 30, 2010, available at http://www.chinadaily.com.cn/china/2010-05/30/content_9908896.htm.

rely on indirect evidence and the procedures that courts should follow if they have questions about evidence.¹⁴⁷ The rules further touch on the debated topic of sentencing by listing relevant factors.¹⁴⁸

B. *Evidence Exclusion Rules*

Although the Evidence Exclusion Rules are considerably shorter in length (fifteen articles compared with the Death Penalty Evidence Rules' forty-one articles), their impact is potentially greater because they apply to all criminal cases. The rules place overwhelming emphasis on oral evidence, with article 1 providing that "illegal oral evidence includes statements by criminal suspects or defendants obtained through illegal means such as confessions extracted through force, as well as witness testimony or victim statements obtained through illegal means such as use of violence or threats."¹⁴⁹ Thereafter, article 2 provides, "Oral evidence that has been determined to be illegal in accordance with the law shall be excluded and may not serve as the basis for conviction."¹⁵⁰

The Evidence Exclusion Rules take a softer stance with respect to physical and documentary evidence: "If physical or documentary evidence is obtained in a manner that clearly violates the law and may have an impact on the fairness of an adjudication, redress or some reasonable explanation should be made, otherwise that physical or documentary evidence may not serve as a basis for conviction."¹⁵¹ China has considered a search-and-seizure exclusionary rule along the lines used in the United States, but that debate remains largely academic.¹⁵² The compromise position was to address physical evidence in principle but to defer clearer measures to the fu-

147. Death Penalty Evidence Rules, *supra* note 7, arts. 32-40.

148. *Id.* art. 36 (listing factors such as whether the defendant has shown remorse and whether the victim was at fault).

149. Evidence Exclusion Rules, *supra* note 7, art. 1.

150. *Id.* art. 2.

151. *Id.* art. 14.

152. See Xu Henan (徐鹤喃), *supra* note 87, at 149 (comparing emphasis in United States on physical evidence with focus on oral evidence in China); Chen Guangzhong (陈光中), *supra* note 5, at 2 (commenting on the long-term debate in China over exclusion of physical evidence).

ture.¹⁵³ This decision is understandable when viewed through the lens that the 2010 Evidence Rules are aimed at reliability of evidence and not concerns about privacy or property. The tremendous powers in the hands of police also dampen prospects for a search-and-seizure exclusionary rule.¹⁵⁴ In one glaring difference with police in the United States, police in China do not need to obtain a court-issued warrant to conduct a search.¹⁵⁵ Instead, search and seizures are limited only by internal police procedures and are not subject to review by any external bodies.

The conventional wisdom is that exclusion of physical evidence is further impractical in light of the general emphasis on substantive over procedural justice.¹⁵⁶ It is highly doubtful that the courts and public, let alone the police, could stomach suppression of a smoking gun because legal procedures were violated.¹⁵⁷ Indeed, the United States is unusual in its rela-

153. Ng, *supra* note 4 (quoting Professor Bian Jianlin of China University of Political Science and Law as saying physical evidence “require[s] a more delicate balancing act between combating crime and protecting human rights” and that criminal procedure reform had to take place “one step at a time”).

154. See WONG, *supra* note 9, at 138 (explaining police authority to “employ appropriate compulsory measures—summoning for investigation, detention, arrest, guarantor pending trial, or residential surveillance—against a defendant for investigation purposes”).

155. See CPL, *supra* note 91, art. 43; Qin, *supra* note 123 (describing the broad search and seizure powers of the police); LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 95, at 32 (explaining that of the five forms of pretrial detention under the Criminal Procedure Law, “the only one subject to any review by an institution other than the police is arrest, which must be approved by the procuratorate”).

156. See Peerenboom, *supra* note 12, at 1072 (“Many citizens in China, as elsewhere, feel the procedural rights for criminal suspects may be used to defeat the goal of seeking the truth and thwart substantive justice by allowing those who have committed crimes to escape conviction and punishment.”); Sida Liu & Terence C. Halliday, *Recursivity in Legal Change: Lawyers and Reforms of China’s Criminal Procedure Law*, 34 L. & SOC. INQUIRY 911, 920 (2009) (“A more fundamental source of Chinese characteristics comes from a long history of criminal justice that emphasizes substantive law and overlooks procedure.”); Chen Weidong & Liu Ang (陈卫东 & 刘昂), *supra* note 84, at 15 (proposing that illegally obtained physical evidence be excluded in principle but that there be exceptions that would allow its use in practice).

157. Cf. Oaks, *supra* note 37, at 666 (“Evidence obtained by an illegal search and seizure is just as reliable as evidence obtained by legal means. This cannot always be said of evidence obtained by improper methods of lineup identification or interrogation.”); see also *infra* notes 225-29 and ac-

tively hard stance towards exclusion,¹⁵⁸ although the U.S. rule has softened considerably over recent years.¹⁵⁹

Perhaps the most interesting aspect of the Evidence Exclusion Rules is their codification of procedures by which a defendant can challenge the government's evidence. The rules are significant in even allowing for a pretrial procedure to challenge a confession.¹⁶⁰ The onus is on the defense to allege that a confession was obtained illegally and to provide the court with supporting leads or evidence, though the rules are unclear as to how much evidence is needed to trigger further procedures.¹⁶¹ If the court has doubts about the evidence after an initial review, the burden shifts and the prosecutor must provide evidence to eliminate suspicion that the confession was obtained through illegal means.¹⁶²

In an eyebrow-raising break from past practice, the rules provide not only that "interrogators or other individuals shall testify before the court," but also that "prosecution and defense may cross-examine evidence and carry out debate with regard to the question of whether the defendant's pretrial confession was obtained legally."¹⁶³ This attention to in-court testimony goes against deeply embedded practices in the criminal justice system.¹⁶⁴ The defense previously lacked any plau-

companying text (explaining that the PRC Government is most interested in deterring conduct that decreases the accuracy of verdicts).

158. Bradley, *supra* note 13, at 399 (commenting that the United States' mandatory approach "has been universally rejected").

159. See, e.g., *United States v. Leon*, 468 U.S. 897 (1984) (incorporating a "good faith" exception into the Fourth Amendment exclusionary rule). The scope of the "good faith" exception is again before the Supreme Court this term. See *Davis v. United States*, 598 F.3d 1259 (11th Cir. 2010), *cert. granted* (U.S. Nov. 1, 2010) (No. 09-11328) (addressing question whether "the good-faith exception to the exclusionary rule applies to a search authorized by precedent at the time of the search that is subsequently ruled unconstitutional"), available at <http://www.supremecourt.gov/qp/09-11328qp.pdf>.

160. Evidence Exclusion Rules, *supra* note 7, art. 7; cf. Ira Belkin, *China, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 91, 102 (Craig M. Bradley ed., 2d ed. 2007) ("Under its current system, there are no pre-trial procedures in China.").

161. See Evidence Exclusion Rules, *supra* note 7, art. 6.

162. *Id.* art. 7.

163. *Id.*

164. See He Jiahong & He Ran (何家弘 & 何然), *Xingshi Cuo An Zhong De Zhengju Wenti* (刑事错案中的证据问题), 2 *Zhengfa Luntan* 19 (政法论坛) [TRIB. POL. SCI. & L.], at 3 (2008) (explaining how, despite the

sible capability to compel the appearance in court of witnesses, especially when those witnesses were police officers. Cui Min, a professor at Chinese People's Public Security University, commented that it "may be common practice for police in the West or in Hong Kong, but it is a new thing for Chinese policemen to testify in court."¹⁶⁵ Admittedly, there remains the question whether police will testify truthfully or engage in "testilying."¹⁶⁶ Even so, official endorsement of the idea that police should appear in court and explain their actions is in itself a breakthrough.

The rules provide prosecutors an opportunity to obtain a postponement in order to submit additional evidence or continue the investigation.¹⁶⁷ While the court "shall" agree to a prosecutor's request for a postponement, it merely "may" agree when the defense asks for a postponement to call witnesses.¹⁶⁸ Finally, the court must decide what to do with the proffered evidence. If the prosecutor does not provide evidence to confirm the legality of the defendant's confession, or the evidence provided is not credible or sufficient enough, the confession may not serve as a basis for conviction.¹⁶⁹ Moreover, if the trial court fails to investigate the defendant's mo-

obligation to testify under the CPL (arts. 47-48), the law further provides for the submission of "the records of testimony of witnesses who are not present in court" (art. 157), thus allowing a means of circumventing the need to appear in court).

165. Andrew Jacobs, *China Bans Court Evidence Gained Through Torture*, N.Y. TIMES, May 31, 2010, available at <http://www.nytimes.com/2010/06/01/world/asia/01china.html>.

166. See Christopher Slobogin, *Testilying: Police, Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041-48 (1996) (describing the nature and causes of police perjury).

167. Evidence Exclusion Rules, *supra* note 7, art. 9; see also CPL, *supra* note 91, art. 165 (providing circumstances permitting postponement of a trial).

168. Evidence Exclusion Rules, *supra* note 7, art. 9.

169. *Id.* art. 11. Beyond the exclusion of the confession itself, there appears to be, at best, modest support for adopting some form of the "fruits of the poisonous tree" doctrine that would also exclude physical evidence obtained as a result of a coerced confession. See Chen Weidong & Liu Ang (陈卫东 & 刘昂), *supra* note 84, at 15 (explaining that introducing the "fruits of the poisonous tree" doctrine is not feasible in China today). See generally Stephen C. Thaman, "Fruits of the Poisonous Tree" in *Comparative Law*, 16 SW. J. INT'L L. 333 (2010) (exploring how exclusionary rules in different jurisdictions are interpreted with respect to derivative "fruits" of constitutional violations).

tion, the second instance court shall conduct an investigation on appeal, though the scope of this article may be tempered by the provision that the trial court “uses the defendant’s pre-trial confession as a basis for conviction.”¹⁷⁰

Because formal implementation of the 2010 Evidence Rules only began on July 1, 2010, courts, prosecutors, and lawyers are still in the initial stages of operationalizing these reforms. This Article now takes a step back from the nitty-gritty of implementation and addresses the underlying questions of “why the rules” and, more pointedly, “why now”?

