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## Miscarriage of Justice in Chinese Capital Cases<sup>†</sup>

BY MOULIN XIONG\* AND MICHELLE MIAO\*\*

### Abstract

In recent years, the media exposure and judicial exoneration of wrongfully convicted defendants in a number of high-profile capital cases in China have attracted the attention of reformers, the general public, and policy makers—both domestic and international. Yet, until now, there has been merely a thin body of empirical literature on this salient research topic. This lack of academic attention is due to the political sensitivity of the topic and the lack of publicly-accessible data. This paper is aimed at filling this critical gap in the literature. Based on in-depth analysis of 122 death-sentenced innocents, of which 109 have been exonerated and five have been wrongly executed, the research findings reveal that: first, murder and robbery account for the majority of convictions; second, over half of those wrongfully convicted were sentenced to the death penalty with immediate execution; (c) third, innocent prisoners facing capital proceedings, on average, were incarcerated 3161.3 days as a result of recursive trials; (d) courts are reluctant to exonerate the innocents, only 4.1% of cases were acquitted in the second instance while 93.44% of those cases were sent to the first instance for retrial,

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or upheld and sentence reduction at the second instance; (e) there has been a significant reduction in death penalty with immediate execution and increasing in exoneration since 2007. The paper demonstrates that ‘hard strike’ campaigns and provincial higher courts’ review of capital cases bred lethal errors, but China has made great progress in the prevention and correction of wrongful death sentences.

—*Shubin, we all come here to worship you today. Our efforts in last twenty years paid your vindication.*<sup>1</sup>

—*Taking facts as the basis and law as the criterion, I assure that I am not guilty according to law, because the legal system has been developing toward correct direction in our country.*<sup>2</sup>

—*We firmly insist on exonerate wrongful conviction without hesitation.*<sup>3</sup>

—*Innocent fatalities are a concern of all social activity with a capacity to kill.*<sup>4</sup>

—*Capital exonerations are a serious challenge to the legitimacy of both death sentencing and the criminal justice system.*<sup>5</sup>

—*There is no way to tell how many of the more than 1,000 people executed since 1976 may also have been innocent.*<sup>6</sup>

—*Sunny Jacobs and Peter Pringle are a happy couple with a rare common bond. Each spent more than 15 years on death row for murder—she in the U.S., he in Ireland—before being found innocent and given back*

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1. Zhang Huanzhi, the executed and exonerated innocent Nie Shubin’s mother, cried and said on 3 December 2016. Zhu Zijie (朱自洁), Wu Mingmin (吴明敏) & Peng Ziyang (彭子洋), *Nie Shubin Fumu Wei Erzi Shangfen Jidian Fenqian Gaosheng Langdu “Wuzui”* (聂树斌父母为儿子上坟祭奠 坟前高声朗读“无罪”), BEIJING NEWS (新京报) (Dec. 3, 2016), <http://www.bjnews.com.cn/news/2016/12/03/425845.html>.

2. Liu Xiang (刘响), *Beijing Chang Linfeng Shexian Shaqi Fensian Ruhe cong Youzui Bian Wuzui* (北京常林锋涉嫌杀妻焚尸案 如何从有罪变无罪), GUANCHAZHE (观察者) (Dec. 9, 2014), [http://www.guancha.cn/broken-news/2014\\_12\\_09\\_302911.shtml](http://www.guancha.cn/broken-news/2014_12_09_302911.shtml).

3. Xue Yongxiu (薛勇秀), *Zhouqiang: Yifa Jiuzheng Cuoan* (周强: 依法纠正错案), CHINA COURT (中国法院网) (July 4, 2013), <https://www.chinacourt.org/article/detail/2013/07/id/1021634.shtml>.

4. James S. Liebman, *Rates of Reversible Error and the Risk of Wrongful Conviction*, 86 JUDICATURE, 78 (2002).

5. Karen S. Miller, *WRONGFUL CAPITAL CONVICTION AND THE LEGITIMACY OF THE DEATH PENALTY 4* (LFB Scholarly Publishing LLC, 2006).

6. *Executed but Possibly Innocent*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/executed-possibly-innocent>.

*their freedom.*<sup>7</sup>

—*The inescapable risk of executing even one innocent individual should be reason enough to abolish capital punishment.*<sup>8</sup>

## Introduction

For legal scholars and criminologists, few topics in China are as important as miscarriage of justice in capital cases, particularly on wrongful execution. On one hand, it is widely believed that capital punishment is reserved for the most serious offenders and carries important penological purposes such as retribution and deterrence.<sup>9</sup> On the other, miscarriage of justice, often leading to the execution of innocent prisoners, arouses public outrage and loss of confidence in the criminal justice regime.<sup>10</sup> Empirical

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7. Huma Qureshi, *Former Death Row Couple: 'Life Turned Out Beautifully'*, THE GUARDIAN (June 22, 2013), <https://www.theguardian.com/lifeandstyle/2013/jun/22/former-death-row-couple>.

8. Joseph M. Giarratano, *To the Best of Our Knowledge, We Have Never Been Wrong: Fallibility vs. Finality in Capital Punishment*, 100 YALE L.J. 1005, 1009 (1991).

9. See Dietrich OBERWITTLER & Shenghui Qi, PUBLIC OPINION ON THE DEATH PENALTY IN CHINA: RESULTS FROM A GENERAL POPULATION SURVEY CONDUCTED IN THREE PROVINCES IN 2007/08 (Max Planck Institute for Foreign and International Criminal Law), [https://www.mpicc.de/shared/data/pdf/forschung\\_aktuell\\_41.pdf](https://www.mpicc.de/shared/data/pdf/forschung_aktuell_41.pdf) (last visited Mar. 22, 2017) (survey conducted in three provinces in 2007 indicated that 78.1% of respondents believe that people who take a life deserve to be punished by having their own life taken, and 63.6% of respondents believe that the abolition of the death penalty would immediately cause an increase of crime in China, while 58.6% believe the death penalty deters crime most among all the available punishments); Shanhe Jiang & Jin Wang, *Correlates of Support for Capital Punishment in China*, 18 INT'L CRIM. JUST. R. 24, 31 (2008) (indicating 50% of survey students used revenge as a rationale to support punishing violent criminals); Cao Liqun & Francis T. Cullen, *Thinking about Crime and Control: A Comparative Study of Chinese and American Ideology*, 11 INT'L CRIM. JUST. R. 58 (2001); Shanhe Jiang, Eric G. Lambert & Vincent M. Nathan, *Reasons for Death Penalty Attitudes among Chinese Citizens: Retributive or Instrumental?* 37 J. CRIM. JUST. 225, 229 (2009) (survey in Hebei indicated that 39.5% of citizens believe the idea of an eye for an eye, a life for life, while 51.3% of citizen support that society has a right to seek revenge on violent criminals); Shanhe Jiang, Eric G. Lambert & Jin Wang, *Capital Punishment Views in China and The United States: A Preliminary Study Among College Students*, 51 INT. J. OFFENDER THER. 84, 89-92 (2007); Bin Liang, Hong Lu, Terance D. Miethe & Lening Zhang, *Sources of Variation in Pro-Death Penalty Attitudes in China: An Exploratory Study of Chinese Students at Home and Abroad*, 46 BRIT. J. CRIMINOL. 119, 125 (2006) (surveyed Student in China indicating 43.3% of respondents support general deterrence, while 55% of respondents prefer specific deterrence).

10. See *id.*, Jiang & Wang, at 31-32 (survey indicating 80% of students believed that innocent people are sometimes sentenced to death, and the fear of wrongful execution was negatively related to the support of the death penalty); Jeffrey L. Kirchmeier, *Dead Innocent: The Death Penalty Abolitionist Search for a Wrongful Execution*, 42 TULSA L. REV. 403, 407

findings on wrongful conviction and execution of prisoners in China will illuminate the field by providing evidence for evaluating the criminal law and policy in the recent decades.

On December 2, 2016, a decade after being wrongfully executed at the age of 21 years old, Nie Shubin was exonerated by China's Supreme People's Court. Despite his exoneration, Nie's innocence was discovered after the real murderer and rapist Wang Shujin confessed in 2005.<sup>11</sup> Nie was not the sole wrongfully executed person in China during the past decades. According to media reports, three wrongfully convicted prisoners—Teng Xingshan,<sup>12</sup> Wei Qingan<sup>13</sup> and Huge Jiletu<sup>14</sup>—were executed in 1990s and

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(2006) (indicating the irreversible execution of an innocent person raises constitutional issues and undermines our justice system and our sense of fairness); Charles I. Lugosi, *Executing the Factually Innocent: The U.S. Constitution, Habeas Corpus, and the Death Penalty: Facing the Embarrassing Question at Last*, 1 STAN. J. C.R. & C.L. 473, 494 (indicating that nothing would undermine the moral force of the criminal law more than the discovery that, not only are innocent people found guilty of crimes they did not commit, but that they have been executed); Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 588 (2005) (the errors of innocent being sentenced to death undermine the legitimacy of the entire criminal justice system); Kenneth Williams, *Why the Death Penalty is Slowly Dying*, 46 SW. L. REV. 253, 254 (2017) (indicating no issue has had a bigger impact on the public's attitude towards the death penalty than the possibility of an innocent person being executed).

11. See Liu Xin, *Nie Shubin Files Opened to Lawyers*, GLOBAL TIMES (Mar. 7, 2015), <http://www.globaltimes.cn/content/912369.shtml>; see also Katie Hunt, Serentitie Wang & Steven Jiang, *'My Son is Innocent': Chinese Man Exonerated 21 Years after Execution*, CNN NEWS (Dec. 2, 2016), <https://edition.cnn.com/2016/12/01/asia/china-executed-man-found-innocent-nie-shubin/index.html>.

12. Huang Shiyuan, *Chinese Wrongful Convictions: Causes and Prevention*, 80 U. CIN. L. REV. 1219, 1220 (2012); JIANG NA, *WRONGFUL CONVICTIONS IN CHINA: COMPARATIVE AND EMPIRICAL PERSPECTIVES* 44-46 (Springer, 2016); He Jiahong, *Miscarriage of Justice and Malpractice in Criminal Investigations in China*, 16 CHINA REV. 65, 67 (2016).

13. See WANG JIA (王佳), ZUIXUN ZHENGYI: FAZHI SHIYEXIA DE XINGSHI CUOAN (追寻正义: 法治视野下的刑事错案), 188-93 (2011); Niu Donghao (钮东昊), *Henan Qingnian Bei Dang Qiangjianfan Qiangjue Hou Zhenxiong Luowang* (河南青年被当强奸犯枪决后真凶落网 揭洗冤实情), NEW NEWS (新闻) (July 21, 2010), [http://www.china.com.cn/news/law/2010-07/21/content\\_20540247.html](http://www.china.com.cn/news/law/2010-07/21/content_20540247.html).

14. See Jiang, *supra* note 12, at 260-264.

another two—Ma Zhilan<sup>15</sup> and Yang Wencai<sup>16</sup>—died while being brutally tortured. Wrongful conviction in capital cases has been recognized as an increasingly important issue by researchers in the fields of criminal law and criminal justice community.<sup>17</sup> There has been a growing body of literature in the past decades.<sup>18</sup> We contribute to the development of the literature in the field by collecting all capital cases resulting in miscarriage of justice which are openly accessible in the media and news archives.

In his book *“Back from Dead: Wrongful Convictions and Criminal Justice in China,”* Professor He Jiahong introduced two wrongful cases involving innocents She Xianglin and Teng Xinshen that the killed-but-actual-alive “victim” returned home.<sup>19</sup> Instead, we pay our attention to innocents who would be alive but executed (*ying huozhe que zhixing sixing* 应活着却执行死刑), and would be executed but alive (*keneng zhixing sixing que huozhe* 可能执行死刑却活着) because of a timely exoneration and release. This paper explores over a hundred innocent defendants who were wrongfully executed or were once subject to execution. We will not confine our analysis to high profile cases such as Zhang Gaoping and Zhanghui, She Xianglin, Teng Xinshan, Zhao Zuohai, Li Huailiang, Zhao Xinjian, Du Peiwu, Li Jiuming, and Chen Jinchang, which have been

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15. See Dong Kaiwei (董开炜), Hanbei 26 Zai, Yuanan Zhaoxue Shangtong Nanfu (含悲26载, 冤案昭雪伤痛难抚), 兰州晨报, LANZHOU MORNING NEWS (July 3, 2009), at A06, [http://www.lzcbnews.com/page/1/2009-07/03/A06/20090703A06\\_pdf.pdf](http://www.lzcbnews.com/page/1/2009-07/03/A06/20090703A06_pdf.pdf); Dong Kaiwei (董开炜), Mengyuanzhe Qinshu huopei 55 Wanyuan (蒙冤者亲属获赔55万元), 兰州晨报, LANZHOU MORNING NEWS (July 4, 2009), A07, [http://www.lzcbnews.com/page/1/2009-07/04/A07/20090704A07\\_pdf.pdf](http://www.lzcbnews.com/page/1/2009-07/04/A07/20090704A07_pdf.pdf); Dong Kaiwei (董开炜), Hanbei 26 Zai, Yuanan Zhong Zhaoxue (含悲26载, 冤案终昭雪), 兰州晨报, LANZHOU MORNING NEWS (Dec. 31, 2009), at T11, [http://www.lzcbnews.com/page/1/2009-12/31/T11/20091231T11\\_pdf.pdf](http://www.lzcbnews.com/page/1/2009-12/31/T11/20091231T11_pdf.pdf).

16. See Liu Gang (刘刚). Yi Sixing Fan Jubao 26 Nianqian Mingan Lingyou Zhenxiong (一死刑犯举报26年前命案另有真凶), 新京报, BEIJING NEWS (March 22 2014), at A16, [http://epaper.bjnews.com.cn/html/2014-03/22/content\\_501455.htm?div=-1](http://epaper.bjnews.com.cn/html/2014-03/22/content_501455.htm?div=-1).