V. DYNAMICS BEHIND THE EXCLUSIONARY RULE IN CHINA

Why would the PRC Government constrain its law enforcement agents on whom it relies so heavily to maintain stability? In contrast to the jurisdictions discussed in Part II, this is not a story of assertive courts introducing an exclusionary rule as something demanded or even suggested by the constitution, nor is it a situation where a government in overt transition marks a break with a past marred with abuse at the hands of government agents. Different forces pushed the PRC Government to adopt the 2010 Evidence Rules.

As one comparative scholar noted after reviewing the exclusionary rule in the United States, Italy, France, and Germany, “[C]omparative law suggests that exclusion is a remedy arising not only from the United States Constitution, but also from the constitution of any legal system that respects civil liberties and human rights.”¹⁷¹ A single-party authoritarian state is not the typical poster child for the exclusionary rule, and China’s record concerning respect for civil liberties and human rights is riddled with problems. Nevertheless, forces coalesced to create a receptive atmosphere for reforms. This Part explores how domestic pressure instigated the new rules’ adoption and how international influences provided complementary incentives.

170. Evidence Exclusion Rules, *supra* note 7, art. 12.

171. Pakter, *supra* note 28, at 56; *see also* Bradley, *supra* note 58, at 1066 (positing that the existence of a detailed system of exclusionary rules in Germany “indicates that exclusionary rules are a reflection of shared democratic principles, even though the rules’ particular provisions vary according to context and tradition”).

A. *Domestic Factors*

Zhao Zuohai's case of the returned "murder" victim, as explained in the Article's introduction, capped a growing tide of concern for miscarriages of justice connected to police misconduct. Over several years, a series of highly publicized wrongful convictions combined with wider reports of frustration with the justice system generated intense pressure on the PRC Government to take action. In addition to the impetus for reform driven by the public outcry reflected in the media and Internet, it is important to recognize a genuine desire by reform-minded people in the government and legal circles to curb abuses. Yet, considering that these largely academic debates have been ongoing for years without generating concrete reforms, it is doubtful that they would ever have been enough standing alone to push through reforms.

1. *Highly Publicized Wrongful Convictions*

A spate of widely reported wrongful convictions have "shocked society" in China.¹⁷² The issue exploded into public discussion in 2005 when She Xianglin's wife, whom he allegedly murdered a decade earlier, returned to her home village alive and well.¹⁷³ That same year, a murder suspect confessed to a previous killing with a level of detail indicating that he indeed was the actual murderer. However, in 1994, another man named Nie Shubin had already been executed for the crime.¹⁷⁴ More recently, Liu Junhai and Liu Yintang were released after spending fifteen years in detention after being tor-

172. Chen Guangzhong (陈光中), *supra* note 5.

173. See Hubei Shaqi Yuan An Shizhu She Xianglin Huo Peichang Jin 46 Wan Yuan (湖北殺妻冤案事主余祥林獲賠償近46萬元), Xinhua Wang (新华网) [XINHUA NET], Apr. 13, 2005, http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/legal/2005-09/01/content_3427899.htm. There was discussion in China regarding wrongful convictions prior to She Xianglin's case, though it received relatively little public attention. See Kang Junxin & Han Guangjun (康均心 & 韩光军), Hexie Yujing Xia De Xingshi Cuo An Yanjiu (和谐语境下的刑事错案研究) [A Study on the Misjudged Criminal Case in the Context of the Harmonious Society], 2 Xinan Zhengfa Daxue Xuebao 73 (西南政法大学学报) [JOURNAL OF SWUPL], at 82 (2007) (bibliography listing a number of pre-2005 articles addressing wrongful convictions).

174. See Liebman & Wu, *supra* note 90, at 276-77 (explaining details of the case).

tured into confessing to murder.¹⁷⁵ Similarly, Wang Zifa was sentenced to a commuted death sentence, but later another man came forward and confessed.¹⁷⁶ Wang was later released and received approximately \$13,500 in compensation from the government.¹⁷⁷

Tellingly, such stories have increasingly appeared in the official media, demonstrating the government's blessing of their publication.¹⁷⁸ The pattern is not a top-down approach whereby the official media initiates news of a wrongful conviction and other sources follow suit. Instead, a marked bottom-up approach is at work: The blogosphere and non-government-mouthpiece media sources generally break the story, and then the story generates momentum across a wide geographic area. If enough evidence comes to light to substantiate the story, at some point the government looks ridiculous for denying that there is a problem. It is hard to say with a straight face that people should have confidence in a system that convicts a man for murdering his very-much-alive wife. This combination of coverage by well-established media outlets and grassroots reports has brought a level of scrutiny to the issue of wrongful convictions that was unthinkable prior to the Internet's explosion in China.¹⁷⁹

175. Wang, *supra* note 119 (“The police tortured me [Liu Junhai] for four days until I confessed . . .”).

176. “Zhenxiong” Xianshen San Nian “Bei Yuan Zhe” Wei Chuyu (“真凶”现身三年“被冤者”未出狱), *Xin Jing Bao* (新京报) [BEIJING NEWS], June 4, 2010, at A19, available at <http://epaper.bjnews.com.cn/images/2010-06/04/A19/A19604C.pdf> (discussing case and quoting an official from a local procuratorate regarding evidentiary problems). Yet another example of a wrongful conviction tied to a forced confession is that of Du Peiwu. See Qin, *supra* note 123 (“Du Peiwu, a policeman in Yunnan Province, for example, was wrongly convicted for a murder based on his false confession extracted after torture.”).

177. See Guojia Peichang 89 Wan Wang Zifa An Si Liao Wei Liao (国家赔偿 89 万王子发案似了未了), *Xinhua Wang* (新华网) [XINHUA NET], Sept. 1, 2010, http://news.xinhuanet.com/comments/2010-09/01/c_12505397.htm.

178. See, e.g., Li, *supra* note 4 (“The new rules came in the aftermath of a headline case about a false murder conviction . . .”).

179. See Keith B. Richburg, *China's “Netizens” Hold Authorities to New Standard*, WASH. POST, Nov. 9, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/08/AR2009110818166.html> (“Almost every form of open dissent is outlawed in China, but mass protests organized online are increasingly putting pressure on police, judges and other

In particular, the outcry surrounding Zhao Zuohai's case served as a tipping point that reportedly expedited release of the 2010 Evidence Rules.¹⁸⁰ Zhao's wrongful conviction prompted a renewed look at prior cases and reflections on how to reform the system to avoid similar cases in the future.¹⁸¹ The media further connected earlier cases like She Xianglin's to development of the new rules and openly stressed the rules' important function in avoiding wrongful convictions.¹⁸² The often outspoken newspaper Southern Metropolis Daily took a more aggressive stance by calling for brave efforts to eliminate extorting confessions by force and arguing that criminal sanctions against police who actually get caught are insufficient to change the problem.¹⁸³

The wrongful convictions in the above-discussed cases are largely credited as resulting from police extracting confessions through force, a long-standing issue in China.¹⁸⁴ It is difficult if not impossible to determine what other factors may be exacerbating the problem, such as negligence or incompetence on the part of prosecutors and judges. Although it is certainly possible that prosecutors are charging and judges are convicting in weak cases because they simply are misjudging the evidence, a more pressing concern is that they are pressured to

officials—and getting results.”); *cf.* GUOBIN YANG, THE POWER OF THE INTERNET IN CHINA: CITIZEN ACTIVISM ONLINE 2 (2009) (“By June 2008, the number of Internet users [in China] had reached 253 million.”).

180. Ng, *supra* note 4.

181. *See, e.g.*, Cong She Xianglin, Nie Shubin Zai Dao Zhao Zuohai, Yuan Jia Cuo An He Yi Bu Jue?

(从佘祥林、聂树斌再到赵作海，冤假错案何以不绝?), Nanfang Bao Wang (南方报网) [NFDAILY.CN], May 10, 2010, http://nf.nfdaily.cn/huati/content/2010-05/10/content_11791479.htm.

182. *See* XINHUA NET, *supra* note 116.

183. Qingchu Xingxun Bigong Youdai Gongmin Yongyu Weiquan (清除刑讯逼供有待公民勇于维权), Nanfang Dushi Bao (南方都市报) [SOUTHERN METROPOLIS DAILY], Mar. 2, 2010, <http://nf.nfdaily.cn/epaper/nfds/content/20100302/ArticleA02002FM.htm>.

184. *See* Xin Chutai Liang Ge Guanyu Banli Sixing Anjian Wenjian Fangfan Cuo An Tupoxing Jucuo

(新出台两个关于办理死刑案件文件防范错案突破性举措), Xinhua Wang (新华网) [XINHUA NET], May 31, 2010, http://news.xinhuanet.com/politics/2010-05/31/c_12163533.htm (describing extracting confessions through force as a “chronic disease”). For an excellent historical discussion of the reliance on confessions and policing more generally, see generally DUTTON, *supra* note 98.

prosecute by the police, political-legal committees, or other outside forces, and do not have the institutional power to resist.¹⁸⁵

A further blind spot in our knowledge is the extent of the problem of wrongful convictions.¹⁸⁶ These high-profile cases have not been discovered through DNA evidence, nor have they been uncovered by an “innocence project” or other organized investigative work by academia or civil society organizations. Instead, the sources have been decidedly low-tech and fortuitous, such as the “victim” of the murder showing up alive or another person confessing with information that could only be known by someone intimately involved in the crime. There are reports that blood sampling has been used to verify information once the police are confronted with compelling evidence of a possible wrongful conviction, yet this appears to be a follow-up measure rather than a proactive action to clarify whether the actual perpetrator was convicted.¹⁸⁷ For the foreseeable future, limitations on evidence preservation and access to evidence will likely stymie efforts to conduct a detailed, comprehensive study of wrongful convictions in China.¹⁸⁸

185. Political-legal committees are responsible for coordinating the relationship among the public security, courts, and procuracy and are a channel for the Party to intervene in individual cases. See Randall Peerenboom, *Common Myths and Unfounded Assumptions: Challenges and prospects for judicial independence in China*, in JUDICIAL INDEPENDENCE IN CHINA 69, 80 (Randall Peerenboom ed., 2010) (explaining the role of the political-legal committee); He Weifang, *The Police and the Rule of Law: Commentary on “Principles and Secret Agents”*, 191 CHINA Q. 671, 672 (2007) (noting that the common practice of having the head of the local public security bureau serve as secretary of the political-legal committee “leads to the universal phenomenon of police power being higher than judicial power”).

186. See Song Yuansheng (宋远升), Xingshi Cuo An Bijiao Yanjiu (刑事错案比较研究), 1 Fanzui Yanjiu 73 (犯罪研究) [CRIM. RES.], at 75 (2008) (commenting that, due to many reasons, there are not official statistics on wrongful convictions in China).

187. See, e.g., Tu Zhonghang (涂重航), Zhao Zhuohai An Zhong An Shizhu Fumu Ren Shi Ceng Zaoju (赵作海案中案事主父母认尸曾遭拒), Xin Jing Bao (新京报) [BEIJING NEWS], June 4, 2010, at A17, available at http://epaper.bjnews.com.cn/html/2010-06/04/content_108322.htm?div=_1 (reporting the belated collection of blood samples in the Zhao Zuohai case); see also Death Penalty Evidence Rules, *supra* note 7, art. 6(4) (providing that emphasis be put on DNA testing).

188. Preliminary efforts are being made to conduct empirical research on the issue. See He Jiahong & He Ran (何家弘 & 何然), *supra* note 164, at 4 (describing the results of 1,715 questionnaires on wrongful convictions com-

Despite these constraints on understanding the full scale and nature of the problem, what is apparent is that even the limited number of highly publicized cases that link forced confessions with wrongful convictions have brought tremendous pressure to bear on the government. Adding to this pressure, as discussed in the next section, is the fact that the uproar over wrongful convictions is closely connected with larger concerns regarding police abuse and the justice system.

2. *Broader Dissatisfaction with the Justice System*

Separate from the specific issue of excluding illegally obtained evidence at trial, a series of cases have brought increased attention to police treatment of suspects in detention and public dissatisfaction with the justice system more generally.

Detention is common and often extended in criminal cases in China, and confessions usually occur while suspects are in detention.¹⁸⁹ Yet allegations of abuse during detention are not necessarily tied to wrongful convictions. In the 2009 case of Li Qiaoming, the results were more immediate and tragic. Li, who was in detention on charges of illegal logging, ended up dying from a head injury that police clumsily attributed to inmates playing a game of “elude the cat” (resembling blind man’s bluff).¹⁹⁰ To say the least, this explanation stretched the bounds of plausibility. The resulting public criticism of Li’s death prompted a prominent newspaper to name his case the most influential case in 2009 that changed China.¹⁹¹ Similarly, in early 2010, the spotlight turned to Wang Yahui who allegedly died after drinking a glass of hot

pleted by judges, police, prosecutors, lawyers, and other officials involved in the criminal justice system in nineteen areas around China).

189. See Qin, *supra* note 123 (“At least 85 percent [of] criminal cases in China involve detention. Furthermore, long-term periods of custody are common”); see also *supra* notes 123-25 and accompanying text.

190. See Luo Jieqi (罗洁琪), Guanfang Tongbao “Duo Maomao” Shijian Diaocha Jieguo (官方通报“躲猫猫”事件调查结果), Cai Jing (财经) [CAIJING], Feb. 27, 2009, <http://www.caijing.com.cn/2009-02-27/110075141.html> (reporting details of Li Qiaoming’s case).

191. 2009 Shi Da Yingxiangxing Susong Ge An Gaibian Zhongguo (十大影响性诉讼个案改变中国), Nanfang Zhoumo (南方周末) [SOUTHERN WEEKLY], Jan. 27, 2010, available at <http://www.infzm.com/content/40868>.

water.¹⁹² The police were holding Wang for a suspected theft and, according to the police, he requested hot water to drink during his interrogation. This story became even more suspect when an autopsy revealed multiple wounds on his body.¹⁹³

The recent cases of Li and Wang echo an earlier case that is credited with spurring reforms to the criminal justice system. In 2003, the death of a young man named Sun Zhigang while in police custody created a public outcry.¹⁹⁴ Reform-minded lawyers and academics harnessed the anger to push for the abolition of “custody and repatriation,” the controversial form of administrative detention under which the police were holding Sun.¹⁹⁵ Similar to Zhao Zuohai and the release of the 2010 Evidence Rules, in Sun’s case, reaction to a specific example of police misconduct was widely credited with generating crucial momentum for a proposed legal reform that was reportedly already percolating behind the scenes.¹⁹⁶ The examples are not completely analogous, however, because the 2010 Evidence Rules introduced basic changes to the formal process by which courts evaluate and assess evidence, whereas the rules put in place after Sun Zhigang’s death reacted more specifi-

192. See Nanzi Kanshousuo Nei “He Shui Siwang” Shanghai Man Shen Rutou Bei Ge (男子看守所内“喝水死亡”伤痕满身乳头被割), *Jinghua Shibao* (京华时报) [JINGHUA TIMES], Feb. 26, 2010, available at http://news.ifeng.com/society/1/201002/0226_343_1556258.shtml (reporting details of the case).

193. Following the release of the 2010 Evidence Rules, media reports of police abuse have continued. See, e.g., Pang Qi, *Young Man in Detention Dies of “Suffocation”*, *GLOBAL TIMES*, Dec. 3, 2010, available at <http://china.globaltimes.cn/society/2010-12/598936.html> (“[The victim’s] sister told the *Global Times* that a police officer who accompanied Qi to the hospital thought that he had been accidentally suffocated by a quilt. But she said that no one in his family believed that.”).

194. See generally Keith Hand, *Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People’s Republic of China*, 45 *COLUM. J. TRANSNAT’L L.* 114 (2006) (detailing the case and resulting reforms).

195. *Id.* at 138-40 (explaining arguments for abolition of custody and repatriation).

196. See Liebman & Wu, *supra* note 90, at 273-74 (discussing legislative reforms after the case and asserting that “the link between the Sun Zhigang case and ensuing public outcry was clear”); Hand, *supra* note 194, at 142 (“Chinese sources suggest that the government had contemplated reform of the [custody and repatriation] system before news of Sun Zhigang’s death broke.”).

cally to filling a perceived gap created by the repeal of custody and repatriation.¹⁹⁷

Other cases connected with vocal public dissatisfaction towards the police include anger over the violent arrest of a female prostitute,¹⁹⁸ support for a young cab driver who cut off his own finger in protest of police entrapment,¹⁹⁹ and fury over the death of a young child who starved while her mother was detained, despite her mother's cries that someone tend to her daughter.²⁰⁰ A handful of cases admittedly make for a small sample size, especially in a country of well over a billion people. However, not only is collecting extensive data on police actions in China exceedingly difficult,²⁰¹ but also the key point is not the actual magnitude of the issue but rather the perceived magnitude of the problem. The PRC Government is primarily reacting to the public's perception of the problem of police abuse, not necessarily the existence of abuse itself.

Nor are police the only target of public concern. The courts have also come under fire for corruption and for failing to be responsive to public cries for justice in criminal and civil cases.²⁰² This frustration reflects more widespread dissatisfac-

197. Cf. Hand, *supra* note 194, at 127-29 (describing new regulations "to replace the [custody and repatriation] measures").

198. See Yan Jie, *Arrest of Naked 'Prostitute' Excessive: Critics*, CHINA DAILY, Nov. 4, 2009, http://www.chinadaily.com.cn/china/2009-11/04/content_8909670.htm.

199. See Sun Zhongjie De Xinxin, Wang Shuai De Juewang (孙中界的信心, 王帅的绝望), Xin Jing Bao (新京报) [BEIJING NEWS], Jan. 1, 2010, http://news.xinhuanet.com/comments/2010-01/01/content_12738219.htm; Richburg, *supra* note 179 ("A severed finger sparked an online uproar that went viral. And very quickly, rattled authorities here took note.").

200. See Fu, *supra* note 15, at 244.

201. Even the central government finds it challenging to obtain relevant information. See, e.g., Tanner & Green, *supra* note 9, at 647 ("Because of their coercive power over witnesses and evidence, police enjoy an almost unrivalled capacity to suppress or cover-up the very information their principals require to monitor their activities."); Minzner, *supra* note 10, at 115 (analyzing "the age-old principal-agent problem at the core of Chinese governance . . .").

202. See, e.g., Willy Lam, *The Politicisation of China's Law-Enforcement and Judicial Apparatus*, 2 CHINA PERSPECTIVES 42, 50 (2009) ("Corruption cases involving senior members of the judiciary are regularly reported even by the official Chinese media."). In an extreme example of frustration with the courts, a man opened fire in a court, killing himself and three others. See Liu Chang, *In a City of Court Killings, Who's the Hero?*, CAIXIN ONLINE, June 8, 2010, <http://english.caing.com/2010-06-08/100150958.html> (reporting

tion with government officials and the concomitant increasing use of the Internet to monitor their work.²⁰³ In light of this fermenting public anger over police abuse in particular and government action more broadly, the issuance of the 2010 Evidence Rules by the PRC Government is logical when seen as a mechanism to distance central policy from local misconduct. In the first reports after release of the 2010 Evidence Rules, the issuing central authorities stressed the importance of the new rules.²⁰⁴ And the importance of evidence reforms is entering the vernacular of even the most hard-core law-and-order officials. Zhou Yongkang, former Minister of Public Security and now member of the Politburo Standing Committee as well as head of the Central Political and Legislative Affairs Committee, is quoted as requiring all levels of courts, procuratorates, public security organs, state security organs, and judicial administration organs to carry out their duties in accordance with law and strictly enforce the 2010 Evidence Rules.²⁰⁵ Wang Lequan, former Party head of Xinjiang Autonomous Region and current Deputy Chair of the Central Political and Legislative Affairs Committee, said in a June 2010 speech that the government should seek to put an end to forced confessions and better protect and promote just law enforcement.²⁰⁶

The exclusionary rule, at least with respect to coerced confessions, is now solidly part of the PRC Government's offi-

people who gathered to "honor" the shooter and demand justice in their own cases).

203. *Net Effective Check of Govt Officials, Survey Finds*, PEOPLE'S DAILY ONLINE, May 12, 2010, <http://english.people.com.cn/90001/90776/90785/6982345.html> (reporting a poll in which about seventy percent of Chinese surveyed responded that "they believe government officials fear online public opinion and supervision").

204. *See, e.g.*, XINHUA NET, *supra* note 116 (reporting high priority placed on 2010 Evidence Rules by the central government).

205. *Id.* *See also* Fu, *supra* note 15, at 241 (analyzing the impact of Zhou Yongkang's "crusade against police abuse of power" after becoming Minister of Public Security in late 2002).