17. Jiang Na, *The Adequacy of China's Responses to Wrongful Convictions*, 41 INT. J.L. CRIME & JUST. 390, 392 (2013) (believing concern over wrongful conviction has recently increased in China); Hugo Adam Bedau & Michael L. Radelet, *Miscarriage of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 22 (1987) (indicating that few errors made by government officials can compare with the horror of executing a person wrongly convicted a capital crime).

18. See Yuning Wu & Marvin Zalman, *Wrongful Conviction in China: Analyzing the Scholarship*, 21 CRIME & CRIM. JUST. INT., 1 (2013), <http://www.twscholar.com/Publication/alDetailedMesh?DocID=18104045-201309-201401210009-201401210009-1-45>.

19. See HE JIAHONG, WANGZHE GUILAI, XINGSHI SIFA SHIDA WUQU (亡者归来, 刑事司法十大误区), 108-18, 200-10 (Beijing Daxue Chubanshe (北京大学出版社), 2014).

discussed by existing literatures.<sup>20</sup> Nor will we focus on murder cases involving miscarriage of justice in which the supposedly 'dead' victims return alive. Whilst the aforementioned cases illuminate important dimensions of the criminal process during which innocent defendants were at risk of wrongful conviction throughout the trial proceedings; they were incarcerated years before being acquitted or released; and that courts were unlikely to release the innocent prisoners unless multiple rounds of retrials and reinvestigations were carried out,<sup>21</sup> they fail to offer sufficient basis for rigorous academic critique.

This said, there has been an important body of literature employing mainly qualitative methods to conduct a descriptive analysis of miscarriage of justice and its causes in China.<sup>22</sup> They revealed, primarily, the legal causes for miscarriage of justice, such as the absence of a presumption of innocence<sup>23</sup> as well as police torture and other misconducts of law enforcement agencies.<sup>24</sup> A recent body of literature is devoted to studying the judicial and legislative responses to miscarriages of justice. These include but are not limited to the enactment of new exclusionary rules.<sup>25</sup>

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20. See Huang, *supra* note 12, at 1220; Jiang, *supra* note 12, at 42-57; Jiang Na, *A Comparison of Wrongful Convictions in Death Penalty Cases Between China and the United States*, 41 INT. J. LAW CRIME JUST. 144, 147 (2013); He Jiahong, *Case Study on The Causes of Wrongful Conviction in Chinese Criminal Proceedings*, 10 FRONTIERS L. CHINA, 670, 675 (2015); He Jiahong, *Wrongful Convictions and The Exclusionary Rules in China*, 9 FRONTIERS L. CHINA, 490, 491 (2014); Ira Belkin, *China's Tortuous Path Toward Ending Torture in Criminal Investigation*, 24 COLUM. J. ASIAN L. 273, 287 (2011).

21. See He, *Case Study on The Causes of Wrongful Conviction in Chinese Criminal Proceedings*, *supra* note 20, at 675 (2015); Jiang Na, *Problems and Prospects: China's Response to Wrongful Convictions*, 43 INT. J.L. CRIME & JUST., 109, 113 (2015).

22. See He, *supra* note 19; Jiang, *A Comparison of Wrongful Convictions in Death Penalty Cases Between China and the United States*, *supra* note 20, at 145.

23. See He, *Case Study on The Causes of Wrongful Conviction in Chinese Criminal Proceedings*, *supra* note 20, at 686; Jiang Na, *The Presumption of Innocence and Illegally Obtained Evidence: Lessons from Wrongful Convictions in China?* 43 HONG KONG L.J. 745 (2013); Jiang Na, *Convicting the Innocent: What Causes Wrongful Convictions in China?* 3 CHINA J. COMP. L. 161, 166 (2015); Wu Xiaofeng, *An Analysis of Wrongful Convictions in China*, 36 OKLA. CITY U. L. REV. 451, 456 (2011).

24. See Jiang Na, *Iron Triangle of the Gong Jian Fa: Lessons from Wrongful Convictions in Capital Cases?* 42 INT. J.L. CRIME JUST. 406, 411 (2014); He Jiahong, *Miscarriage of Justice and Malpractice in Criminal Investigations in China*, 16 CHINA REV. 65, 71 (2016).

25. See He, *Wrongful Convictions and the Exclusionary Rules in China*, *supra* note 20, at 495; Jiang Na, *Problems and Prospects: China's Response to Wrongful Convictions*. 43 INT. J.L. CRIME & JUST. 109, 112 (2015); Margaret K. Lewis, *Controlling Abuse to Maintain Control: The Exclusionary Rule in China*, 43 N.Y.U. J. INT'L. L. & POL. 629, 633 (2011); Jiang Na, *The Adequacy of China's Responses to Wrongful Convictions*, 41 INT. J.L. CRIME JUST. 390 (2013).

Despite their important findings, the legal analysis approach, which is normally limited to a few cases, seems insufficient to uncover the overall policy impact of miscarriage of justice. Our research will make a timely and valuable contribution to the field.

In general, the wrongful conviction of capital defendants share common features with miscarriage of justice in noncapital cases. The only difference, understandably, is that the former leads to the imposition of death sentences. Wu and Zalman reviewed that wrongful conviction may be caused by the misconduct of court and police, such as their failure of the former to conduct cross-examinations and the criticized practice of the latter to extract false confessions through torture.<sup>26</sup> Jiang further explained that institutional defects, such as the abuse of trial proceedings, ineffective counsel representation, flawed legal supervision system, presumption of guilt, and an ‘iron triangle’ style of cooperation among the police, the procuratorate and courts are responsible for the prevalence of miscarriage of justice.<sup>27</sup> He added that wrongful conviction is a consequence of improper police investigation, including their heavy reliance on confession and observance of tight deadlines to solve criminal cases (this is called “*min an bi po*” and “*xian qi po an*”).<sup>28</sup> Last but not least, Wu attributed the causes for widespread wrongful conviction to the weak status and limited resource held by defense lawyers.<sup>29</sup>

These causes for wrongful conviction may be found in cross-national practices,<sup>30</sup> despite the variation of culture and legal systems across the

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26. See Wu & Zalman, *supra* note 18, at 21-32; Yuning Wu & Marvin Zalman, *Wrongful Conviction in China: Analyzing the Scholarship*, 21 CRIME & CRIM. JUST. INT., 1 (2013), <http://www.twscholar.com/Publication/alDetailedMesh?DocID=18104045-201309-201401210009-201401210009-1-45>.

27. See Jiang, *A Comparison of Wrongful Convictions in Death Penalty Cases Between China and the United States*, *supra* note 20, at 147; Jiang, *supra* note 24, at 406.

28. See He, *supra* note 24, at 70; Cui Jia, *Deadlines Lead to Wrongful Convictions*, CHINA DAILY (Aug. 11, 2009), [http://www.chinadaily.com.cn/china/2009-08/11/content\\_8552317.htm](http://www.chinadaily.com.cn/china/2009-08/11/content_8552317.htm). (The author indicated that some police are forcing the innocent to confess to crimes they did not commit in order to meet strict investigation deadlines set by their superior officers); Jiang Jue, *Legal and Political Rights Advocacy in Wrongful Conviction Death Penalty Cases in China: A Study of The Leping Case of Injustice*, 29 COLUM. J. ASIAN L. 96, 97 (2016).

29. See Wu, *supra* note 23, at 459.

30. See Jiang, *A Comparison of Wrongful Convictions in Death Penalty Cases Between China and the United States*, *supra* note 20, at 145; Jiang, *supra* note 12, at 41-88; Jiang, *Convicting the Innocent: What Causes Wrongful Convictions in China?*, *supra* note 23, at 161; Shawn Armbrust & Susan Friedman, *Causes of Wrongful Convictions*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE, 303-10 (Gerben Bruinsma & David Weisburd eds.,

globe. Existing literature indicates that these causes include high conviction rates, the lack of procedural checks and balances, flawed evidence, police interrogation, false confession, ineffective trials, social and media pressure, absence of DNA tests, and the lack of appellate proceedings.<sup>31</sup>

We believe investigating the processes and characteristics of wrongful convictions is equally, if not more important than studying the causes for wrongful conviction.<sup>32</sup> The existing literature has failed to comprehensively describe how and why capital defendants were convicted, detained, and exonerated. We aim to fill this gap in the literature.

This research analyzes 122 capital defendants who were wrongfully convicted from 1983 to 2012, and describes the status of exoneration or release by the date October 26, 2016, when we finished in creating our dataset. In comparison with previous research in China, not only have we collected more samples regarding wrongful death sentences published in earlier stages and recent years, but also, we have uncovered cases that have been given less attention in previous studies.<sup>33</sup> The innocence of 109

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2014); Ronald C. Huff, *Wrongful Conviction: The Experience of America*, 46 CAN. J. CRIMINOL. CRIM. JUST. 107, 109 (2004); C. RONALD HUFF & MARTIN KILLIAS, *WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICAN AND EUROPEAN CRIMINAL JUSTICE SYSTEMS*, 15-237 (2013).

31. Lynne Weathered, *Wrongful Conviction in Australia*, 80 U. CIN. L. REV. 1391, 137 (2012); Lynne Weathered, *Investigating Innocence: The Emerging Role of Innocence Project in The Correction of Wrongful Conviction in Australia*, 12 GRIFFITH L. REV. 64, 65 (2003); Andrea S. Anderson, *Wrongful Conviction and The Avenues of Redress: The Post-Conviction Review Process in Canada*, 20 APPEAL REV. CURRENT L. & L. REFORM 5, 6 (2015); Adam Górski & Maria Ejchart, *Wrongful Conviction in Poland*, 80 U. CIN. L. REV. 1179, 1185 (2012); C. Ronald Huff, *Wrongful Conviction: Cause and Public Policy Issues*, 18 CRIM. JUST. 15, 16 (2003); Paul J. Saguil, *Improving Wrongful Conviction Review: Lessons From a Comparative Analysis of Continental Criminal Procedure*, 45 ALTA. L. REV. 117 (2007).

32. See Armbrust & Friedman, *supra* note 30, at 303 (the author indicated, in any system of justice, there is a risk of convicting innocent people); James R. Acker, *Foreword*, 74 ALBANY L. REV. 1067, 1068 (2011) (the author indicated, the criminal law would be enforced reliably, equitably, and proportionately against offenders, and only offenders, in a perfect just and error-free world. Unfortunately, we do not live in such a world); Hannah Quirk, *Identifying Miscarriages of Justice: Why Innocence in the UK Is Not the Answer*, 70 MOD. L. REV. 759 (2007) (the author indicated, in any criminal justice system, mistakes are bound to occur; the factually guilty will escape conviction and the innocent will be judge falsely).

33. Chinese research concerning wrongful death sentences, introduced repeatedly in cases such as Teng Xinshan and She Xianglin et al., were basically not different from cases analyzed in English literature. See Fang Peng (方鹏), *An Empirical Study of 33 Death Penalty Cases Reported to the Media, (Sixing Cuoan de Lixing Fenxi 死刑错案的理性分析)*, 1 CRIM. L. REV. (Xingshifa Pinglun 刑事法评论) 26, (2006) (Fang investigating 33 wrongful capital cases and their trial process via online search); Lyu Zehua (吕泽华) & Jia Yizeng (贾宜臻), *An Empirical Research on the Evidence Problem of Death Penalty, False Offense and Cases*

individuals have been declared by the authorities and another 13 innocents uncovered and agreed by academics and journalists. In the former scenario, wrongful convicts were officially acquitted, exonerated and released for various reasons and following different proceedings. Despite the absence of official declaration in the latter scenario, miscarriage of justice has been confirmed by media commentators, scholars, and defense attorneys.<sup>34</sup> Prior to their ultimate exoneration or release, these innocent prisoners would normally be incarcerated for many years, even executed as the sentence came into force. We conducted statistical analysis on the entire journey from the innocent prisoner's detention to their release. We carefully observed how legislative changes and criminal policy reforms generate impact on miscarriage of justice in capital cases in recent years.

The contribution of this research is twofold. On one hand, this research compares China's practice with other jurisdictions around the world, with a particular focus on the irrevocability of death sentences and the risk of wrongful executions capital defendants faced in China, such as the connection between hard strike campaigns and wrongful conviction. Another important contribution should lend our different perspectives to perceive the development of law and criminal justice in China, what Chinese legislative and judicial organs learned from the death-sentenced innocent.

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(*Sixing Yuanjia Cuoan Zhengju Wenti zhi Shizheng Yanjiu* 死刑冤假错案证据问题之实证研究), 2 J. OF HUBEI POLICE ACAD. (Hubei Jingguan Xueyuan Xuebao 湖北警官学院学报) 55, (2017) (the authors investigated 19 wrongly convicted innocent individuals sentenced to death via public media); Han Dayuan (韩大元), *The Constitutional Control of Death Penalty in Case of Misjudgment—From the Perspective of the Analysis of Ten Death Penalty Cases* (*Sixing Yuancuoan de Xianfa Kongzhi: Yi Shige Sixing Yuancuoan de Fenxi Wei Shijiao* 死刑冤错案的宪法控制—以十个死刑冤错案的分析为视角), 6 J. OF RENMIN U. OF CHINA (Zhongguo Renmin Daxue Xuebao 中国人民大学学报) 10 (2013) (the author paid attention to 10 wrongful death-sentenced innocent on perspective of constitutional law); Jin Zegang (金泽刚), *Reasons and Prevention of Misjudgment of Judges—Based on Sample Analysis of 19 Criminal Misjudged Cases* (*Faguan Cuopan de Yuanyin Yu Fangzhi: Jiyu 19 Qi Xingshi Cuoan de Yangben Fenxi* 法官错判的原因与防治—基于19起刑事错案的样本分析), 2 L. REV. (Faxue Pinglun 法学评论) 139, 2015 (the author presented 13 individuals who were sentenced to death to analyze the reason of wrongful conviction).