206. Pei Zhiyong & Huang Qingchang (裴智勇 & 黄庆畅), Chixu Zhuahao Sanxiang Zhongdian Gongzuo Quanli Weihu Shehui Hexie Wendong (持续抓好三项重点工作全力维护社会和谐稳定), Renmin Ribao (人民日报) [PEOPLE'S DAILY], June 7, 2010, at 2, available at http://paper.people.com.cn/rmrb/html/2010-06/07/nw.D110000renmrb_20100607_1-02.htm.

cial platform,²⁰⁷ though it is debatable whether Zhou Yongkang, Wang Lequan, and others who are publicly supporting the 2010 Evidence Rules would reiterate their comments with equal enthusiasm if responding candidly off the record. In the face of public criticism over cases like Zhao Zuohai's, the central government can now say that they have taken a clear step to address the problem.

B. *International Factors*

Beyond a domestic audience, a commitment by the leadership in Beijing to an exclusionary rule has positive public relations potential overseas as a response to reports of governmental abuse.²⁰⁸ Taking overt steps to rein in abuse also complements current discussions regarding China's long-awaited ratification of the International Covenant on Civil and Political Rights (ICCPR).²⁰⁹ The ICCPR provides that a suspect not be compelled to testify against himself or to confess guilt.²¹⁰ In addition, "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."²¹¹

Legal circles in China are debating how to square the ICCPR's requirements with Chinese law. In a 2009 paper on the ICCPR and the provisions on self-incrimination, Yang Yuguan, a professor at China University of Political Science and Law, questioned how to handle evidence that is obtained through compelled testimony and, after noting that China's

207. See Xu Can (徐灿), Wu Bumen Lianhe Fabu Zhengju Guize Qiangdiao Quebao Mei Yiqi Anjian Jingdeqi Lishi De Jianyan (五部门联合发布证据规则 强调确保每一起案件经得起历史的检验), May 31, 2010, <http://www.mps.gov.cn/n16/n1237/n1342/n803715/2430581.html> (reporting that improving the system of evidence in criminal cases is an important part of judicial reforms).

208. See, e.g., Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Mission to China*, Comm'n on Human Rights, U.N. Doc. E/CN.4/2006/6/Add.6 (Oct. 3, 2006) (by Manfred Nowak) (reporting on the status of prisoners in Chinese custody).

209. ICCPR, *supra* note 67. China signed the ICCPR on October 5, 1998, but has not yet ratified it. Status of Treaties, ICCPR, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Feb. 18, 2011).

210. ICCPR, *supra* note 67, art. 14(3)(g).

211. *Id.* art. 7; see also Human Rights Comm., General Comment 20, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (Mar. 10, 1992) (explaining lack of definition of "torture" and other concepts covered by Article 7).

legal system still is not ICCPR-compliant, recommended that China implement an exclusionary rule.²¹²

China has not yet ratified the ICCPR, but China has ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).²¹³ Article 15 provides, “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”²¹⁴ The PRC Government has expressed its support for and compliance with CAT,²¹⁵ though a 2005 visit by the Special Rapporteur on Torture highlighted continuing concerns.²¹⁶ In a 2009 report, the United Nations Committee Against Torture welcomed China’s effort “to combat torture practices, including the adoption of administrative regulations prohibiting the use of torture to obtain confessions, . . . notwithstanding the lack of adequate methods of enforcement for the administrative regulations and the lack of changes to criminal or criminal procedure laws.”²¹⁷

The argument here is not that international pressure was necessary or sufficient to push through reforms. Rather, it provided added impetus to adopt the 2010 Evidence Rules. The ICCPR and CAT embody values that are reflected in the new rules and that China has been criticized by the international community for failing to uphold. Of course, implementation of these international human rights instruments also in-

212. Yang Yuguan (杨宇冠), *supra* note 106, at 83.

213. See CAT, *supra* note 67; see also Xu Henan (徐鹤喃), *supra* note 87, at 152-53 (discussing the intersection of CAT and the exclusionary rule).

214. CAT, *supra* note 67, art. 15.

215. See, e.g., *China Fulfills Obligations Under U.N. Convention Against Torture*, PEOPLE’S DAILY ONLINE, May 5, 2000, http://english.people.com.cn/english/200005/05/eng20000505_40220.html; 2009 CAT Report, *supra* note 104, at 2 (statement by the PRC Government that it will earnestly fulfill its international obligations, including obligations under CAT).

216. Press Release, Special Rapporteur on Torture, Special Rapporteur on Torture Highlights Challenges at End of Visit to China (Dec. 2, 2005), *available at* <http://www.unhcr.ch/hurricane/hurricane.nsf/0/677C1943FAA14D67C12570CB0034966D?opendocument>.

217. Comm. Against Torture, Rep. of the Comm. Against Torture, 41st & 42d Sess., Nov. 3-21, 2008, Apr. 15-May 15, 2009, ¶ 38(6), U.N. Doc. A/64/44 (Nov. 3, 2009).

volves domestic political costs.²¹⁸ Furthermore, the extent to which international pressure impacts decisions in Beijing is increasingly dubious in light of the PRC Government's clear challenges to foreign pressure on trade policy, exchange rates, military development, and other issues.²¹⁹ Even if international norms are adopted by Beijing, there is the added question of whether the acts will be window dressing or actually translate into concrete reforms on the ground—a gap between public relations and practice that doubtless happens in other countries as well.²²⁰ Despite grounds for cynicism, China does not seek to be an international pariah.²²¹ International atten-

218. For example, there is debate about how to square reeducation through labor with the ICCPR because it is a police-administered detention of up to four years that is decided without any judicial involvement. See ICCPR, *supra* note 67, art. 8(3)(b)-(c) (indicating that prisoners may only be made to perform hard labor “in pursuance of a sentence to such punishment by a competent court” or otherwise by court order); cf. SARAH BID-DULPH, *LEGAL REFORM AND ADMINISTRATIVE DETENTION IN CHINA* 5-10 (2007) (explaining types of detention powers); Wang Lin (王琳), Minyi Shi Tuidong “Lao Jiao” Bianfa De Youli Mengyou (民意是推动“劳教”变法的有力盟友), *Xin Jing Bao* (新京报) [BEIJING NEWS], June 24, 2010, http://epaper.bjnews.com.cn/html/2010-06/24/content_117082.htm?div=_1 (discussing proposed reforms to reeducation through labor). For an exploration of compliance costs across countries, see Oona A. Hathaway, *The Cost of Commitment*, 55 *STAN. L. REV.* 1821, 1834 (2003) (discussing expected compliance costs when deciding to join a human rights treaty).

219. See, e.g., G. John Ikenberry, *The Rise of China and the Future of the West*, *FOREIGN AFF.*, Jan.-Feb. 2008, at 23, 25 (arguing that China's rise will inevitably end the United States' unipolar moment).

220. See Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 *YALE L.J.* 1935, 1941 (2002) (using a quantitative analysis that indicates “ratification of human rights treaties appears to have little favorable impact on individual countries' practices”); Liu & Halliday, *supra* note 156, at 918 (explaining the need for China's leaders “to position themselves between their domestic challenges of social stability and China's presentation of self to the rest of the world”).

221. See, e.g., Scott, *supra* note 112, at 70-71 (asserting that the PRC Government's identification of the beneficial international effect of the 2007 death penalty revisions “reveals the impact of international opinion”). An interesting example of the PRC Government taking a measure heralded by the international community while receiving criticism at home is the lifting of the travel ban for foreigners with HIV/AIDS. See Shan Juan, *Ban Removed on Foreigners with HIV/AIDS*, *CHINA DAILY*, Apr. 29, 2010, http://www.chinadaily.com.cn/china/2010-04/29/content_9788598.htm (“Meanwhile, about 84 percent of more than 4,000 respondents opposed lifting the

tion could be ineffective or even backfire, but it is my view that sustained, low-key pressure has served a constructive, even if modest, function.²²²

In sum, both at home and abroad, the PRC Government stands to gain political capital by taking a clear stance against police abuse and the use of illegally obtained evidence to secure convictions. Having examined the impetus behind the 2010 Evidence Rules, the next Part reflects on how China's adoption of the exclusionary rule fits with the standard rationales.

VI. CONTROLLING ABUSES IN THE CRIMINAL JUSTICE SYSTEM AS A MEANS OF MAINTAINING POLITICAL CONTROL

The familiar rationales for the exclusionary rule of enhancing the accuracy of fact-finding, deterring police misconduct, and maintaining judicial integrity are in play in China, but with a twist. The new rules are best understood as holistically addressing "governmental integrity" as the central government openly recognizes police abuse and publicly touts the rules' importance in remedying the problem. Sixty years into the continuous leadership of the Chinese Communist Party, the highest ranks in government appear to acknowledge the positive role that endorsing an exclusionary rule can serve in maintaining their power.

A. *Detering Conduct that Leads to Inaccurate Fact-Finding*

In the United States, the deterrence rationale is based on the premise that police will be deterred from violating constitutional rights if they know that courts will exclude the fruits of illegal conduct. In this way, the exclusionary rule is seen as

ban, citing the possibility that infected foreigners would further spread the incurable disease in China . . .").

222. This debate regarding the past role and potential future effectiveness of international pressure in influencing domestic policy is certainly not new. See Donald C. Clarke & James V. Feinerman, *Antagonistic Contradictions: Criminal Law and Human Rights in China*, 141 CHINA Q. 135, 153 (1995) ("Accession to additional international human rights instruments, attention to the requirements of those to which the PRC has already acceded and continuing scrutiny by the international human rights community may all act to constrain the worst abuses of the Chinese government and its officials.").

compelling respect for constitutional guarantees:²²³ “The exclusionary rule does not operate primarily by altering a short-term pleasure-pain calculus or by frustrating a police officer’s distinctive blood lust. It works over the long term by allowing judges to give guidance to police officers who ultimately prove willing to receive it.”²²⁴ Simply put, “[t]he rule is calculated to prevent, not to repair.”²²⁵

Deterrence takes on a slightly different slant in China. The emphasis on reliability in the 2010 Evidence Rules and surrounding debate indicate that the PRC Government is specifically concerned with deterring conduct that leads to wrongful convictions.²²⁶ In other words, the focus is on deterring conduct that decreases the accuracy of verdicts (i.e., convicting a person who did not engage in the alleged criminal activity), not on deterring conduct because it violates constitutional rights or notions of procedural justice.²²⁷ The provision in the Evidence Exclusion Rules that allows for supplemental evidence collection reflects this focus on accuracy.²²⁸ Similarly, as explained by a local police chief to Xinhua News Agency following news of Zhao Zuohai’s wrongful conviction, “[c]onfessions extracted through torture are unreliable

223. See, e.g., *Mapp*, 367 U.S. at 656 (1961); Bradley, *supra* note 58, at 1064 (“The German and the American exclusionary rules both reflect the fundamental principle that relevant evidence must occasionally be excluded to safeguard constitutional rights . . .”).

224. Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1374 (2008); see also William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 16-17 (1997) (describing Warren-era cases as “more explicitly regulatory: they tell the police, prosecutors, the court system, and even defense lawyers what not to do and what will happen if they do it”).

225. *Elkins v. United States*, 364 U.S. 206, 217 (1960).

226. See, e.g., Xu Henan (徐鹤喃), *supra* note 87, at 150 (explaining the purpose of the exclusionary rule as preventing wrongful convictions); Chen Ruihua (陈瑞华), “Liang Gui” Pinglun Zhi Yi: Gaige Wanshan Xingshi Zhengju Zhidu De Zhongda Chengjiu (“两规”评论之一：改革完善刑事证据制度的重大成就), *Jiancha Ribao* (检察日报) [PROCURATORIAL DAILY], June 4, 2010, available at <http://www.spp.gov.cn/site2006/2010-06-04/0005427844.html> (noting the positive significance of the exclusionary rule in reducing wrongful convictions).

227. Damaška helpfully differentiates between “extrinsic exclusionary rules” (i.e., rules structured to exclude probative information or items for the sake of values unrelated to the pursuit of truth) and “intrinsic exclusionary rules.” DAMAŠKA, *supra* note 18, at 12-17.

228. Evidence Exclusion Rules, *supra* note 7, art. 9.

Police officers should learn to handle criminal cases in a more intelligent and scientific manner.”²²⁹

As noted in Part II, deterrence has its problematic aspects. First, it is extremely difficult to measure. Second, it requires support for the systemic benefits of deterrence over the urge in an individual case to admit evidence obtained by illegal means.²³⁰ To the extent that China seeks to exclude potential evidence only because its reliability is questionable and tailors use of the exclusionary rule to this end, the reforms should be a relatively easy sell to people concerned about the societal costs of the rule. The harder case is when the excluded evidence appears probative of the defendant’s guilt.²³¹ In the words of Justice Cardozo, “[t]he criminal is to go free just because the constable blundered.”²³² Americans are understandably incensed when a “guilty” person goes free because of the court’s exclusion of probative evidence based on a “technicality.”²³³ And courts are not necessarily keen on this either.²³⁴

229. Tran, *supra* note 1.

230. See White, *supra* note 34, at 1281 (noting that, when discussing the shortcomings of the deterrence rationale in the context of the exclusionary rule, “the real cost of the possible release of a guilty defendant is weighed against the merely contingent advantage of the marginal deterrent impact of exclusion in a diffuse and unknown future”).

231. Cf. *Rochin*, 342 U.S. 165, 172-73 (1952) (concluding that the Fourth Amendment requires exclusion of evidence obtained in a manner that violates “certain decencies of civilized conduct,” even when the evidence is reliable and probative).

232. *People v. Defore*, 150 N.E. 585, 587 (1926); see also *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (“The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his ‘rights,’ may nonetheless be excluded and a guilty defendant go free as a result.”); 8 WIGMORE ON EVIDENCE § 2184, at 51-52 (McNaughton ed., 1961) (arguing that exclusionary rules “serve neither to protect the victim nor to punish the offender but rather to compensate the guilty victim by acquittal and to punish the public by unloosing the criminal in their midst . . .”).

233. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 24 (1979) (“[M]any are disgusted as well at decisions which free a ‘known criminal’ on a technicality . . . and these people take the opportunity, if it is available to them, to express their moral outrage.”). For an example of a recent case, see *Accused Killer May Be Set Free on Legal Technicality*, KSWO-7 NEWS (Okla.), May 26, 2010, <http://www.kswo.com/Global/story.asp?S=12549515>.

234. See Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 111, 112 (2003) (opining that a judge will do her best to protect constitutional rights and still keep a “clearly guilty murderer or rapist” in jail “simply

In China, without the embedded, strong emphasis on procedural protections for the accused, tolerance for this scenario is all the more doubtful. This concern is very much part of the domestic debate.²³⁵ The decision to address physical evidence only briefly in the 2010 Evidence Rules helps to avoid these tough cases. The new rules will not require exclusion of any smoking guns.

Even when the evidence at issue is a coerced confession—a type of evidence that is specifically subject to exclusion under the new rules—there is a serious question whether this “deterrence to support accuracy in fact-finding” rationale will hold when an unsympathetic defendant is at issue. For example, in 2003, the notorious gangster Liu Yong was given a two-year reprieve to his death sentence after evidence came to light that he had been tortured in order to secure his confession.²³⁶ In a sudden turn of events, he was quickly executed following a public outcry that the courts had granted a dangerous gangster a reduced sentence.²³⁷ Less extreme though still difficult cases will be those in which a victim’s family or members of the local community impassionedly petition the court for action in a case that lacks the nationwide infamy of Liu Yong’s.

Going forward, another major issue is the extent to which the reforms will filter down and actually influence police behavior. For the police to refrain from illegal methods of evidence collection because of the threat of exclusion, they must be aware of the rules and then decide to comply with them. If police engage in prohibited conduct, a second question is whether prosecutors will refrain from using evidence that they

because she does not like the idea of dangerous criminals being released into society”).

235. See, e.g., Yang Yuguan (杨宇冠), *supra* note 87, at 113 (commenting that the exclusionary rule may “tie the hands and feet” of police and even may result in criminals avoiding punishment); He Jiahong & He Ran (何家 & 何然弘), *supra* note 164, at 19 (asserting that the saying “Do not wrong a good a person nor let off a bad person” is an unrealizable ideal).

236. See Liebman & Wu, *supra* note 90, at 281.

237. See *id.* at 282 (describing Liu’s execution following “angry commentary, denouncing Liu’s ‘lenient’ treatment”); Eva Pils, *Yang Jia and China’s Unpopular Criminal Justice System*, 1 CHINA RTS. F. 59, 59 (2009) (“Liu Yong exemplified a return to a ‘popular’—or populist—form of criminal justice, in which the judiciary uses the notion of public sentiment about a case to push for a particular decision.”).

believe the police obtained through illegal means. And, if prosecutors present evidence to the courts that the defense challenges as warranting exclusion, there is a further question whether judges will break with the police and prosecutors and exclude the evidence. The 2010 Evidence Rules signal a subtle shift toward the courts overseeing police conduct, as compared with the former overwhelming emphasis on internal police controls.²³⁸ The fact that police are now expressly required to appear in court and explain their behavior may seem mundane to people unfamiliar with China's legal system, but it is a praiseworthy and unexpected development. Yet, at this early stage, it remains an open question whether the balance of power among actors in the criminal justice system will adjust noticeably in practice and court decisions will have a discernible deterrent effect.

B. *Governmental Integrity*

Another commonly cited rationale for exclusionary rules is judicial integrity. As explained by the U.S. Supreme Court, permitting prosecutors to use unconstitutionally seized evidence "would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."²³⁹ A number of countries have emphasized a similar judicial integrity rationale in support of exclusionary rules.²⁴⁰

238. See WONG, *supra* note 9, at 135-37 (describing efforts since the 1980s to improve supervision of police powers). Compare Fu, *supra* note 15, at 251 ("Police reform in China is predominantly an internal matter for the police, and is well orchestrated and controlled."), with Fu, *supra* note 101, at 7 ("The formal authority of the court has also grown in the criminal process and gradually, China is witnessing a transition from a police-centric criminal justice toward a court-centric criminal justice.").

239. *Weeks v. United States*, 232 U.S. 383, 394 (1914); Bloom & Fentin, *supra* note 16, at 50-59 (tracing the role of judicial integrity in Supreme Court jurisprudence).

240. See, e.g., Bradley, *supra* note 58, at 1047 ("[T]he principal justification for exclusion [in Germany] is not to punish the police, but to maintain the integrity of the judicial process."); Don Stewart, *Welcome Flexibility and Better Criteria from the Supreme Court of Canada for Exclusion of Evidence Obtained in Violation of the Canadian Charter of Rights and Freedoms*, 16 SW. J. INT'L L. 313, 316-19 (2010) (explaining a 2009 Canadian Supreme Court decision that

In China, the exclusionary rule is better viewed as addressing “governmental integrity” in a broader sense. Five central government bodies jointly issued the 2010 Evidence Rules. This is far from a matter of the courts alone. In addition to the SPC, the SPP, Ministry of Public Security, Ministry of State Security, and Ministry of Justice also signed on to the rules.²⁴¹ Unlike the 1998 SPC interpretation regarding evidence that was narrowly issued by the courts for the courts, the public show of unity from government bodies—especially those with greater power than the courts—accentuates that the 2010 Evidence Rules are emanating from the central government as a cohesive entity.²⁴² The fact that courts in China are subject to strong influences from outside the judiciary makes the decision to showcase a unified government effort all the more understandable. Despite China’s constitutional statement of judicial independence,²⁴³ it is widely known that courts face a variety of extra-judicial pressures. In fact, courts are encouraged to accept the supervision of the Party, legislatures, and procuracy, rather than vice versa.²⁴⁴ The concern in the United States that judges would be acting as “accomplices in the willful disobedience of a Constitution they are sworn to uphold”²⁴⁵ is thus inapposite in China where courts are intimately tied to a larger government/Party apparatus and clearly already are accomplices.

At base, the PRC Government is reacting to a pressing crisis of public faith in the government. As succinctly stated by

emphasized whether admission of evidence “would bring the administration of justice into disrepute”).

241. 2010 Evidence Rules Notice, *supra* note 6.

242. *Cf.* Li, *supra* note 4 (opining that the joint issuance of rules “came in time to regulate the judicial procedures and also shed some light on the government’s resolve to set to right what has been thrown into disorder”).

243. XIANFA art. 126 (1982) (China).

244. *See* Xu Xin & Lu Rongrong (徐昕 & 卢荣荣), *Zhongguo Sifa Gaige Niandu Baogao* (2009) (中国司法改革年度报告 (2009)) [Annual Report on China’s Judicial Reform (2009)], at 5-6 (2010), available at <http://www.fyfz.cn/download/sg2009.pdf> (noting that the SPC promptly issued a supporting plan in line with a guiding opinion from the central Party leadership); Randall Peerenboom, *Between Global Norms and Domestic Realities: Judicial Reforms in China* 8 (May 8, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1401232> (noting that the SPC’s Third Five-Year Agenda “much more explicitly invokes the need to cooperate with other state organs”).

245. *Elkins*, 364 U.S. at 223 (1960).

Justice Brandeis nearly a century ago, “If the Government becomes a lawbreaker, it breeds contempt for law”²⁴⁶ In China, the concern is not that the government will *become* a lawbreaker, but rather that the government already is a lawbreaker. The PRC Government has recognized that some of its agents have indeed been breaking the law through their methods of obtaining evidence, and it is trying to turn the tide of public opinion. Whereas the *Hudson* Court described use of the exclusionary rule as “forcing the [American] public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago,”²⁴⁷ the 2010 Evidence Rules address the sins and inadequacies of the regime that exists today. Concerns over police abuse in China have been waxing rather than waning.

Importantly, this goal of enhancing governmental integrity is not a standalone rationale: it is intertwined with the goal of deterring police misconduct in order to improve the accuracy of fact-finding. If the public perceives that the 2010 Evidence Rules are indeed curbing police abuse and leading to a decrease in wrongful convictions, this has integrity-enhancing benefits for the government. The rules have the potential to increase public confidence even further if they are seen as a catalyst for improving investigative practices such that the government is better able to identify, prosecute, and convict dangerous people. Conversely, if the public perceives that the government is putting factually innocent people behind bars—and potentially leaving dangerous people on the streets—faith in government will likely decrease.

All that said, the exclusionary rule is certainly not the linchpin undergirding the PRC Government’s control, but it is one piece of the puzzle as the government seeks to bolster its legitimacy. The highest levels of the central government have voiced awareness and sensitivity to the potentially destabilizing effects of public dissatisfaction with the government and the role that law can play in countering this sentiment.²⁴⁸ For ex-

246. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

247. *Hudson*, 547 U.S. at 597 (2006).

248. See, e.g., Steve Tsang, *Consultative Leninism: China’s New Political Framework*, 18 J. OF CONTEMP. CHINA 865, 870-71 (2009) (describing reforms under former SPC President Xiao Yang and asserting that the “resultant improvement in the administration of justice in criminal cases was valuable in en-

ample, *Legal Daily*, a publication of the Ministry of Justice, reprinted a talk given by Premier Wen Jiabao at one of China's leading law schools, during which he gave strong backing to the promotion of rule of law in China.²⁴⁹ In response to a question from a student, Premier Wen acknowledged the importance of ensuring that justice is "not only done, but also seen to be done." Similarly, the Minister of Public Security, Meng Jianzhu, has noted not only the growth in public awareness of law and rights, but also the concomitant intensity of scrutiny from public opinion.²⁵⁰ The motivation at the highest level to *at least be seen as* responding to public concerns regarding governmental abuse is apparent. And the exclusionary rule is one tool by which the central government can emphasize that it is not in cahoots with malfeasant local officials.

Outside of government circles, Chinese scholars who support the exclusionary rule have also pointed out that allowing the use of illegally obtained evidence could cause people to lose faith in the law, government, and Party.²⁵¹ Upon release of the 2010 Evidence Rules, Professor Bian Jianlin of the China University of Political Science and Law opined that wrongful convictions "seriously undermine the image of China's justice system and people's trust in the government."²⁵² At the same time, as previously noted, there is the lurking flip side to this argument: if the Chinese public comes to view the exclusionary rule as letting "guilty" people go free due to technicalities, the rule could actually undermine public

hancing the credibility of the regime and thus the Party's governance capacity").

249. Wen Jiabao Zongli Tong Daxuesheng Tan Fazhi (温家宝总理同大学生谈法治), *Fazhi Ribao* (法制日报) [LEGAL DAILY], Dec. 4, 2009, available at http://news.xinhuanet.com/politics/2009-12/04/content_12585138.htm (transcript of talk at China University of Political Science and Law in May 2008).

250. See Meng Jianzhu (孟建柱), Zhuoli Qianghua Wu Ge Nengli Jianshe Quanmian Tisheng Weihu Wending Shuiping (着力强化五个能力建设全面提升维护稳定水平), Qiu Shi (求是) [QIU SHI], Dec. 1, 2009, <http://www.mps.gov.cn/n16/n894593/n895609/2148122.html>.

251. See Yang Yuguan (杨宇冠), *supra* note 87, at 114 (connecting use of illegally obtained evidence to people's loss of faith in law); Kang Junxin & Han Guangjun (康均心 & 韩光军), *supra* note 173, at 78 (stating that continuing use of extracting confessions through force hurts the reputation of the Party).

252. Wang, *supra* note 8.

confidence rather than bolster it.²⁵³ This dynamic is indicative of the PRC Government's broader dilemma of how to incorporate legal reforms to maintain its power while not letting reforms go so far as to threaten its control. It is as if the PRC Government is seated behind a massive pipe organ with a vast array of keyboards, stop knobs, and pedals and is trying to figure out where to exert pressure and where to relieve it—the hope being that this complex push and pull will somehow manage to produce harmonious music.²⁵⁴

C. *Symbolic Integrity Enhancement or Real Changes*

After the initial fanfare surrounding the 2010 Evidence Rules fades, will the reforms founder and fail to gain traction in concrete cases? As advanced above, it appears that the PRC Government is aiming to reap integrity-enhancing benefits of reforms and use the 2010 Evidence Rules as a distancing mechanism to show the public that they (the central authorities) are confronting the problem of police abuse even if local authorities do not always heed orders from the center. Meaningful implementation requires overcoming significant obstacles. The challenges outlined below are a brief and non-exhaustive list.

A glaring issue is that the vast majority of defendants in China are not represented by counsel.²⁵⁵ Without defense counsel, it is doubtful that defendants will know to make a motion to exclude evidence, let alone be able to support that motion. Adding to defendants' predicament, not only is there no right to silence in the Criminal Procedure Law, article 93 explicitly requires criminal suspects to answer questions truth-

253. *Cf.* Illinois v. Gates, 462 U.S. 213, 258-62 (1983) (White, J., concurring) (arguing that excluding reliable evidence of guilt when police acted in "good faith" may weaken public confidence in the integrity of the criminal justice system).

254. *Cf.* *Building Harmonious Society Crucial for China's Progress*, PEOPLE'S DAILY ONLINE, June 27, 2005, http://english.peopledaily.com.cn/200506/27/eng20050627_192495.html (reporting that President Hu Jintao "instructed the country's leading officials and Party cadres to place 'building a harmonious society' top on their work agenda").

255. Belkin, *supra* note 160, at 104 (noting low representation rates and hesitancy by lawyers to take criminal cases).

fully.²⁵⁶ Thus, as unfair as it may sound, if the defendant is asked at trial whether he indeed committed the offense, this in-court confession could replace the excluded confession.²⁵⁷ And the persisting policy of “leniency for those who confess, severity for those who resist” increases pressure to confess. Notably, nothing in the 2010 Evidence Rules changes this underlying issue. A biting editorial in the Beijing News immediately following announcement of the 2010 Evidence Rules decried this practice as a “presumption of guilt” in criminal cases.²⁵⁸

Even when a defendant is represented, defense lawyers face a host of challenges that the 2010 Evidence Rules do not alleviate. Indeed, it is a wonder that people pursue careers as criminal defense lawyers in China, especially outside of the relatively financially lucrative realm of white-collar crime. Among the most fundamental challenges to mounting an effective defense is the lack of access to clients and to case information.²⁵⁹ Further hindering efforts to reveal coerced confessions, the Criminal Law provides up to seven years in prison if a lawyer forges evidence or entices a witness to give false testimony.²⁶⁰ No one is arguing that lawyers should forge evidence or encourage people to give false testimony. The problem is that the government has reportedly used this provision to harass lawyers, creating a chilling effect on their ability to zealously defend clients.²⁶¹ Should a defendant recant his confes-

256. CPL *supra* note 91, art. 93. See generally Timothy A. Gelatt, *The People's Republic of China and the Presumption of Innocence*, 73 J. CRIM. L. & CRIMINOLOGY 259 (1982) (tracing the historical development of discussion surrounding the presumption of innocence in China).

257. See Ira Belkin, *China's Tortuous Path Toward Ending Torture in Criminal Investigations*, 24 COLUM. J. ASIAN L. (forthcoming 2011).

258. Cuo An Jingshi Ri: Yao Jingshi De Shi “You Zui Tuiding” (錯案警示日:要警示的是“有罪推定”), Xin Jing Bao (新京報) [BEIJING NEWS], June 4, 2010, <http://comment.bjnews.com.cn/2010/0604/22183.shtml>.

259. See Qin, *supra* note 123 (“The activities of attorneys under most conditions, including meetings with their client, entail the involvement or approval of the investigatory personnel, according to the law.”); Dui Hua Human Rights Journal, *Translation: How “Three Difficulties” of Criminal Defense Became “10 Difficulties”* (Feb. 2, 2010), <http://www.duihuahrjournal.org/2011/02/translation-how-three-difficulties-of.html> (commenting on and translating article in *Legal Weekly* regarding increasing difficulties of conducting criminal defense work in China).

260. PRC Criminal Law, *supra* note 91, art. 306.

261. See Cheung Yiu-leung, *Between a Rock and a Hard Place: China's Criminal Defence Lawyers*, in *A SWORD AND A SHIELD: CHINA'S HUMAN RIGHTS LAW-*

sion or a witness changes his statement and the prosecutors pursue charges, the lawyer is thrust into an often untenable position of trying to prove that the later confession/statement actually was true. In a recent high-profile case using this provision, lawyer Li Zhuang was convicted and sentenced to two-and-a-half years while he was representing alleged gangsters.²⁶² Li confessed and then retracted his confession, leading to a flurry of speculation as to whether he was forced to confess or perhaps had done so as part of a deal for a more lenient sentence.²⁶³ The circumstances behind Li's case remains shrouded in secrecy, yet publicly available information raises serious questions about the procedures used in securing his conviction.²⁶⁴

The exclusionary rule in China further faces the twin difficulties of weak courts coupled with incentives for judges to avoid exercising the power that they do have. It will be a challenge for a judicially enforced rule to influence police behavior in China. There is scant, if any, precedent for police bowing to judicial pressure. Thus, while the 2010 Evidence Rules signal an increased role for the courts in policing the police, the ability of courts to act on this and constrain the police is questionable.²⁶⁵ Nor is it clear whether courts have the will to assert power over the police and disrupt their usually cozy relationship. Professor Chen Weidong of Renmin University, for example, expresses skepticism about whether courts have the courage, ability, and motivation to exclude evidence considering the principle of "separation of functions, mutual coordination, and mutual checks" among the police, procuracy, and

YERS 57, 58-60 (Stacy Mosher & Patrick Poon eds., 2009) (explaining why the threat of article 306 discourages defense lawyers from requesting evidence from prosecution witnesses).