34. For example, the cases Zhao Rongfen, Zhu Jifeng, Ren Wenhui listed in Appendix 1 have been widely acknowledged as innocent. See Wang Xiao (王晓), *Naxie Beipan "Sihuan" de Sharenfan* (那些被判“死缓”的杀人犯), 28 ORIENTAL OUTLOOK WEEKLY (瞭望东方周刊) (July 12, 2010), [http://www.dooland.com/magazine/article\\_68269.html](http://www.dooland.com/magazine/article_68269.html); see also Bai Rundai (白润岱) & Liu Jizhong (刘继忠), *Henan Yujing Shexian Xionsha Fayuan Ping Haitong Zhengci Panqi Sihuan* (河南狱警涉嫌凶杀 法院凭孩童证词判其死缓), HENAN BUSINESS DAILY (河南商报) (June 3, 2005), <http://news.sina.com.cn/s/2005-06-03/10216833761.shtml>.

Unlike the previous researches to review the long march of law and penal reform,<sup>35</sup> this article is valuable to notice the basement of death penalty and his woeful miscarriage of justice.

## **I. Wrongful Conviction in Capital Cases: A Global Phenomenon**

In countries which retain capital punishment, wrongful conviction in capital cases attract growing media and academic attention worldwide. This is particularly so if wrongful execution occurs. We will classify wrongful conviction in capital cases into four categories: (a) exoneration of the defendant after wrongful execution; (b) exoneration prior to wrongful execution; (c) death while incarcerated; (d) wrongful execution which has not resulted in exoneration. The first category covers innocent prisoners who were wrongfully executed before innocence was discovered. In the second scenario, the defendant was sentenced to the death penalty, but was later exonerated, acquitted, or pardoned on death row. In the third scenario, the defendant died in custody and was later found to be innocent. In the last scenario, the innocent defendant has not been proven innocent even after his execution.

### ***A. Exoneration After Wrongful Execution***

Existing research demonstrates that wrongful executions are unavoidable as far as the institution of state-sanctioned use of lethal force continues to operate.<sup>36</sup> In Anglo American jurisdictions, wrongful convictions in capital cases has been a controversial topic throughout the history of capital punishment.<sup>37</sup> In continental legal systems, wrongful

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35. See Albert H.Y. Chen, *China's Long March towards Rule of Law or China's Turn Against Law?* 4 CHIN. J. COMP. L. 1 (2016); Susan Trevaskes, *China's Death Penalty: The Supreme People's Court, the Suspended Death Sentence and the Politics of Penal Reform*, 53 BRIT. J. CRIMINOLOGY 482 (2013).

36. See Miller, *supra* note 5, at 4; Peter J. van Koppen, Dick J. Helsing & Chistianne J. de Poot, *Public Reasons for Abolition and Retention of the Death Penalty*, 12 INT'L CRIM. JUST. REV. 77, 78 (2002) (arguing, "The Death penalty does provide for special safeguards, but there exists no guarantee that the penalty is indeed imposed on the real perpetrator."); Erik Lillquist, *Absolute Certainty and The Death Penalty*, 42 AM. CRIM. L. REV. 45, 67 (2005) (indicating, "what has done the most to undermine the death penalty in the United States in recent years has been the discovery of numerous individuals who have been wrongly convicted of capital crimes").

37. See Jeffrey L. Kirchmeier, *Dead Innocent: The Death Penalty Abolitionist Search for*

conviction in capital cases is also widespread. Japan's Innocence and Death Information Center discovered four exonerations from the death row from 1983 to 1989 but none ever since 1989.<sup>38</sup> In Taiwan, Jiang Guoqing, a former member of the air force, was wrongfully executed on 3 August 1993. He was exonerated in September 2011, when the real offender Xu Rongjiu confessed.<sup>39</sup> Wrongful execution is ubiquitous where capital punishment is relied upon to deter criminals.

Of the 8595 defendants sentenced to death and 1421 executed between 1973 and 2015 in United States, none were found to be innocent after execution.<sup>40</sup> This, however, does not imply no wrongful execution has ever occurred. This is because very few wrongful executions are ever even discovered. Moreover, even when the correctness of execution was in doubt, criminal justice systems are reluctant to admit the errors they produced.<sup>41</sup> Cameron Todd Willingham, a Texas prisoner insisted on his innocence, is a pertinent example.<sup>42</sup> Willingham was executed in 2004 for killing his three young daughters, but not exonerated until recently, despite forensic evidence indicating it was impossible that he committed arson.<sup>43</sup> Interestingly,

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*a Wrongful Execution*, 42 TULSA L. REV. 403, 411-421 (2006); Bruce P. Smith, *The History of Wrongful Execution*, 56 HASTINGS L.J., 1185, 1188 (2005); John B. Gould, *One Hundred Years Later: Wrongful Convictions after a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 827 (2010).

38. See JAPAN INNOCENCE & DEATH PENALTY INFORMATION CENTER, <http://www.jiadep.org> (last visited Nov. 8, 2016).

39. See Cindy Sui, *Executed Taiwan Airman Chiang Kuoching Innocent*, BBC NEWS (last visited Sept. 13, 2011), <http://www.bbc.com/news/world-asia-pacific-14895747>; see also Dennis Engbarth, *Taiwan: Wrongful Execution Response Death Penalty Debate*, GLOBAL ISSUES (last visited Feb. 25, 2011), <http://www.globalissues.org/news/2011/02/05/8419>.

40. Number of death-sentenced and executed defendants are calculated by Samuel et al.'s statistical amount 7,482 and 943 between 1973 and 2004 respectively, and the number listed in Death Penalty Information Center between 2005 and 2015. See Samuel Gross, Barbara O'Brien, Chen Hu & Edward H. Kennedy, *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 P. NATL. ACAD. SCI. 7230, 7231 (2014); *Death Sentences in the United States From 1977 by State and by Year*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-present> (last visited Dec. 10 2016).

41. See Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1123 (2015) (the author indicated that, we are also unwilling to acknowledge the significant number of false convictions that any system of criminal justice will create, which may be why plea bargaining takes the form that it does, hiding the risk of false convictions behind the false assurance of admissions of guilt).

42. See Meghan J. Ryan, *Remedy Wrongful Execution*, 45 U. MICH. J.L. REFORM 261, 262 (2012).

43. *Cameron Todd Willingham: Wrongfully Convicted and Executed in Texas*, INNOCENCE PROJECT (Sept. 13, 2010), <http://www.innocenceproject.org/cameron-todd-willi>

exoneration can be tracked to the early days of America's criminal justice system but not commonly-seen in the contemporary era. For example, Chipita Rodriguez, hanged in Texas in 1863, was exonerated on 13 June 1985, after Governor Mark White signed a resolution to alter her conviction.<sup>44</sup> In two other cases, Thomas Griffin and Meeks Griffin who were executed in 1915,<sup>45</sup> and Joe Arridy who was executed in 1939. They were posthumously pardoned rather than exonerated in 2009 and 2011 respectively.<sup>46</sup>

In other common law jurisdictions, the exoneration of wrongful convictions is also unbelievably difficult. In the Great Britain, for example, Timothy Evans—who was wrongly hanged for murdering his wife and baby daughter in 1950—was given a posthumous royal pardon but his conviction was not formally quashed until 1966.<sup>47</sup> Evans's innocence was confirmed by the Criminal Cases Review Commission on November 17, 2004.<sup>48</sup> Further, George Kelly, who was wrongfully executed in 1951, and Mahmood Hussien Mattan, who was wrongfully executed in 1952, were vindicated in 1998 and 2003 respectively.<sup>49</sup> Derek Bentley, a 19-year-old, whose mental age was 11 at the time of crime, might be the last wrongfully executed prisoner in 1953. A posthumous examination quashed his conviction for murdering a police officer 45 years later in 1998.<sup>50</sup> It was widely accepted that these cases precipitated the abolition of death penalty in the UK. On April 6, 2015, Irish government apologized for Harry Gleeson's execution

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ngham-wrongfully-convicted-and-executed-in-texas/.

44. Marylyn, Underwood, *Rodriguez, Josefa [Chipita]*, THE HANDBOOK OF TEXAS ONLINE TEXAS STATE HISTORICAL ASSOCIATION (Dec. 10, 2016), <https://www.tshaonline.org/handbook/online/articles/fro50>.

45. Tom Joyner. *S.C. Men Executed in 1913 get State Pardon*, NBC NEWS (Oct. 14, 2009), [http://www.nbcnews.com/id/33310170/ns/us\\_news-crime\\_and\\_courts/t/sc-men-executed-get-state-pardon/#.WEw-wcflxC0](http://www.nbcnews.com/id/33310170/ns/us_news-crime_and_courts/t/sc-men-executed-get-state-pardon/#.WEw-wcflxC0).

46. Charmaine Ortega Getz, *Joe Arridy Pardoned*, WEIRD COLORADO (Feb. 5, 2011), <http://www.weirdcolorado.net/cemetery-safar-update-joe-arridy-pardoned>; Robert Perske, *Colorado Governor Pardons Joe Arridy*, 49 INTELLECT. DEV. DISAB. 192, 365 (2011).

47. Neil Prior, *Timothy Evans Family's 60-year Conviction Wait*, BBC NEWS (Mar. 9, 2010), [http://news.bbc.co.uk/2/hi/uk\\_news/wales/8556721.stm](http://news.bbc.co.uk/2/hi/uk_news/wales/8556721.stm).

48. Julian B. Knowles, *The Abolition of the Death Penalty in the United Kingdom: How it Happened and Why it Still Matters*, THE DEATH PENALTY PROJECT, 32 (2015), <http://www.deathpenaltyproject.org/wp-content/uploads/2015/11/DPP-50-Years-on-pp1-68-1.pdf>.

49. Owen Bowcott, *Man Hanged 53 Years Ago Was Innocent*, THE GUARDIAN (June 11, 2003), <https://www.theguardian.com/uk/2003/jun/11/ukcrime.owenbowcott>.

50. *UK Craig's relief at Bentley pardon*, BBC NEWS (July 30, 1998), <http://news.bbc.co.uk/2/hi/142351.stm>; *R v. Derek William Bentley* [1998] EWCA (Crim.) 2516 (Eng.).

in 1941 based on circumstantial evidence.<sup>51</sup> The delayed apology caused a continuous debate on why the innocence of the defendant was not uncovered earlier than his execution.

### ***B. Exoneration Before Execution***

In addition to the acquittal, pardon, and commutation of death sentences of the wrongfully convicted, efforts have been made to prevent lethal errors. Death Penalty Information Center in United States recorded 156 innocent prisoners on the death row from 1973 to 2015. It takes, on average, 11.3 years for these prisoners to be released, pardoned, or acquitted.<sup>52</sup> And authorities do not admit the error in every case. Only 48 cases were “acquitted”, according to DPIC, which account for 30.77 percent of all cases identified with miscarriage of justice. Other innocent prisoners were pardoned or had their charges dismissed.

The earliest exoneration recorded by DPIC was David Keaton in 1973, after the actual killer was identified. He was convicted in 1971 based on mistaken identification and coerced confessions. A most recent exoneration of an innocent defendant in United States was Derral Wayne Hodgkins,<sup>53</sup> who was sentenced to the death penalty in 2013 for stabbing his former girlfriend in September 2006. The Supreme Court of Florida entered a judgment of acquittal on June 18, 2015, on the basis of the insufficient evidence to sustain his conviction. In this case, none of the 21 sets of fingerprints lifted from the crime scene belonged to Hodgkins and no evidence linked him to the bloody bottle found at the scene.<sup>54</sup> Furthermore, Radelet et al. identified hundreds of death row inmates who were later released after the 1970s.<sup>55</sup> Also, Hime identified 130 death penalty cases in

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51. Erin McGuire, *How Harry Gleeson Was Wrongly Hanged for Murder in 1941*, THE IRISH TIMES (Apr. 6, 2015), <http://www.irishtimes.com/news/crime-and-law/how-harry-gleeson-was-wrongly-hanged-for-murder-in-1941-1.2165731>.

52. *List of Those Freed from Death Row*, DEATH PENALTY INFORMATION CENTER, INNOCENCE (Nov. 11, 2016), <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>.

53. *Hodgkins v. State*, 175 So.3d 741 (Fla. 2015).

54. *Innocence Cases*, DEATH PENALTY INFORMATION CENTER (Dec. 12, 2016), <https://deathpenaltyinfo.org/node/4900#156>; PASCO TRIBUNE, *Conviction overturned in 2006 Land O' Lakes Murder Case*, TAMPA BAY TIMES (June 18, 2015), <http://www.tbo.com/pasco-county/conviction-overturned-in-2006-land-o-lakes-murder-case-20150618/>.

55. See Bedau & Radelet, *supra* note 17, at 37-39, 90-172; Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289,

which innocent defendants were wrongfully convicted, sentenced to death and, later released or wrongfully executed.<sup>56</sup> For the latter group of cases, exonerating evidence was brought forth only after execution.

In Ireland, Peter Pringle was convicted for capital murder and robbery, and then sentenced to death by a Special Criminal Court in Dublin in 1980 without a jury trial. Two weeks before his scheduled execution in May 1981, he was commuted to a 40-years penal servitude without remission. His sentence was finally quashed in 1995 after serving a 15-year term.<sup>57</sup> In other European countries, there were possibly wrongful executions before the abolition of capital punishment. For example, despite the lack of a conclusion of wrongful execution due to missing official data and record, Zoltan Toth was believed to be innocent among the 206 prisoners who received the death sentence between 1960s and 1980s in Hungary.<sup>58</sup> Two innocent defendants who were sentenced to death before the political transition of 1989-1990 were proven innocent before execution.<sup>59</sup> After the abolition of capital punishment in 1990, Ede Kaiser, who was charged with his co-offender Mor Bank for robbery and murder of eight people in May 2002 and wrongfully convicted for aggravated murder, was another case of wrongful conviction in Hungary. For his case, many lawyers were confident that, if capital punishment had been in force in Hungary at that time, Kaiser would have been executed.<sup>60</sup>

### ***C. Death While Incarcerated Before Exoneration***

Wrongful conviction is commonly seen in Asian countries such as Japan. Japan's Innocence & Death Penalty Information Center recorded six cases in which the death sentence was remanded and then verdicts of not-

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295-97, 306-14 (1993); Michael L. Radelet et al., *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907, 923-63 (1996).