262. See Wang Huazhong, *Lawyer for Gang Bosses Gets Prison Sentence*, CHINA DAILY, Jan. 9, 2010, http://www.chinadaily.com.cn/china/2010-01/09/content_9291841.htm.

263. See He Xin, *Lawyer's Retraction Written into Plea Bargain*, CAIXIN ONLINE, (Feb. 10, 2010), <http://english.caing.com/2010-02-10/100117225.html>.

264. For a helpful compilation of articles on Li's case, see *The Li Zhuang Case*, CAIXIN ONLINE, <http://english.caing.com/2010/lizhuang/> (last visited Jan. 26, 2011).

265. See Belkin, *supra* note 160, at 103 ("The police have complete control over the investigative stage of a case.").

courts.²⁶⁶ Professor Yi Yanyou of Tsinghua University cited the emphasis on coordination over checks and the failure to scrutinize each other's work as a key factor in Zhao Zuohai's wrongful conviction.²⁶⁷ The reality that courts are largely beholden to local governments for financial support adds an additional incentive not to expose abuses that are committed or condoned by local officials.

The case of Fan Qihang has brought to the fore these concerns over whether courts will invoke the new rules. As part of a broader crackdown on organized crime in Chongqing, Fan was convicted of murder and offenses related to involvement in a criminal syndicate.²⁶⁸ Although the courts sentenced Fan to death prior to release of the 2010 Evidence Rules, when the SPC engaged in final review of the sentence in July 2010, his lawyer submitted evidence that Fan was tortured.²⁶⁹ Included in the evidence was a secretly made video of a detained Fan showing scars on his wrists that he said resulted from the police shackling and suspending him during interrogations.²⁷⁰ Despite the grave concerns prompted by this evidence, the SPC promptly upheld the sentence, and Fan was executed in September 2010.²⁷¹ The highly politicized na-

266. Chen Weidong & Liu Ang (陈卫东 & 刘昂), *supra* note 84, at 13; *see also* Kang Junxin & Han Guangjun (康均心 & 韩光军), *supra* note 173, at 77 (asserting that great emphasis is placed on mutual coordination instead of checks that protect suspects' rights).

267. *New Miscarriage of Justice Highlights Need for Legal Reforms, Say Experts*, PEOPLE'S DAILY ONLINE, (May 13, 2010), <http://english.peopledaily.com.cn/90001/90776/90882/6983590.html>.

268. Jerome A. Cohen & Eva Pils, *Rules and Reality*, S. CHINA MORNING POST, Sept. 2, 2010, available at <http://www.usasialaw.org/wp-content/uploads/2010/08/20100902-Rule-and-Reality.pdf>.

269. *See id.* The Evidence Exclusion Rules expressly allow appellate courts to conduct an investigation into allegations of torture when the case is on direct appeal. Evidence Exclusion Rules, *supra* note 7, art. 12. Although the Rules do not expressly address procedures for final review of a death sentence, the SPC simply failed to acknowledge the new rules rather than reject Fan's argument on procedural grounds. *See* Paul Mooney, *Chongqing Execution Raises Political Spectre*, S. CHINA MORNING POST, Oct. 3, 2010, available at http://www.pjmooney.com/en/Most_Recent_Articles/Entries/2010/10/3_Chongqing_execution_raises_political_spectre.html ("Teng Biao, a prominent human rights lawyer, said that in rejecting Fan's appeal for a retrial, the supreme court completely ignored the charges of torture.").

270. *See* Cohen & Pils, *supra* note 268.

271. Li Xincheng (李心成), *Chongqing "Hei Lao Da" Fan Qihang Bei Zhixing Sixing* (重庆“黑老大”樊奇杭被执行死刑), Hualong Wang (华龙网)

ture of the Chongqing crackdown raises questions whether the SPC might be more willing to look at evidence of torture in lower-profile cases. Nevertheless, the SPC's failure to even require an evidentiary hearing is far from an auspicious beginning for the 2010 Evidence Rules.

In light of the minor role that trials play in China, yet another consideration is whether an exclusionary rule that focuses on the trial stage will have a significant impact. In 2006, China had an acquittal rate of 0.19 percent.²⁷² Vigorous implementation of the 2010 Evidence Rules could increase this rate. Moreover, even if not reflected in the formal acquittal rate, the rules could seep back earlier in the process as prosecutors and police make decisions with the knowledge that evidence may be excluded at trial. There is also some question regarding the number of people who are charged and whose cases are later dropped before completion of trial, thus leaving them out of the formal acquittal statistics.²⁷³ Yet, even with those caveats, statistics indicate that charging almost always leads to conviction, and it would be shocking if this changed radically in the wake of the 2010 Evidence Rules. One suggestion raised during the reform debate was whether there should be a procedure at the investigation stage through which the prosecutor would determine whether to use evidence based on some kind of hearing. This proposal, in which prosecutors would decide whether to use evidence after listening to the views of police and defense counsel regarding its admissibility, would be in tension with the prosecutor's purportedly adversarial role at trial.

Another potential barrier is the structure of providing state compensation to defendants whose rights have been violated.²⁷⁴ Although admirable for trying to provide some rem-

[CQ News], Sept. 26, 2010, *available at* http://news.xinhuanet.com/legal/2010-09/26/c_12607715.htm.

272. Fu, *supra* note 101, at 8, 24.

273. *See id.* at 8 (explaining use by judges of "informal negotiation in which judges persuade and compel prosecutors to withdraw weak cases from proceeding further").

274. *See* Zhonghua Renmin Gongheguo Guojia Peichang Fa (中华人民共和国国家赔偿法) [PRC State Compensation Law] arts. 3, 15 (promulgated by the Nat'l People's Cong., May 12, 1994, effective Jan. 1, 1995) (China) (providing for compensation if injury results from extorting a confession); *see also* Liu & Halliday, *supra* note 156, at 935 (discussing finan-

edy, this policy adds a financial incentive for local governments to avoid recognizing wrongful convictions. For example, the government provided Zhao Zuohai with approximately \$96,000 in compensation after he was released from prison.²⁷⁵

Incentive structures driving police behavior pose an added hurdle. The more the police are arrest- and prosecution-oriented instead of conviction-oriented, the less impact an exclusionary rule will likely have on police behavior.²⁷⁶ Today in China, police face intense pressure literally to “break the case”;²⁷⁷ “In some places, clearance rates are regarded as a rigid gauge of staff or department performance and that has fueled the eagerness of the police to solve a case, very often by using violence,” said Professor Cui Min, of the Chinese People’s Public Security University.²⁷⁸ This pressure is particularly

cial incentives to avoid ruling that a confession was extorted); Zhong Jianhua & Yu Guanghua, *Establishing the Truth on Facts: Has the Chinese Civil Process Achieved This Goal?*, 13 J. TRANSNAT’L L. & POL’Y 393, 411 (2004) (describing the system of liability for erroneous judgments including criminal liability); Gai Bu Gai Gei Zhao Zuohai Bufa Guojia Peichangjin? (该不该给赵作海补发国家赔偿金), *Xin Jing Bao* (新京报) [BEIJING NEWS], July 18, 2010, <http://www.chinanews.com.cn/fz/2010/07-18/2408489.shtml> (discussing the increase in compensation available for wrongful convictions).

275. Tran, *supra* note 1 (discussing compensation for wrongful imprisonment); INNOCENCE PROJECT, BENJAMIN J. CARDOZO SCH. OF LAW, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION 3 (Benjamin N. Cardozo School of Law, 2009), available at <http://www.innocenceproject.org/Content/2277.php> (stating that, in the United States, twenty-seven states have compensation laws, while the remainder rely on tort theories, civil rights claims, or private bills that often have formidable hurdles to obtaining compensation).

276. See Sklansky, *supra* note 45, at 581 (“It is not exactly news that the exclusionary rule can only deter the police when they care about the admissibility of the evidence they obtain.”); Heffernan & Lovely, *supra* note 39, at 325 (explaining the position that exclusion cannot be expected to deter when officers have no intention of producing evidence at trial).

277. Wang, *supra* note 8 (reporting that clearance rates are a “rigid gauge of staff or department performance that make police eager to be seen as solving cases”); see also COHEN, *supra* note 97, at 33 (“Arrest is a feather in the cap of the interrogator, for, in the idiom that the Chinese share with us, it is taken to mean that he has ‘broken’ the case.”).

278. *New Miscarriage of Justice Highlights Need for Legal Reforms, Say Experts*, *supra* note 267.

acute in homicide cases.²⁷⁹ Chinese media cited this pressure as a key factor why the prosecutors went forward with Zhao Zuohai's case despite weak evidence.²⁸⁰

Furthermore, because the new rules only apply to "criminal" cases, "administrative" punishments fall outside their purview.²⁸¹ If the police do not intend to pursue a case through the formal criminal justice system and instead are gathering evidence to harass or to divert a suspect through China's extensive administration detention system, then the current trial-focused exclusionary rule may have limited bite. Most strikingly, police have the power to send people to reeducation through labor for three years, with a possible one-year extension.²⁸² Despite resulting in longer deprivations of freedom than many criminal sentences, reeducation through labor sentences may only reach the courts through a cumbersome administrative appeal.²⁸³

Beyond deliberate disregard for the new rules, to the extent that police are poorly trained and thus either do not understand the rules or are not encouraged to follow them, any

279. See Shen Bin (沈彬), Bie Rang Minyi Yihua Wei Fan Minyi: Niang Cheng Zhao Zuohai Yuan An De "Minyi Jichu" (别让民意异化为反民意: 酿成赵作海冤案的"民意基础"), Nanfang Dushi Bao (南方都市报) [SOUTHERN METROPOLIS DAILY], May 17, 2010 (connecting policy of "murder cases must be solved" to Zhao's conviction), available at http://nf.nfdaily.cn/nfdsb/content/2010-05/17/content_11969159.htm.