56. Adam Hime, *Life or Death Mistakes: Cultural Stereotyping, Capital Punishment, and Regional Race-Based Trends in Exoneration and Wrongful Execution*, 82 U. DET. MERCY L. REV. 181, 183 (2005).

57. Clarke Forum on Contemporary Issues, *Innocent on Death Row: The Story of Sunny and Peter* (Sept. 27, 2016), <http://clarke.dickinson.edu/sunny-jacobs-and-peter-pringle/>.

58. Zoltan J. Toth, *The Capital Punishment Controversy in Hungary: Fragments on the Issues of Deterrent Effect and Wrongful Convictions*, 21 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 37, 53 (2013) (the author indicated that in the 1960s there were 129 death sentences, in the 1970s there were 47, and in the 1980s there were only 32).

59. *Id.* at 49.

60. *Id.*

guilty were handed down.<sup>61</sup> For instance, Masaru Okunishi, charged for murder of five women, was found not guilty at first trial on 23 December 1963, and then convicted by the second-instance court on 10 September 1969. He was then incarcerated on the death row until death in a Tokyo prison on October 4, 2015, despite his relentless seeking of retrial and claiming of innocence.<sup>62</sup> In Australia, researchers discovered about 125 native residents died in custody between 1981 and 1988.<sup>63</sup> Without the abolition of the death penalty, some of them would be sentenced to death and executed.

Another tragedy of wrongful conviction of a capital offense was Frank Lee Smith, an African-American who was convicted in Florida for the rape and murder of an eight-year-old girl. He died of cancer in 2000 after spending fifteen years on the death row.<sup>64</sup> On December 15, 2000, eleven months after his death, and fourteen years after his conviction in 1986, Frank Lee Smith was exonerated based on exculpatory DNA testing results.<sup>65</sup> Denes Pusoma, charged for killing a woman in a small Hungarian village on the evening of March 16, 1994, committed suicide after his requests for state compensation was rejected after his exoneration.<sup>66</sup> Although he was lucky enough to escape wrongful execution, Pusoma was arguably 'killed' by the disappointing responses by state agencies to those who suffer from wrongful conviction.

Wrongful executions are an affront to society. Nevertheless, the revealed erroneous executions may just be the tip of an iceberg. A large bulk of unidentified false executions might be buried underneath a seemingly functioning regime of capital punishment. Moreover, wrongful execution asides, the suffering of the innocents on death row itself may cause severe psychological trauma and extreme stress. This process, on its own right, can be an experience worse than execution.

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61. Japan Innocence & Death Penalty Information Center. *Death Demanded-Not Guilty*, [http://jiadep.org/styled-10/files/page395\\_1.html](http://jiadep.org/styled-10/files/page395_1.html) (last visited April 14, 2018).

62. Kyodo, *Death Row Inmate Seeking Retrial Over 1961 Wine-poisoning Murders Dies at 89*, THE JAPAN TIMES (Oct. 4, 2015), <http://www.japantimes.co.jp/news/2015/10/04/national/crime-legal/death-row-inmate-seeking-retrial-1961-wine-poisoning-murders-dies-89/#.WUfuf8flxC0>.

63. Peter Nagle & Richard Summerrell, *Aboriginal Deaths in Custody: The Royal Commission and Its Records, 1987-1991*, National Archive of Australia, 61-67 (2002), <http://guides.naa.gov.au/aboriginal-deaths-in-custody/index.aspx> (last visited Dec. 14, 2016).

64. Hime, *supra* note 56, at 202.

65. *Frank Lee Smith*, THE NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3644> (last visited Dec. 14, 2016).

66. *See* Toth, *supra* note 58, at 50-51.

### *D. Wrongful Executions That Are Never Exonerated*

The worst scenario for innocent defendants is if their innocence is never uncovered. In May 2003, Gallup Poll showed that 73 percent of Americans believed that an innocent man has been executed in the past five years.<sup>67</sup> Benson and his colleagues calculated the probability of wrongful executions in Texas, based on the 12 innocent prisoners exonerated from the death row among 1071 received the death sentence. They found that a 99% probability that Texas has executed innocent persons with a significance level at 0.0093370.<sup>68</sup> Unfortunately, five executed innocent prisoners<sup>69</sup>—Carlos Deluna,<sup>70</sup> Ruben Cantu,<sup>71</sup> David Spence,<sup>72</sup> Gary Graham,<sup>73</sup> and Cameron Todd Willingham<sup>74</sup>—so far have not been exonerated despite their claim for innocence. Furthermore, it is possible that a further group of eight executed prisoners recorded by DPIC—Larry Griffin, Joseph O'Dell, Leo Jones, Calade Jones, Troy Davis, Lester Bower, Brian Terrell, Richard Masterson

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67. See Lois Romano, *When DNA Meets Death Row, It's the System That's Tested*, WASH. POST (Dec. 12, 2003), available at <https://www.washingtonpost.com/archive/politics/2003/12/12/when-dna-meets-death-row-its-the-system-thats-tested/624c865d-3540-4b2f-8dff-1a9c1b773539/>.

68. See Daniel H. Benson et al., *Executing the Innocent*, 3 ALA. C.R. & C.L. L. REV. 1, 10-14 (2013).

69. See *id.* at 21; The NAACP Legal Defense and Educational Fund, *Death Row U.S.A. Spring 2016 (As of April 1, 2016)*, at 13-28 (2016) [http://www.naacpldf.org/files/publications/DRUSA\\_Spring\\_2016.pdf](http://www.naacpldf.org/files/publications/DRUSA_Spring_2016.pdf).

70. See James S. Liebman et al., *Los Tocayos Carlos*, 43 COLUM. HUM. RTS. L. REV. 711 (2012); Ed Pilkington, *The Wrong Carlos: How Texas Sent an Innocent Man to His Death*, THE GUARDIAN (May 15, 2012), available at <https://www.theguardian.com/world/2012/may/15/carlos-texas-innocent-man-death>; Nicole Megale, *Executing the Innocent: How to Remedy a State's Wrong*, 28 J.C.R. & ECON. DEV. 373 (2016).

71. Kenneth Williams, *Why It Is so Difficult to Prove Innocence in Capital Cases*, 42 TULSA L. REV. 241, 242-43 (2006); William W. Wilkins, *The Legal, Political, and Social Implications of the Death Penalty*, 41 U. RICH. L. REV. 793, 802-03 (2007).

72. *Did George W. Bush Execute an Innocent Person: David Wayne Spence?*, TEXAS MORATORIUM NETWORK (Jan. 8, 2012), <http://www.texasmoratorium.org/archives/1891>; RICHARD A STACK, *GRAVE INJUSTICE: UNEARTHING WRONGFUL EXECUTIONS*, at 64-69 (Potomac Books, 2013).

73. Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 91-92 (2003); see Peter T. Hofer and Ryan J. Maierson, *The Case of Gary Graham: After a Procedural Circus, a Pyrrhic Victory*, 2 TEX. F. ON C.L. & C.R. 69 (1995).

74. See Megale, *supra* note 70, at 375-76; Rachel Dioso-Villa, *Scientific and Legal Developments in Fire and Arson Investigation Expertise in Texas v. Willingham*, 14 MINN. J.L. SCI. & TECH. 817 (2013); Meghan J. Ryan, *Remedying Wrongful Execution*, 45 U. MICH. J.L. REFORM 261 (2012).

—were likely to be innocent given available evidence, which cast doubt on their conviction.<sup>75</sup>

Another study by Liebman and his research team indicated that, of 5,800 death verdicts that were imposed in 1,004 counties which retain the death penalty between 1973 and 1995, 41 percent of these death sentences had flaws, 10 verdicts were reversed on state post-conviction review, and 68 per 100 verdicts were reversed by either state or federal proceedings.<sup>76</sup> Additionally, in a recent groundbreaking research, Professor Samuel Gross concluded that at least another 4.1 percent of defendants sentenced to death in the United States are innocent, in addition to the exoneration of 138 death row inmates by legal authorities. Accordingly, as many as 141 innocent prisoners have not been exonerated.<sup>77</sup> We have notice that the 156 exonerations from the death row in the DPIC list were exonerations before execution. There has been no official record of exoneration after the execution of innocent prisoners in the United States.

Given existing research findings, we believe there are a large number of unexonerated executions in the United States. For instance, Jesse Joseph Tafero,<sup>78</sup> who was executed in 1990 for murdering patrol officers Philip Black and Donald Irwin in 1976, was found to be a wrongful conviction later on when Walter Rhodes confessed to shooting the officers.<sup>79</sup> In this case, Jesse's partner Sonia (Sunny) Jacobs was also sentenced to death in 1981,<sup>80</sup> although she had her conviction overturned after being incarcerated for 17 years and finally released in 1992. Until the current day, Jesse's case has not been exonerated despite numerous judicial campaigns calling for his exoneration. Ruben Cantu,<sup>81</sup> aged 17 at the time of crime, was executed in Texas on August 24, 1993, for violent thief, gang crimes and shooting a victim nine times to death. Growing evidence indicated, however, his

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75. *Executed but Possibly Innocent*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/executed-possibly-innocent> (last visited Nov. 9, 2016); *Wrongful Executions*, NATIONAL COALITION TO ABOLISH THE DEATH PENALTY, <http://www.ncadp.org/pages/wrongful-executions> (last visited Dec. 15, 2016).

76. See Liebman, *supra* note 4, at 80-81.

77. See Gross et al., *supra* note 40, at 7230.

78. *Tafero v. State*, 406 So.2d 89 (Fla. 1981).

79. Alejandra de la Fuente, *Questionable Membership*, PLAIN ERROR: THE OFFICIAL BLOG OF THE INNOCENCE PROJECT OF FLORIDA (Oct. 03, 2011), <http://floridainnocence.org/content/?tag=jesse-tafero>; Huma Qureshi, *Former Death Row Couple: 'Life Turned Out Beautifully'*, THE GUARDIAN (June 22, 2013), available at <https://www.theguardian.com/lifeandstyle/2013/jun/22/former-death-row-couple>.

80. *Jacobs v. State*, 396 So.2d 713, 715 (Fla.1981).

81. See *Cantu v. State*, 738 S.W.2d 249 (Tex. Cr. App. 1987).

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conviction and execution might be erroneous, and the real killer might be the witness who was 15 years old.<sup>82</sup>

From 1867 to the abolition of the death penalty for murder on July 14, 1976 in Canada, 1,481 people were sentenced to death and 710 were executed.<sup>83</sup> However, we know little about the execution of innocent defendants in Canada. Since 1993, wrongful convictions have been revealed and nonprofit organizations have assisted 21 offenders to secure their exoneration.<sup>84</sup> Of the five defendants who were wrongfully convicted for murder—David Milgaard, Donald Marshall Jr., Guy Paul Morin, Tomas Sophonow, and Clayton Johnson—three were convicted after 1976.<sup>85</sup>

Recognizing the inevitable and unpreventable risk of wrongful convictions, over 145 countries have abolished the death penalty in law or in practice worldwide. Though due process safeguards in criminal proceedings help reduce the risk of errors, wrongful execution cannot be entirely eliminated as far as the institution of capital punishment remains operative. With this global and comparative picture in mind, we will devote the rest of our paper to miscarriage of justice in capital cases in China.

## II. Wrongfully Convicted Capital Defendants in China

In this section, we seek to demonstrate the main features and process of wrongful conviction in capital cases in China. To be noticed, we reaffirm our stance on theoretical and empirical research only. Discussions in this paper are not qualified to be used as evidence for criticizing the criminal justice system, but reveal the fragility of the death sentence and how much more prudence is necessary because of the irrevocability of an execution.

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82. Lise Olsen, *Did Texas Execute An Innocent Man? The Cantu Case: Death and Doubt*, CHRON (Nov. 20, 2005), available at <http://www.chron.com/news/houston-texas/article/Did-Texas-execute-an-innocent-man-1559704.php>.

83. *Capital Punishment in Canada*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Capital\\_punishment\\_in\\_Canada](https://en.wikipedia.org/wiki/Capital_punishment_in_Canada) (last visited June 3, 2017); Margaret Dudgeon, *The Death Penalty in Canada: Ethnicity, Abolition, and the Current Debate*, in CAPITAL PUNISHMENT IN NEW PERSPECTIVES 275, 275 (Peter Hodgkinson ed., 2013); C. W. Topping, *The Death Penalty in Canada*, 284 THE ANNALS AM. ACAD. POL. AND SOC. SCI. 147, 147 (1952).

84. *Exonerations*, INNOCENCE CANADA, <https://www.aidwyc.org/cases/historical/> (last visited Dec. 18, 2016).

85. Susan Munroe, *Abolition of Capital Punishment in Canada*, THOUGHTCO (Mar. 25, 2016), available at <https://www.thoughtco.com/abolition-of-capital-punishment-in-canada-510121>.

### *Finding Death-Sentenced Innocents*

All case in our sample can be found published online. Nonetheless, no official source or agency in China systematically collects or reports wrongful convictions.<sup>86</sup> We use various approaches to collect the wrongly convicted cases. This is because we face the immense restriction of access to data; this is in particular true with regard to pre-1996 cases. Nongovernmental agencies publish comprehensive information on wrongful convictions in the United States and the United Kingdom, but have no counterpart in China. What we have so far are early-stage developments and efforts made by grassroots organizations. For instance, a group of lawyers created a website, *Exoneration Net* (*xiyuanwang* 洗冤网), which publishes reports and approximately 80 cases involving the miscarriage of justice.<sup>87</sup> In August 2015, another organization started to collect official judgments which might involve miscarriage of justice via a website named *Legalist* (*falyujia* 法律家). So far, they have published about 70 case decisions online.<sup>88</sup> Despite these important improvements, the information about wrongful conviction published by these two organizations remain limited in scope and depth.