280. *New Miscarriage of Justice Highlights Need for Legal Reforms, Say Experts*, *supra* note 267 (reporting that prosecutors yielded to pressure).

281. See generally FLORA SAPIO, SOVEREIGN POWER AND THE LAW IN CHINA: ZONES OF EXCEPTION IN THE CRIMINAL JUSTICE SYSTEM (2010) (exploring areas where investigation, detention and "sentencing" take place in derogation of formal criminal proceedings).

282. See BIDDULPH, *supra* note 218; Liu Renwen, Presentation at the Brookings Institution: Reform of China's Reeducation Through Labor System 7 (Jan. 25, 2005), available at <http://www.brookings.edu/~media/Files/events/2005/0125china/20050125.pdf> (comparing length of deprivation of freedom under reeducation through labor and criminal sentences); see generally Fu Hualing, *Re-education in Historical Perspective*, 184 CHINA Q. 811 (2005) (discussing historical and contemporary use of reeducation through labor).

283. See Jerome A. Cohen & Margaret K. Lewis, *The Enduring Importance of Police Repression: Laojiao, the Rule of Law and Taiwan's Alternative Evolution*, in THE IMPACT OF CHINA'S 1989 TIANANMEN MASSACRE 142, 147 (Jean-Philippe B  ja ed., 2010) (explaining procedures for challenging reeducation through labor).

rule on the books will be flimsy in practice.²⁸⁴ Aside from lack of knowledge or desire to follow rules, Chinese scholars have also pointed out that the lack of alternative investigative techniques fuels the reliance on confessions, especially among relatively unsophisticated local police forces.²⁸⁵

Finally, fears about rising crime may also work against energetic implementation of the new rules.²⁸⁶ Certainly, no one is expecting the PRC Government to go soft on crime and, in fact, the government announced a new “strike hard” campaign in June 2010 targeting violent crime.²⁸⁷ Like in all countries, concerns about police abuse sometimes work in tension with concerns about crime and the need for police to be able to do their jobs effectively.²⁸⁸

284. See Yanfei Ran, *When Chinese Criminal Defense Lawyers Become the Criminals*, 32 *FORDHAM INT'L L. J.* 988, 1008-09 (2009) (describing general problems with the low level of legal training of law enforcement agents, despite some improvements).

285. See Yang Yuguan (杨宇冠), *supra* note 106, at 82 (discussing lack of modern investigation methods among local police).

286. See Wang Zhijian & Yang Yamin (王志坚 & 杨亚民), *Wo Guo Feifa Zhengju Paichu Guize De Moshi Xuanze* (我国非法证据排除规则的模式选择), 1 *Faxue* 145 (法学) [LEGAL SCIENCE], at 148 (2007) (asserting that crime control needs to be taken into consideration when fashioning an exclusionary rule); see generally Alexa Olesen, *Spiraling Violent Crime Triggers Concern in China*, *SEATTLE TIMES*, June 3, 2010, available at http://seattletimes.nwsourc.com/html/nationworld/2012020733_apaschinaviolence.html (reporting recent violent crime, including attacks against schoolchildren).

287. See Gonganbu Zhaokai Dianshi Dianhua Huiyi Bushu “2010 Yanda Zhengzhi Xingdong,” Jianchi Yanda Fangzhen Bu Dongyao Quebao Shehui Zhian Daju Chixu Wending, Zhang Xinfeng Zuo Dongyuan Bushu Huang Ming Zhuchi Huiyi (公安部召开电视电话会议部署“2010严打整治行动,”坚持严打方针不动摇确保社会治安大局持续稳定, 张新枫作动员部署黄明主持会议), June 13, 2010, <http://www.mps.gov.cn/n16/n894593/n895609/2443110.html> (Ministry of Public Security announcing the launch of a “strike hard” campaign).

288. Cf. Herbert L. Packer, *The Courts, the Police and the Rest of Us*, 57 *J. CRIM. L. CRIMINOLOGY & POLICE SCI.* 238, 239 (1966) (describing the two competing models of the American criminal justice system as being the efficiency-focused “Crime Control” model and the individual-rights-focused “Due Process” model). *But see* Mirjan R. Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 *U. PA. L. REV.* 506, 574-77 (1973) (critiquing Packer on the basis that the “inner tension [between efficiency and protecting defendants’ rights] is part and parcel of the dialectics of any criminal process” (emphasis omitted)).

VII. CONCLUSION

Being realistic about the limits on judges' power and other barriers to implementation does not inevitably lead to permanent pessimism. First, as implementation goes forward, it is worth asking how we judge if the rules are a success.²⁸⁹ Perhaps simply getting a police officer to testify is a small but meaningful step, even if actual exclusion seldom occurs.

Second, the incremental path of criminal justice reforms in China is aptly expressed by a twist on the Chinese philosopher Laozi's famous phrase: "A journey of a thousand reforms begins with a single step."²⁹⁰ The 2010 Evidence Rules provide a new and welcome level of detail in the long and arduous path of changing the way evidence is collected, examined, and judged. In time, dynamic actors in the criminal justice system may gain a toehold and gradually give the rules real heft in practice.

Taking a long-term view, several futures are possible for the 2010 Evidence Rules. They may fall by the wayside and be of little note. Alternatively, they may be seen by the public as exposing limited rotten apples among the police, in which case the higher-ups in Beijing could keep a relatively untarnished reputation and point fingers at local actors who are not heeding their orders. More drastically, vigorous use of the new rules may be seen by the public as revealing the system to be so flawed that the whole orchard of law enforcement is infected, which could backfire and undermine the government's power. This third possibility is the least likely, seeing as it would require the uncovering of widespread malfeasances by actors in the criminal justice system followed by expansive reporting, no easy feat in any system and especially in China, where organized monitoring of the police by the public is

289. Cf. John Gillespie, *Towards a Discursive Analysis of Legal Transfers into Developing East Asia*, 40 NYU J. INT'L L. & POL. 657, 688-89 (2008) (commenting, in discussing how to assess the success of legal transfers, that "[a] related issue is determining from whose perspective success should be measured").

290. See ROBERT G. HENDRICKS, *LAO TZU'S TAO TE CHING: A TRANSLATION OF THE STARTLING NEW DOCUMENTS FOUND AT GUODIAN 63* (2005) (noting that the line in the Tao Te Ching exists in two forms: "a journey of a thousand *li* begins with a single step" and "a height of eight hundred feet starts from under your foot").

highly constrained.²⁹¹ Despite the increasingly porous nature of the Internet in China, no one expects the government to give the media free rein to report on police abuse. The government's ability to stop leaks in the censorship dam is not unlimited, but it is still strong.²⁹²

Looking beyond the 2010 Evidence Rules themselves, the new rules are also a bellwether of larger issues at play in China's criminal justice reforms in the lead-up to long-anticipated revisions to the CPL. The debate over the exclusionary rule in China brings to the fore questions about the values that the PRC Government is seeking to embody in China's criminal justice system, including how nascent procedural protections for defendants may work in tension with a more traditional emphasis on substantive justice.²⁹³

The debate further highlights the relationship among the police, prosecutors, and courts (collectively referred to as a three-character phrase, *gong jian fa*) and whether the courts will develop a more assertive posture in policing the police. Interestingly, the character "*jian*," which comes from the three-character word for "prosecutor," means to "check" or "inspect." Thus, the common phrase also reflects the persisting state of affairs in China, in which the power of the police (*gong*) is often seen to eclipse, or "check" (*jian*), that of the courts (*fa*). It is perhaps too optimistic to hope that the current reforms will give rise to a situation of "*fa jian gong*," in

291. Compare INFORMATION OFFICE OF THE STATE COUNCIL OF THE PRC, THE INTERNET IN CHINA, pt. III (June 8, 2010), available at <http://china.org.cn/government/whitepaper/node7093508.html> ("The Chinese government has actively created conditions for the people to supervise the government, and attaches great importance to the Internet's role in supervision."), with Rebecca McKinnon, *China's Internet White Paper: Networked Authoritarianism in Action*, RCONVERSATION (June 15, 2010), <http://rconversation.blogs.com/rconversation/2010/06/chinas-internet-white-paper-networked-authoritarianism.html> ("How . . . can a government that so blatantly censors the Internet claim with a straight face to be protecting and upholding freedom of speech on the Internet? The answer of course is that China's netizens are free to do everything . . . except for the things they're not free to do.")

292. Cf. Liebman & Wu, *supra* note 90, at 314 ("More wrongs are being exposed in China, but this does not necessarily mean the Party is any less in control than in the past.")

293. See Liu & Halliday, *supra* note 156.

which the courts inspect or check the police. But there may be subtle shifts at work.²⁹⁴

Finally, efforts to implement the exclusionary rule bring into question the very limits of criminal procedure reform in a single-party authoritarian state. While initial signs are not very encouraging, it is still too early to tell whether the 2010 Evidence Rules will remain a mere gloss to enhance the PRC Government's public support, or whether tangible changes will take root under the veneer.²⁹⁵ For an assessment on this point, we will need to wait and see whether police, prosecutors, judges, and lawyers take the next steps in the lengthy journey of implementation, which truly begins under their feet.²⁹⁶

294. *But see* Fu, *supra* note 15, at 252 (“The police cannot be truly responsive to public need and accountable to any institutions other than the [Chinese Communist Party] as long as China remains an authoritarian state, which uses the police to maintain its monopoly of power.”).

295. Hopefully, however, we will not need to wait so long as Zhou Enlai felt necessary when commenting on the significance of the French Revolution. *See* William P. Alford, *Exporting “The Pursuit of Happiness”* 113 HARV. L. REV. 1677, 1705 (2000) (book review) (recounting the “perspective attributed to the late Chinese premier Zhou Enlai (1899-1976) who purportedly replied to a question about the significance of the French Revolution with the answer that ‘it is too early to say’”).

296. Moss Roberts presents “the journey of a thousand *li* begins beneath one’s feet” as an alternative reading on Laozi’s phrase commonly translated as “a journey of a thousand *li* begins with a single step.” LAOZI, TAO TE CHING: THE BOOK OF THE WAY 458 (Moss Roberts ed., 2001).