We collect all cases involving miscarriage of justice, which are publicly available in various outlets—court website, online media, newspaper, journal, and blog.<sup>89</sup> We then verified the information of these cases using different approaches, while we scraped the available information outlets to locate the details of each and every case. Sometimes the details of these cases are missing, though, such as when the innocent defendants were arrested and the outcomes of appeal or retrial proceedings. With growing transparency in judicial affairs, furthermore, high-profile case decisions

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86. See Fang, *supra* note 33, at 30. Fang Peng (方鹏), *An Empirical Study of 33 Death Penalty Cases Reported to the Media*, (*Sixing Cuoan de Lixing Fenxi* 死刑错案的理性分析), 1 CRIM. L. REV. (Xingshifa Pinglun 刑事法评论) 26, (2006)

87. See *Guonei Yuanan* (国内冤案), XIYUANWANG (洗冤网), [http://www.xiyuanwang.net/html/list\\_1271\\_1.html](http://www.xiyuanwang.net/html/list_1271_1.html) (last visited June 1, 2017).

88. A company named Fa Lyu Jia Keji In. C. and founded in 2005 created the Website of Falyujia, which aimed to publish controversial documents. See Zhengyi Caipan Wenshu (争议裁判文书), <http://www.fae.cn/zy> (last visited June 1, 2017).

89. For example, several blogs have been used in the earlier stage of data collection. Yuanming Chenjiafeng de Boke (冤民陈家峰的博客), SINA, [http://blog.sina.com.cn/s/articlelist\\_1613344023\\_0\\_1.html](http://blog.sina.com.cn/s/articlelist_1613344023_0_1.html) (last visited Apr. 7, 2014); Suren Haiyang de Boke (俗人海洋的博客), SINA, [http://blog.sina.com.cn/s/articlelist\\_1266416375\\_1\\_1.html](http://blog.sina.com.cn/s/articlelist_1266416375_1_1.html) (last visited Mar. 3, 2014); 26 Nian Sifa Qiguan Jilin Sheng Li Qiuwei de Boke (26年司法奇观吉林省李秋伟的博客), SINA, [http://blog.sina.com.cn/s/articlelist\\_1420929140\\_0\\_1.html](http://blog.sina.com.cn/s/articlelist_1420929140_0_1.html) (last visited June 2, 2013).

involving wrongful convictions have been published by Chinese courts on their websites.<sup>90</sup> For these cases, information relating to the causes of wrongful convictions, the reasoning of courts and the compensation packages offered by the state are publicly available. Nevertheless, the search for detailed information in some other cases are more difficult, given the fact of uncovered details. Relying on published news reports to gather information, we re-edit the case in a time series to generate the features of each case according to the proceeding procedures, and then encode detailed information into database.

Death sentences in China are classified into death penalty with immediate execution and death penalty with suspension, though they both belong to the general category of capital punishment.<sup>91</sup> Thus, our sample of capital defendants include those who receive the death penalty with immediate execution (hereinafter as “Capital Execution”), and death penalty with suspended execution (hereinafter as “Capital Suspension”). All these cases in our sample were at least heard by the first-instance courts (these are intermediate people’s courts in China), and most of them appealed to the second instance for wrongful conviction.

We collected detailed information with regard to demographic characteristics such as the gender of the defendant, the details relating to various stages of judicial proceedings including arrest, prosecutorial charge, trial, conviction, release, execution, and exoneration. We also computed the duration of incarceration before release or exoneration via the date of arrest, exoneration or release, and also investigate the underlying reasons for wrongful conviction. Given the topic we concerned, we are not going to report every detail in this paper. For example, the role of torture for death-sentenced innocents is inescapably a common sense for wrongful conviction,

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90. Given the limitation of pages, we do not want to list all the adjudication files in this paper. In recent years, the SPC and provincial higher court published a lot of influential cases, particularly in Zhejiang, Fujian, Sichuan, Henan. For instance, an adjudication file regarding the innocent Zhang Gaoping/Zhang Hui, and Chen Jianyang et al. were published by Zhejiang Provincial Higher Court via their website. See Zhang Hui v. Zhejiang, 1 Comp. Zhe H.C. 2013 (2013浙法赔字第1号), <http://www.zjsfgkw.cn/Document/JudgmentDetail/2833931>; Zhang Gaoping v. Zhejiang, 2 Comp. Zhe H.C. 2013 (2013浙法赔字第2号), <http://www.zjsfgkw.cn/Document/JudgmentDetail/2833932> (last visited June 26, 2017); Zhejiang v. Chen Jianyang, Tian Weidong, et al., 3 RETRIAL CRIM. Zhe H.C. 2013 (2013浙刑再第3号), <http://www.zjsfgkw.cn/Document/JudgmentDetail/5005208> (last visited June 26, 2017).

91. See Trevaskes, *supra* note 35, at 488 (2013); Liu Siyu, *Capital Punishment with a Two-Year Suspension: China’s Gateway to Fewer Executions?*, 21 CRIME & CRIM. JUST. INT., 1, 3-4 (2013), <http://lawdata.com.tw/tw/detail.aspx?no=235584>; Michelle Miao, *Two Years between Life and Death: A Critical Analysis of The Suspended Death Penalty in China*, 45 INT. J. LAW CRIM. JUSTICE 26, 27-29 (2016); SUSAN TREVASKES, *THE DEATH PENALTY IN CONTEMPORARY CHINA*, at 5, 138 (Palgrave MacMillan 2012).

which has been admitted by Supreme People's Court.<sup>92</sup>

### ***The Profile of Capital Cases Involving Wrongful Convictions***

We have uncovered wrongful convictions in 25 provinces in China. None was found in the rest five provinces (Jiangsu, Ningxia, Xinjiang, Xizang, and Tianjin), because there were no relevant news reports to present wrongful capital case. We have discovered regional variance across different provinces. Hebei produced the largest number of wrongful convictions in capital cases, 13 in total. Henan ranks second on the list, with a total of 11 capital defendants wrongfully convicted. Wrongful conviction in capital cases in Gansu totals nine. We discovered only a single wrongful conviction in each of the following provinces: Beijing, Shandong, and Shanghai.

According to Table 2, 95.9 percent of the wrongfully convicted capital defendants were male (n=177), with only five female. Of the 122 wrongfully convicted defendants who received the death sentence including capital suspension and capital execution, 109 defendants (89.34%) have been officially acquitted. The rest of defendants in 13 cases have not been pronounced innocent by state authorities, but the defense attorney, academia or journalists believed that their conviction and sentence are wrong.<sup>93</sup> Over half of the defendants faced death penalty with immediate execution (n=65); defendants in the rest cases (n=57) received suspended death sentences.

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92. Wang Hong (汪红), *Yuanan Beihou Pubian Cunzai Xingxun Bigong*, FAZHI WANBAO (法制晚报), Nov. 29, 2013, available at [http://dzb.fawan.com/html/2013-11/29/content\\_466063.htm](http://dzb.fawan.com/html/2013-11/29/content_466063.htm) (In the journalist's report, a chief judge from the SPC admitted that every wrongful conviction originated from torture and forced confession).

93. See Luo Weihui (罗为辉), *Nongfu Sanci Beipan Sixing, Busha de Liyou* (农妇三次被判死刑, 不杀的理由), 7 *Xiandai Xiangzhen* (现代乡镇) 11 (2003), available at <http://www.ixueshu.com/document/bae061aa8adc19f9318947a18e7f9386.html> (the journalist Luo and defense attorney believe that Zhao Fenrong was wrongly convicted because of torture and unwilling confession); *Nongcun Funiu Sanci Beipan Sixing, Shaanxi Youjian Qiangxia Liuren An* (农村妇女三次被判死刑 陕西又见“枪下留人”案), May 11, 2003, available at <http://news.sohu.com/49/66/news209186649.shtml> (last visited July 5, 2017); Li Xianfeng (李显峰), *Hebei Gaoyuan Bohui Chen Guoqing Sharen Yian Shensu* (河北高院驳回陈国清杀人疑案申诉), *Beijing Qingnian Bao* (北京青年报) (June 30, 2016), A10, available at <http://news.163.com/16/0630/03/BQPEUOER00014AED.html> (The journalist indicated that the four defendants suffered torture, and an unknown clue revealed that someone had reported the real offender for their cases.); Guo Guosong (郭国松), *Sici Sixing Sici Daoxia Liuren* (四次死刑四次刀下留人), *Nanfang Zhoumo* (南方周末) July 31, 2003, available at <http://www.southcn.com/news/china/zgkx/200307311241.htm> (The journalist and scholars believe the case of Chen Guoqing and his peers were wrongly convicted and sentenced to death, and the retrial and acquittal imply the court's knowledge about their innocence.).

The largest number of these defendants were convicted for violent offenses. Among them, murder (n=70), robbery (n=38), and rape (n=2), assault (n=3) account for 92.63%. Other types of crimes include embezzlement (n=1), drug SSTM (n=5), explosion (n=2), and poisoning (n=1). The distribution of offences across the spectrum of capital offense are consistent with the general trend in China's capital sentencing practices that executions are reserved for serious violent offense. However, drug crimes might be under-represented in our sample with compared to the portion of death sentence in China. We found only five cases, which accounts for 4.1%. In recent years, alternatively, a previous research indicated that 35.8% of death sentences are drug crimes, based on data from three courts from 2005 to 2012.<sup>94</sup> A possible explanation could be that drug offences are less likely to be wrongfully convicted, compared with violent crimes.

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94. Moulin Xiong, *The Death Penalty after the Restoration of Centralized Review: An Empirical Study of Capital Sentencing*, DEATH PENALTY IN CHINA: POLICY, PRACTICE, AND REFORM 214, 228 (Liang Bin & Lu Hong eds., Columbia University Press 2016).

**Table 1 Death-sentenced Innocent in Provinces of China (1983-2012)**

Province	Capital Suspension		Capital Execution		Total	
	n	%	n	%	n	%
Anwei	3	42.86	4	57.14	7	5.74
Beijing	1	100	0	0	1	0.82
Chongqing	1	50	1	50	2	1.64
Fujian	3	37.5	5	62.5	8	6.56
Gansu	2	22.22	7	77.78	9	7.38
Guangdong	3	75	1	25	4	3.28
Guangxi	5	71.43	2	28.57	7	5.74
Guizhou	2	50	2	50	4	3.28
Hainan	4	100	0	0	4	3.28
Hebei	2	15.38	11	84.62	13	10.66
Heilongjiang	3	75	1	25	4	3.28
Henan	5	45.45	6	54.55	11	9.02
Hubei	3	50	3	50	6	4.92
Hunan	0	0	2	100	2	1.64
Inner Mongolia	1	50	1	50	2	1.64
Jiangxi	0	0	4	100	4	3.28
Jilin	3	75	1	25	4	3.28
Liaoning	2	50	2	50	4	3.28
Shandong	1	100	0	0	1	0.82
Shanghai	1	100	0	0	1	0.82
Shannxi	3	75	1	25	4	3.28
Shanxi	2	100	0	0	2	1.64
Sichuan	2	100	0	0	2	1.64
Yunnan	2	25	6	75	8	6.56
Zhejiang	3	37.5	5	62.5	8	6.56
Total	57		65		122	100

**Table 2 The Wrongly Convicted and Death-Sentenced Innocents (1983-2012)**

		Capital suspension		Capital execution		Total	
		n	Per cent	n	Per cent	n	Per cent
Death Sentence		57	46.72	65	53.28	122	100
Exoneration	No	5	38.48	8	61.54	13	10.66
	Yes	52	47.71	57	52.29	109	89.34
Gender	Male	53	92.98	64	98.46	117	95.9
	Female	4	7.02	1	1.54	5	4.1
Crimes	Murder	39	55.71	31	44.29	70	57.38
	Robbery	12	31.58	26	68.42	38	31.15
	Rape	0	0	2	100	2	1.64
	Assault	2	66.67	1	33.33	3	2.46
	Embezzlement	1	100	0	0	1	0.82
	Drug SSTM <sup>c</sup>	1	20	4	80	5	4.1
	Explosion	2	100	0	0	2	1.64
	Poisoning	0	0	1	100	1	0.82
Law Period	1983-1996	10	29.41	24	70.59	34	27.87
	1997-2006	33	49.25	34	50.75	67	54.92
	2007-	14	66.67	7	33.33	21	17.21

Note: <sup>a</sup> Capital suspension = death penalty with suspension, same as tables below;

<sup>b</sup> Capital execution = death penalty with immediate execution, same as tables below;

<sup>c</sup> Drug SSTM means Drug Smuggling, Selling, Trafficking, and Manufacturing stipulated in Article 347 of the 1997 PRC Criminal Law.

Judicial error in capital cases needs to be evaluated against the context of the vicissitudes of legal and policy developments in China. For this purpose, we divide the recent history of criminal justice in China into three stages: 1983-1996, 1997-2006, and 2007-present. This is due to two landmark events. First, on March 17, 1996, the first Amendment of Criminal Procedural Law (hereinafter the "CPL") was enacted and took effect on January 1, 1997. The CPL, for the first time, stipulated that each and every capital defendant must be represented by counsels.<sup>95</sup> Prior to 1997,

95. Criminal Procedure Law of the People's Republic of China, art. 34 (1996) (If there is the possibility that the defendant may be sentenced to death and yet he has not entrusted

defendants subject to the death penalty were not guaranteed legal representation.<sup>96</sup> This was especially true in the 1980s during the Hard Strike Campaigns. Ma Zhilan and Wang Jinsheng, for example, were not represented by lawyers throughout capital proceedings. Another significant change was the restoration of the review by China's Supreme People's Court via amendment to the Law on People's Courts on October 31, 2006.<sup>97</sup>

Table 2 demonstrates two critical findings. On the one hand, 54.92% of the death sentences were imposed on those wrongful convicted defendants between 1997 and 2006. Only 17.21% of these cases were decided by courts after 2007. Despite the percentage distributed in three stages, we believe the death-sentenced innocents prior to 1997 are much more than other stages. The low representative rate of wrongful conviction between 1983 and 1996 is just the limited access to earlier cases, as absence of approaches such as public media or online technology to reveal enough information regarding wrongful conviction. On the other hand, there has been a steady growth in the number of wrongfully convicted defendants sentenced to the suspended death penalty. This number doubled while immediate execution rates halved during the third stage. Suspended death sentences seem to be an easy compromise between parties seeking the death penalty and courts reluctant to impose the ultimate punishment.<sup>98</sup> Ironically, the restoration of review power to the SPC, and consequently, the rise of the suspended death penalty, have curbed incidents of wrongful executions in China. Yet the wrongfully convicted remain subject to long-term incarceration.

### ***C. Wrongful Incarceration***

To the public, the court must equitably try criminal case under the principle of punishing the guilty, while release the guiltless without

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anyone to be his defender, the People's Court shall designate a lawyer that is obligated to provide legal aid to serve as a defender.)

96. Hong Lu & Terance D. Miethe, *CHINA'S DEATH PENALTY: HISTORY, LAW, AND CONTEMPORARY PRACTICES*, at 65 (Routledge 2007).

97. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xiugai <Zhonghua Renmin Gongheguo Zuzhifa>de Jueding (全国人民代表大会常务委员会关于修改<中华人民共和国人民法院组织法>的决定), Oct. 31, 2006, available at [http://www.gov.cn/gongbao/content/2007/content\\_494409.htm](http://www.gov.cn/gongbao/content/2007/content_494409.htm); Zuigao Renmin Fayuan Guanyu Tongyi Xingshi Sixing Hezhunquan Youguan Wenti de Jueding (最高人民法院关于统一行使死刑案件核准权有关问题的决定), Dec. 28, 2006, available at <http://www.court.gov.cn/fabu-xiangqing-1077.html>.

98. Liu, *supra* note 91, at 1, 14; Trevaskes, *supra* note 35, 487-90 (2013); Miao, *supra* note 91, at 27-28.

hesitation. Nevertheless, the belief regarding judicial behavior was only assumed in the theoretical and textual agenda. We are living in a world where judicial professionals forget frequently the essential principles of justice such as presumption of innocence, due process, beyond reasonable doubt, and fruit of the poisonous tree. Instead, the actual response to suspects the justice applied is the presumption of guilt,<sup>99</sup> where the motivation of arrest, prosecution, and conviction against the suspect is simply to find the sin instead of the guiltless. This section highlights four critical findings to strengthen our current understanding of how wrongfully convicted prisoners are incarcerated in China.

First, most innocent defendants who are sentenced to death spend a substantial period of time under until their eventual release, execution or death. On average, the innocent defendants who are sentenced to death would be wrongfully incarcerated for approximately 8.7 years (3161.3 days). Of the 122 innocents who received capital punishment, Chen Man,<sup>100</sup> who was sentenced to the suspended death penalty from Haikou Intermediate Court for arson and murder on December 25, 1992, was known as the longest incarceration period totaling 8,436 days.<sup>101</sup> And the minimum length of incarceration was 53 days in the case of Liu Zhongming. Liu, aged 23, was convicted on May 17, 1996, for raping an 8-year-old girl and wrongfully executed on May 29, 1996,<sup>102</sup> despite evidence presented by his defense lawyer demonstrating Liu's innocence. The hasty execution of Liu was

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99. Yi Yanyou, *Arrest as Punishment: The Abuse of Arrest in the People's Republic of China*, 10 PUNISHMENT & SOC'Y 9 (2008) (indicating "the use of arrest as punishment is the primary form of abuse inflicted by law enforcement"). Ouyang Junwei (欧阳俊伟), Youzui Tuiding Tuichu Cuonan ("有罪推定"推出错案), 16 检察风云 (Jiancha Fengyun) 39 (2004), available at <http://www.ixueshu.com/document/71ef5c6e81ede727318947a18e7f9386.html> (author indicated that how the judicial activity carried out under the guidance of presumed guilt, including arrest and torture); Chen Yongsheng (陈永生), Woguo Xingshi Wupan Wenti Toushi : Yi 20 Qi Zhengjing Quanguo de Xingshi Yuanan wei Yangben de fenxi (我国刑事误判问题透视——以20起震惊全国的刑事冤案为样本的分析), 3 中国法学 (Zhongguo Faxue) 45 (2007), available at <http://www.ixueshu.com/document/48a59e7cf6e3a03b.html> (arguing "presumption of guilt is the critical reason for wrongful conviction").

100. Zhejiang v. Chen Man, (2015) Zhe Xing Zai Zi Di Er Hao (2015浙刑再字第2号), Chen Man Fan Guyi Sharen Zui Zaishen Xingshi Panjueshu (陈满犯故意杀人罪再刑事判决书) (Feb 4, 2016), available at <http://wenshu.court.gov.cn/content/content?DocID=f65c2a44-26f0-4574-96f19b6c845d5d73&KeyWord=陈满>.

101. Xinhua, *Man Gets Compensation for Wrongful Conviction*, CHINA DAILY (May 13, 2016), available at [http://www.chinadaily.com.cn/china/2016-05/13/content\\_25267511.htm](http://www.chinadaily.com.cn/china/2016-05/13/content_25267511.htm).

102. Zhang Jian (张剑), Pingyuan Fengxiang (平冤风向), 21 CAIJING (财经) (Aug. 13, 2015), available at <http://magazine.caijing.com.cn/20150803/3938992.shtml>.

within merely 56 days from his arrest. In another high-profile case, Huge Jiletu was wrongfully executed within 61 days from his arrest. Liu has not been exonerated until the present day while Huge was exonerated in 2014, 18 years after his wrongful execution.<sup>103</sup>

Second, the innocent prisoner normally has no right to bail during their pretrial detention. On average, among 117 identifiable cases, the innocent prisoners are incarcerated for 571.6 days from the date of arrest to the date of receiving first-instance verdict, and 324.5 days from the date of first-instance verdict to the date of receiving appellate decision from provincial higher people's courts. That is, most of innocent prisoners wait for about two years for the first-instance trial proceedings, and then another year for appellate outcomes. To be stressed, the two years more incarceration is only nominally the first round of conviction and appeal, because there are more recursive retrial as mentioned in next parts. In our sample, Han Jianxun received the longest pretrial detention. He was charged with murdering his wife on May 26, 1988, and detained for 5,853 days before receiving his first-instance conviction and suspended death sentence on December 28, 2013.<sup>104</sup> Chen Man spent the longest waiting period under detention prior to appellate hearing. As a result of trial at the second instance, he waited for 1,618 days to obtain a maintenance for the original conviction and sentence of capital suspension.<sup>105</sup>

Third, even if proceedings are initiated to investigate their cases, most of the innocent prisoners remain incarcerated in detention centers or prisons for years. On average, they spend 2,348.9 more days (6.5 years) prior to release. For example, the case of Nian Bin,<sup>106</sup> who was wrongfully convicted, was heard by courts at different levels eight times. Four of the eight hearings resulted in immediate execution, and three resulted in an order for retrial by the Supreme People's Court and Zhejiang Provincial Higher

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103. See Jiang, *supra* note 12, at 260-64.

104. Han Jianxun was once bailed on August 4, 1994, after being detained 6 years since July 16, 1988, when Heilongjiang Higher Court concluded that the evidence to prove his case was problematic in the year of 1992. However, he was again arrested on 18 March 2004 since the victim's relatives appealed to higher authority for help. See Lyu Boxiong (吕博雄), "Take Mingan Zhengyi" Jiaodian Rengwu Dinglun ("塔河命案"争议焦点仍无定论), ZHONGGUO QINGNIAN BAO (中国青年报) (May 19, 2014), available at [http://zqb.cyol.com/html/2014-05/19/nw.D110000zgqnb\\_20140519\\_2-07.htm](http://zqb.cyol.com/html/2014-05/19/nw.D110000zgqnb_20140519_2-07.htm).

105. See Xinhua, *supra* note 101.

106. Fuzhou v. Nian Bin, (2012) Min Xing Zhong Zi Di 10 Hao (2012闽刑终字第10号), *Nian Bin Toufang Weixian Wuzhi Zui Ershen Xingshi Fudai Minshi Panjueshu* (念斌投放危险物质罪二审刑事附带民事判决书), Aug. 23, 2014, available at <http://www.fjcourt.gov.cn/Page/Court/News/ArticleTradition.aspx?nrid=1e77d372-0ce6-4144-a7ca-92b3d40ee753>.

court respectively. Nevertheless, it took the provincial court only two days to review Nie Shubing's case and arranged the execution of the defendant.<sup>107</sup> Another innocent defendant Liu Zhongming was executed on the same day when Hubei Provincial Higher Court confirmed his death sentencing.<sup>108</sup>

**Table 3 Wrongful Incarceration (days) before Release: pretrial and penalty**

Procedures	Capital suspension				Capital execution				Total			
	n	min.	mean	max.	n	min.	mean	max.	n	min.	mean	max.
All Procedures	57	429	3468.4	8436	65	53	2892.0	8057	122	53	3161.3	8436 *
First Instance	56	119	701.4	5853	64	41	458.0	2834	117	41	571.6	5853 **
Second Instance	46	3	351.4	1618	61	12	304.2	1399	107	3	324.5	1618
After Second Instance	46	70	2471.5	6860	59	2	2283.8	6270	105	2	2348.9	6860

Note: The first instance and second instance means the first verdict in respective procedures.

<sup>a</sup> Innocents missed because of impossible date or not applicable;

<sup>b</sup> The significance test conducted is two-sample t test for one tail.

\* $p \leq 0.1$ ; \*\* $p \leq 0.05$ .

Fourth, the length of wrongful incarceration between prisoners subject to the suspended death sentences and the death penalty by immediate execution differs significantly. Innocent prisoners who received the death sentence with immediate execution, on average, spend fewer days (576.4 days,  $p=0.066$ ) than those who are sentenced to the suspended death penalty. In particular, the term of pretrial detention at first instance are significantly different between those sentenced to the death penalty by immediate execution and those sentenced to the suspended death penalty, reflecting a gap of 243.4 days ( $p=0.021$ ), which suggests that innocent defendants who

107. Hebei Sheng Provincial Higher Court, (2016) Ji Fa Pei 1 Hao (2016冀法赔1号), Nie Shubin An Guojia Peichang Shu (聂树斌案国家赔偿书) (Mar. 31, 2017), [http://www.sohu.com/a/131452942\\_662168](http://www.sohu.com/a/131452942_662168).

108. According to the report, Liu was sentenced to the death penalty and executed within 54 days for rape of an 8-year-old girl. Liu was arrested on April 6, 1996, and received a verdict of capital punishment on May 19 without legal representation. On May 29, Liu received a verdict of a death sentence including an approval decision from Hubei Provincial Higher Court. Just a moment later, he was executed at 9:05am despite his claim of innocence and lethal torture all the time. See Zhang Jian (张剑), 54 Tian, *Yige Gongmin bei Zhixing Sixing* (54天, 一个公民被执行死刑), CAIJING (Aug. 20, 2015), available at <http://yuan.chuang.caijing.com.cn/2015/0820/3951032.shtml>.

are wrongfully convicted and sentenced to the death penalty by immediate execution wait a shorter period before trial. Admitted or not, this phenomenon seemingly reflect that killing the innocents is easier than saving the innocents' life.

Numerical analysis made the public hard to accept the truth, but this is true to the death-sentenced innocents. It is commonly believed, particularly for the innocents themselves and their family members and defense attorney, that in China the judiciary will acquit the innocent without delay. However, the reluctance of the authorities to release the innocent suggests the opposite. It is thus very difficult for the innocent defendants to seek exoneration, in particular if they receive the death penalty with immediate execution.

#### ***D. Exoneration and Release***

Under the ideal of the rule of law, the exoneration of capital defendants should result in an unconditional and direct acquittal. However, the reality is quite different. Although acquittals granted by courts in general lead to release, it is possible to obtain release with a guilty verdict.

We categorize exoneration into different types, based on the outcomes of the processes. In our dataset, 13 innocents have never been exonerated till the present day, nine of which are still under incarceration. For the rest of four innocents, an innocent convicted, Liu Zhongming, was wrongfully executed;<sup>109</sup> two innocent defendants, Huang Aibing<sup>110</sup> and Li Zhiping<sup>111</sup>

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109. *Id.*

110. See Chunyu Mengmeng de Boke, Yuanjia Cuoan zhi Huang Aibing “Guyi Sharen” An (冤假错案之黄爱斌“故意杀人”案), [http://blog.sina.com.cn/s/blog\\_4dcb41ac0101np9v.html](http://blog.sina.com.cn/s/blog_4dcb41ac0101np9v.html) (last visited Apr. 10, 2017); He Chunlin Weiquan Doushi, Hubei Huang Aibing “Guyi Sharen An” (湖北黄爱斌“故意杀人”案), <http://bbs.tianya.cn/post-828-547450-1.shtml> (last visited Apr. 10, 2017).

111. Li Zhiping, an innocent falsely charged for murdering a famer in Dingzhou Hebei, was sentenced to death penalty by Baoding Intermediate Court on November 6, 1984. Disappointed to his conviction and sentence, Li appealed to Hebei Provincial Higher Court. His sentence was revoked and Hebei Court returned his case to the original court at first instance for retrial on December 26 1984. Nevertheless, Baoding Court sentenced him to death penalty with immediate execution on September 2, 1985, again, and was revoked again on March 20, 1986. In the last stage of his case, Baoding Court return his case to the local public security office, and he was bailed out on July 26, 1990 because of the evidence problem against his guilt. Despite his release 25 years ago, he was never officially exonerated, and the public security office was also stop investigating his offences. Wang Xing (王鑫), Wang Dan (王丹), Hebei Nongmin ceng Lianghuo Sixing jun bei Chexiao Jingfang 32 Nian wei Zhongzhi Zhencha (河北农民曾两获死刑均被撤销 警方32年未终止侦查), 搜狐新闻

have been released on bail; Ren Wenhui has already been release on August 11, 2013, after finishing his prison service with sentencing commutation. In the group of the exonerated innocent defendants, six innocent defendants died before their exoneration. One innocent defendant, Ma Zhilan, died in a detention center; another defendant, Wang Yewen,<sup>112</sup> was bailed out but died before his exoneration; and four wrongfully-convicted innocent defendants—Nie Shubing, Hugu Jiletu, Tengxing Shan, and Wei Qingan—were executed. Ninety-two innocents were under incarceration when they received exoneration; two received exoneration after completing their prison terms, and nine were released under informal procedures, including parole, supervision residence and bail.

In our dataset, 71 innocents (58.2%) were released with acquittal verdicts from courts, after a long march to fight for their innocence. Nevertheless, some of other innocents were released not because the admission of innocence by the judiciary, but the abusive pending trial while bail (*qubao houshen*) or supervision residence (*jianshi juzhu*) as a temporary release.<sup>113</sup> Pretrial procedures such as bail and supervision residence were abusively used in the cases of 16 innocents (13.12%). Nine innocents' charge were dismissed by procuratorate, as the court reluctant to exonerate the innocents directly.

To sum up, in at least 25 cases, the defendants obtained informal release before the court ever reached a formal acquittal after the long, drawn out proceedings. Another five innocent defendants were released as a result of completing their prison terms (see Table 4). Three innocents Wang Benyu, Hao Jinan, and Zhao Zuohai served full prison term as a result of sentence commutation from capital suspension, whom verdicts took effective as the innocents gave up their opportunity of appeal. In two other cases the court dismissed a capital charge and replace it with a charge for a non-capital offense. Nevertheless, the wrongful incarceration in the two cases are far

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(Sohu Xinwen) (Dec. 23, 2015), [http://www.sohu.com/a/50135185\\_119703](http://www.sohu.com/a/50135185_119703); Chen Mo (陈默), 32 Nian Jiebu liao an (32年结不了案), ZHONGGUO QINGNIAN BAO (中国青年报) (Dec. 30 2015), [http://zqb.cyol.com/html/2015-12/30/nw.D110000zgqnb\\_20151230\\_1-10.htm](http://zqb.cyol.com/html/2015-12/30/nw.D110000zgqnb_20151230_1-10.htm).

112. Li Xiaolin (李肖霖), Wang Yewen Sharen An Bianhu Fanpan Ji (王业文杀人案辩护翻盘记), 3法律与生活 (Falyu yu Shenghuo) 23 (2016) <http://mall.cnki.net/magazine/Article/FYSH201606008.htm>; Lyu Juan (吕娟), Henan Taikang Zaixian Wang Zifa An (河南太康再现王子发案), 10法律与生活 (Falyu yu Shenghuo) 11 (2016) <http://www.doc88.com/p-9092093485590.html>.

113. Li, Enshen, *The Abuse of Guaranteed Pending Trial in the Chinese Criminal Process: A Violation of International Human Rights Law*, 9 *INDONESIAN J INT'L L.*, 71, 79-100 (2011); Li Qi, *The Justification and Standardized Operation of Residential Surveillance at a Designated Residence*, 2 *CHINA LEGAL SCI.* 75 (2014).

more extensive than their final lenient limited limitations. For example, Leng Guoquan,<sup>114</sup> who was compelled to confess after torture, was sentenced by Dandong Immediate Court to the death penalty with immediate execution for smuggling and selling heroin in the amount of 320 grams in January 1999. After an appeal to Liaoning Higher Court, his conviction was overturned and sent back to Dandong Court for retrial. Eventually he was convicted of illegal possession and sentenced to six-month prison term plus a fine in the amount of thirty thousand yuan.<sup>115</sup>

Although most of innocents were released, the price for them were so unaffordable given the long incarceration and ineffective proceedings. Chinese courts are inclined to uphold verdicts during in first-instance trials and retrials, at least not prone overturning from the original verdict when face potential errors.<sup>116</sup> Moreover, there has been a culture of presumption of guilt, which explains the long proceeding and the extensive incarceration suffered by the innocents.<sup>117</sup> Under the iron-triangle relation among the police, the procuratorate, and the courts,<sup>118</sup> courts are prone to convicting rather than acquitting the defendants. This is particularly so during first and second instances.<sup>119</sup> Every decision on acquittal and release can be reached

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114. Zhang Yuxue (张玉学), Leng Guoquan Shedu Sidu Shoushen, Cheng Zao Xingxun Bigong (冷国权涉毒四度受审, 称遭刑讯逼供), 新京报 (Xin Jingbao) Oct. 16, 2013, A20, [http://epaper.bjnews.com.cn/html/2013-10/16/content\\_471432.htm?div=-1](http://epaper.bjnews.com.cn/html/2013-10/16/content_471432.htm?div=-1); Zhang Yuxue (张玉学), Liaoning Shangren Leng Guoquan Shedu An Bei Xuanpan Wuzui (辽宁商人冷国权涉毒案被判无罪), 新京报 (Xin Jingbao) Nov. 29, 2013, A35, [http://epaper.bjnews.com.cn/html/2013-11/29/content\\_480916.htm?div=-1](http://epaper.bjnews.com.cn/html/2013-11/29/content_480916.htm?div=-1).

115. Jiang, *supra* note 12, at 135 (2016); Jiang Na, *Death Penalty Reforms in China: Lessons from Wrongful Convictions?* 5 TSINGHUA CHINA L. REV. 126 (2013).

116. Wang Chao (王超), Xuzhi de Chengxu: Dui Xingshi Ershen Gongneng de Shijian Fenxi (虚置的程序: 对刑事二审功能的实践分析), 19 Zhongwai Faxue (中外法学) 188, 199 (2007), <http://www.ixueshu.com/document/dca1012f6092c620.html> (arguing, “on average level, the second trial maintain 71.85% of the verdict at first instance from 1990 to 2003”); Wang Yukui, Xingshi Ershen Chengxu Xuzhihua de Misi yu Kuangzheng (刑事二审程序“虚置化”的迷思与匡正), 14 时代法学 (Shidai Faxue) 92, 96 (2016) <http://www.ixueshu.com/document/48b4e6cab3e21b3a318947a18e7f9386.html> (the author indicating that about 70% to 75% of adjudication in first instance were uphold at the second instance as an appeal trial from 1998 to 2013).

117. See Jiang, *supra* note 12, at 84 (2016) (the author believes that the presumption of guilt is deeply entrenched in Chinese legal culture); Belkin, *supra* note 20, at 296 (the author indicated that in Imperial China, there was a presumption of guilt that grew out of a respect for and obedience to the office of official investigators).

118. See Jiang, *supra* note 24, at 406.

119. See Jiang, *supra* note 12, 110, 241-42 (the author indicated an institutional passive attitude to handle the innocent case, involving police, prosecutor, and judge).

only after multiple rounds of retrials by intermediate and higher courts, despite the pressure by social media.

**Table 4 Exonerate and Release the Innocents: Acquittal and Other**

Vindication	Types	Capital suspension		Capital execution		Total	
		n	%	n	%	n	%
Exonerated Method	Died under Detention before Exoneration	0	0	1	100	1	0.82
	Died before Exoneration	1	100	0	0	1	0.82
	Executed before Exoneration	0	0	4	100	4	3.28
	Complete Incarceration before Exoneration	1	50	1	50	2	1.64
	Parole, Bail, Supervision Residence before Exoneration	6	66.67	3	33.33	9	5.74
	Incarcerated when exonerated	44	47.83	48	52.17	92	77.05
	Incarcerated, not exonerate yet	5	55.56	4	44.44	9	7.38
	Executed, not exonerate yet	0	0	1	100	1	0.82
	Released, not exonerate yet	0	0	3	100	3	2.46
	Released Method	Bail	6	42.86	8	57.14	14
Supervision Residence		1	50	1	50	2	1.64
Parole		2	50	2	50	4	3.28
Acquittal		35	49.3	36	50.07	71	58.2
Charge Dismiss		4	44.44	5	55.56	9	7.38
Complete Incarceration		1	33.33	2	66.67	3	2.46
Lenient Crime Change <sup>a</sup>		3	75	1	25	2	1.64
Not Applicable	5	33.33	10	66.67	15	12.3	

Note: <sup>a</sup> The crime punishable by death penalty was turned over and convicted for a lighter crime with limited imprisonment.

### III. Ineffective Trials and Justice Delayed

As “justice delayed is justice denied,” the International Covenant on Civil and Political Right requires all state members to abide by the minimum guarantees as “to be tried without undue delay.”<sup>120</sup> Despite lack of clear definition of “delay,” the wrongfully convicted with death sentences may reveal essential features of the trial procedure in China. In this section, we explore how innocent defendants are wrongfully convicted and why exonerations are reached only after the innocents are incarcerated for years. Given all innocent defendants in this study were tortured,<sup>121</sup> convictions can mainly be attributed to the judges’ attitudes that the evidence can prove the cases beyond reasonable doubt. Thus, our main concerns are repeated retrials at various levels.

#### *Ineffective Appeal and Complaint*

Every wrongful conviction reflects a conflict between convict the guilty and free the guiltless, though, the judicial behavior is actually easy to reach a correct decision. The problem for the incorrect verdict is not from the fact the judge found but from the judicial operation in reality. If the suspect was innocent, the chain of evidence for guilt should be easy to break, since false fact cannot collaborate with all other details. Nevertheless, media reports revealed that the judiciary is aware of various problems even before they mete out the wrongful verdicts. Thus, the root of conviction was not because the court had not identified the flawed evidence, but rather they would not acquit the innocent based on presumption of innocence. Given the institutional culture and triangle relationship amongst main criminal justice agencies, the guilty verdict was reached as a result of coordination and cooperation in anti-crime battles, under the command by political and legal affairs committees.<sup>122</sup>

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120. G.A. Res. U.N.HRO, 2200A (XXI), art. 14.c, International Covenant on Civil and Political Rights (Dec. 16, 1966) (In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (c) To be tried without undue delay).

121. Huang, *supra* note 12, at 1224-25; He Jiahong & He Ran, *Empirical Studies of Wrongful Convictions in Mainland China*, 80 U. CIN. L. REV. 1277, 1287-88 (2013); Zhang Zhouvi (张舟浛). Li Enshu (李恩树). Jihu Suovou Yuanan Douvou Xinxun Bigong (几乎所有冤案都有刑讯逼供), 21 CAIJING (财经) (Aug. 3, 2015), <http://yuanchuang.caijing.com.cn/2015/0813/3946668.shtml>.

122. See He, *supra* note 20, at 673; Jiang, *supra* note 12, at 62, 89-93, 143-151, 224-29, 233-41.

In China, the CPL empowers collegiate panels consisting of three judges in second instance to overturn guilty verdicts and then reached acquittal decisions, if they identify fabricated facts or insufficient evidence.<sup>123</sup> However, second-instance courts normally either impose an order for retrial or a confirmation of the original verdict, instead of an acquittal.<sup>124</sup> Failing to exercise their power to correct false convictions, second-instance courts in China have been criticized for the ineffective relief they grant to those wrongfully convicted.<sup>125</sup>

As indicated in Table 5, only five innocent capital defendants at first-instance level were immediately acquitted after they appealed to the provincial higher court. Others waited for a long time under incarceration due to the reluctance of appellate courts to grant an acquittal. Among the 119 defendants who appealed to provincial higher courts, 85 verdicts were found to be problematic in the courts' assessment of evidence. Although the courts should immediately acquit the defendant given the evidence were not proved beyond reasonable doubt, they returned 80 cases to the original courts for retrials. Such verdict of retrial took up 65.57 percent of the cases as a result of the second instance. Taking She Xianglin's case as an example, Jingzhou Intermediate People's Court sentenced him to the death penalty with immediate execution on October 13, 1994. After he appealed to Hubei Provincial Higher Court, the court ordered a retrial on January 6, 1995, declaring the original verdict invalid due to "unclear facts and insufficient

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123. C.P.L., art. 189, Mar. 17, 1996 (After hearing a case of appeal or protest against a judgment of first instance, the People's Court of second instance shall handle it in one of the following manners in light of the different situations:

(1) if the original judgment was correct in the determination of facts and the application of law and appropriate in the meting out of punishment, the People's Court shall order rejection of the appeal or protest and affirm the original judgment.

(2) if the original judgment contained no error in the determination of facts but the application of law was incorrect or the punishment was inappropriately meted out, the People's Court shall revise the judgment.

(3) if the facts in the original judgment were unclear or the evidence insufficient, the People's Court may revise the judgment after ascertaining the facts, or it may rescind the original judgment and remand the case to the People's Court which originally tried it for retrial.)

124. More cases described in previous literatures account for the abusive retrial. See Jiang, *supra* note 12, 42-57.

125. See Chen Weidong(陈卫东) & Li Fenfei(李奋飞), Xingshi Ershen“Fahui Choangshen”Zhidu zhi Chonggou (刑事二审“发回重审”制度之重构), 1 Faxue Yanjiu (法学研究) (2004) <http://www.ixueshu.com/document/d2ebf07aa4c034db.html>; Kuang Kai & Liang Bin, *Efficiency and Justice and Fairness: An Empirical Analysis of Criminal Appeals in Hunan Province, China*, 21 EUROPEAN J. CRIMINAL POL'Y & RES. 565 (2015).

evidence.”<sup>126</sup>

In contrast, the second-instance courts confirmed the death sentence of 19 innocent defendants. In these cases, although the defendants did not commit the crime, the collegiate panel believed that the evidence fully support the conviction. Another 15 innocent defendants received reduced punishments, from the death penalty with immediate execution to the suspended death penalty or from the suspended death penalty to life imprisonment, after the court recognized the convictions at the first instance were flawed. Among the 19 cases, 68% (13 innocents) of them received a capital suspension verdict and 32% (6 innocents) received a capital execution verdict at first instance. A lesser sentence at second instance than the death penalty with immediate execution thus help them escape execution. This practice of reducing the punishment to a lesser degree, when the evidence is found to be in doubt by courts, has become a routine practice.<sup>127</sup> Instead of presumption of innocence, the sentencing reduction become another operation to solve the erroneous conviction in China’s criminal justice practices.<sup>128</sup>

In general, appellate courts refuse to revoke the guilty verdicts made by court at first instance, especially when the cases would result in executions. In other words, the appellate courts fail to correct the miscarriage of justice.<sup>129</sup> Five innocent defendants were unfortunately executed, though all

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126. See He, *supra* note 20, at 673-675; Jiang, *supra* note 12, at 41-44.

127. See Jiang, *supra* note 12, at 98, 118, 120, 160, 166, 215, 268.

128. By comparison with two extreme verdict consisting of death execution and exoneration, sentencing reduction has become a sign of leaving the verdict leeway (liuyou yudi 留有余地) and lenient punishment for doubtful conviction (yi zuiyizui congqing 疑罪从轻). To some extent, it reflects a judicial reconciliation between punishment and protection, when the judge relegalized the possibility of error and then make a decision to innocents. See Jin, *supra* note 33, at 144-45 (demonstrating “leeway and lenient punishment” become significant in 11 among 19 cases, despite the case have no lenient circumstance, to satisfy the requirement of charge and innocence); Chen Ruihuai(陈瑞华), Liuyou Yudi de Panjue: Yizhong Zhide Fansi de Sifa Caipan Fangshi (留有余地的判决: 一种值得反思的司法裁判方式), 4 法学论坛(Faxue Luntan) 26 (2010) <http://www.ixueshu.com/document/afd1c363a0945690.html>; Liu Xianquan (刘宪权), Kejian Yuanjia Cuoan Yingdang Zunxun de Sange Yuanze (克减冤假错案应当遵循的三个原则), 5 法学(Faxue) 61(2013) <http://www.ixueshu.com/document/a8c408fcf0a29be0318947a18e7f9386.html> (indicating “lenient punishment for doubtful conviction” popularize in wrongful conviction as an absence of presumption of innocence).

129. Xiong Moulin (熊谋林), Wang Xinlan (王馨兰) and Chen Qian (陈强), Heli Yunyong Jianshi Juzhu: Cong Cuoan de Fahui Chongshen Fansi Shenqian Jiya, 1979-2014 (合理运用监视居住: 从错案的发回重审反思审前羁押, 1979-2014), 5 Shandong Daxue

of them readdressed their injustice, even the moment of execution. There might be more wrongfully executed defendants who have never been exonerated and never been discovered by scholars or reported by the media. For example, a possible innocent defendant Dong Wei has not been regarded as wrongfully convicted so far.<sup>130</sup> In some of the exonerated cases in our dataset, the defendants were at risk of execution until last-minute retrial decisions made by courts. In Ding Zhiquan's case, he received a death penalty with immediate execution on August 30, 1996, for murdering his wife, an offense which he did not commit. One day before his arranged execution, the Heilongjiang Provincial Higher Court decided to retry his case and halted the execution.<sup>131</sup>

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Xuebao (山东大学学报) 45, 48-49 (2017) <http://www.cnki.com.cn/Article/CJFDTotal-SDZS201705004.htm> (the authors identifying that only 4.82% of cases were acquitted at second instance, while 25% were upheld, and another 58.77% were returned for retrial among 228 wrongful conviction from 1979 to 2014).

130. Dong Wei, an aged 27 man, was sentenced by Yan An Intermediate Court to death penalty with immediate execution for murdering on May 2, 2001. On April 27, 2002, his defense lawyer Zhu Zhanping was informed abruptly in that Shanxi Higher Court has already upheld Dong's death sentencing and would be executed on April 29, 10:30 a.m. By recognizing such great decision, Zhu tried his all best to arrive Beijing by train and complain this case to Supreme Court to readdress Dong's case could be a legitimate self-defense. Four minutes before his execution, vice chief judge Li Wuqing of criminal division in the Supreme Court issued a suspension order of his execution by phone call to the judge who supervised his execution. Nevertheless, after this suspension, Shanxi Higher court make a new verdict on August 26, 2002, to uphold the death sentencing in Yan an intermediate court, though his case suffered a heavy problematic evidence. On September 5, 2002, Dong was executed finally, leaving a bunch of doubt if his actions was self-defense or homicide. His case was edited as movie "Hold the Execution" by Zhang Yimou and Tianbo. See Jiang Xue (江雪), Qiangxia Liuren Ganzai Xingxing 4 fenzhong Qian (Hold Execution Arrived in 4 minutes Before Execution (枪下留人赶在行刑4分钟前)), Huashang Bao (华商报) (July 12, 2002), <http://news.sohu.com/45/61/news202116145.shtml> (last visited Mar. 25, 2017); Xie Yongqiang (谢勇强), Shaxi Qiangxia Liuren An Paicheng Dianying (陕西“枪下留人”案拍成电影), Huashang Bao (华商报) (Jan. 6, 2015), <http://ehsb.hsw.cn/shtml/hsb/20150106/211959.shtml> (last visited Mar. 25, 2017).

131. Gao Shuang (高爽), Sancu Panjue Sancu Chongshen Chaoqi Jiya 11Nian Huangru Geshi (三次判决三次重审 超期羁押11年恍如隔世) (Dec. 9, 2003), <http://news.qq.com/a/20031219/000185.htm> (last visited Mar. 25, 2017).

**Table 5 Court Trial in Proceedings, Verdict and Reason**

		Capital suspension		Capital execution		Total	
		n	%	n	%	n	%
Appeal	No	3	5.26	0	0.00	3	2.46
	Yes	54	94.74	65	100.00	119	97.54
Verdict of Second Instance	Return	33	57.89	47	72.31	80	65.57
	Maintain First Instance	13	22.81	6	9.23	19	15.57
	Change Sentencing	3	5.26	12	18.46	15	12.30
	Acquit	5	8.77	0	0.00	5	4.10
	Not Applicable	3	5.26	0	0.00	3	2.46
Verdict Reason of Second Instance	Fact/Evidence Problem	38	66.67	47	72.31	85	69.67
	No problem	13	22.81	6	9.23	19	16.39
	Improper Sentencing	3	5.26	12	18.46	15	12.30
	Not Applicable	3	5.26	0	0.00	3	1.64
Verdict Taking Effective	No, incarcerated or died in detention center	34	59.65	34	52.31	68	55.74
	Yes, execution/sending to prison	23	40.35	31	47.69	54	44.26
Last Effective Penalty	Imprisonment, <3 years	1	4.35	1	3.23	2	3.7
	Imprisonment, 15 years	0	0	1	3.23	1	1.85
	Life Imprisonment	3	13.04	4	12.9	7	12.96
	Capital Suspension	19	82.61	20	64.52	39	72.22
	Capital Execution	0	0	5	16.13	5	9.26

### ***Abusive Hold Execution and Sentencing Reduction***

According to the CPL, death sentences must be reviewed by courts at higher levels. Suspended death penalty must be also reviewed and approved by provincial higher courts. Nevertheless, the review process of death penalty with immediate executions has changed over time.<sup>132</sup> The provincial

132. Kandis Scott, *Why Did China Reform its Death Penalty?* 19 PAC. RIM L. & POL'Y J. 63, 65-67 (2010) (indicating possible reasons behind China's legal reform in death penalty, "the influences include international forces and domestic factors such as media, changed circumstances, compassion, and politics"); Andrew Scobell, *The Death Penalty in Post-Mao China*, 123 CHINA Q. 503 (1990) (the author introduced the background of death review in

higher courts were authorized to review most death penalty cases from 1980 to 2007. Since 2007, when the review power was recalled back to the SPC, all death sentences must be submitted to SPC for review.<sup>133</sup> The centralized review is the last valve to stop wrongful execution,<sup>134</sup> but the absence of last valve might eventually lead to abuse of execution against innocents.<sup>135</sup> Most of the wrongful death sentences in our data sample occurred in the era when the review power was held by provincial higher courts.<sup>136</sup> The cases of the five wrongfully executed defendants were all reviewed by provincial higher courts, particularly in a time when “hard strike” campaigns were widespread in China.<sup>137</sup> The other 117 innocents were lucky in comparison with the executed offenders as they were spared from execution; they, however, were also subject to prolonged detention during pretrial, trial, post-trial, and retrial proceedings.

In our dataset, the death sentences for 54 innocent prisoners were in effect and were upheld by second instance courts or commuted to lesser punishment through the review process. In the rest 68 cases, the first-instance decisions were overturned by appeals and reviews, whom verdicts never took effective in the long process of vindication. Precisely which type of punishment the defendant received had little impact on her final destiny-extended incarceration. If there is, the only difference would be the conditions and places of imprisonment, whether this would be the detention center or the prison.

Judges are reluctant to exonerate the innocent defendants even upon discovery of flawed evidence. Alternatively, judges may sentence the

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the 1980s and its changes from law); Xiong Xuanguo, *Death Penalty System Reform in China*, 3 CHINA LEGAL DEV. Y.B. 83 (2009) (the author, the ex-vice-president of SPC, reviewed the whole background of death penalty's review system reform from 1949 to 2007); Guo Zili, *On China's Death Penalty System*, 2 PEKING U. J. LEGAL STUD. 30 (2010) (the author introduced the details of the changing law and policy in review system for capital sentencing from 1979 to 2007).

133. See Xiong, *supra* note 94, at 217-18; Shao Xin (邵新), Sixing Fuhe Quan Xiafang yu Shouhui de Sanwei Sikao (死刑复核权下放与收回的三纬思考), 17 Zhongwai Faxue (中外法学), 585, 586-87(2005) <http://www.ixueshu.com/document/77750a818c2db757.html>.

134. See Jiang, *supra* note 12, at 210 (arguing “the (SPC) review procedure is the last line of defense for preventing potential errors and correcting all errors in death sentences”).

135. See Huang, *supra* note 12, at 1242; Jiang, *supra* note 12, at 209-16.

136. Teng Biao, *Chinese Death Penalty: Overview and Prospect*, 1 E. ASIAN L.J. 85, 89-90 (2010) (the author introduced the motivation of changing capital sentencing review system, and the provincial authority prior to 2007 produced notorious wrongful executed cases).

137. See Huang, *supra* note 12, at 1220-23; Jiang, *supra* note 12, at 44-46 (Springer 2016); He, *supra* note 12, 66-67; Liu, *supra* note 11; see Wang, *supra* note 13, at 188-93.

innocent prisoner to a lesser punishment.<sup>138</sup> In the Chinese criminal justice practice, this operation was called “hold executions (*daoxia liuren*)” and “lighter sentences for the unclear convictions (*yizui congqing*).”<sup>139</sup> Xu Hao, a 22-year-old primary-school teacher, was sentenced to the suspended death sentence by Xiangfan Intermediate Court in April 1999 for murder in 1997.<sup>140</sup> The first-instance judge in Xiangfan refused to convict him given flawed evidence and dismiss the case on March 19, 1999. In contravention to the rule against double jeopardy, merely one month later, Xu was recharged and sentenced to the suspended death penalty. His sentence was approved on June 25, 1999. The crucial reason the case was recharged and sentenced was the decision by the political and legal committee. Interviewed on October 21, 2016, the presiding judge Fang Jinlong over Xu’s case said, “his adjudication was really good”, and said “We had been in doubt, so we thought it is better to give a suspended death sentence without killing him.”<sup>141</sup> Xu is still incarcerated with a reduced 20-year imprisonment. His father died in sorrow and his mother, during her petition, was detained by the authorities in a psychiatric hospital.

As Table 5 indicates, Xu Hao’s case is only a tip of the iceberg of the wrongfully convicted capital defendants. They are misfortune indeed, being alive but suffered psychological torture. Even more case during the criminal proceedings were abusively subjected to sentence reduction rather than release. After sentencing reduction, thirty-nine innocent defendants received eventually the suspended death penalty, seven life imprisonment and three fix-term imprisonment. Among the 31 innocents who were sentenced to the death penalty with immediate execution, 26 innocents had their sentences reduced to lesser punishments.

In the absence of wide recognition of presumption of innocence in criminal proceedings,<sup>142</sup> courts are inclined to strike a compromise between

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138. See Huang, *supra* note 12, 1239-40 (the author indicated the notion of “Sentencing Lenient Punishment when the Evidence is Insufficient”).

139. See Wang, *supra* note 34.

140. Liu Hu (刘虎), Jiqianqian Jiuceng Xiangguo Fang Xu Hao Chulai (几年前就曾想过放徐浩出来), Xin Kuaibao (Xin Kuaibao) (Mar. 20, 2012), T04, <http://news.21cn.com/caiji/roll/a/1999/0419/00/11210796.shtml> (last visited Mar. 31, 2017).

141. Wang Zhuochun (王灼春), Nanzi yin Jubaoxin Beipan Sharen Ruyu 20 Nianhou Anjian Chongqi Fucha (男子因举报信被判杀人 入狱20年后案件重启复查) (Oct. 21, 2016), <http://news.sohu.com/20161021/n470932815.shtml> (last visited Mar. 28, 2017).

142. The argument whether China incorporated the presumption of Innocence have been discussed in English literature. Some believe that China legislated it by the Article 12 the CPL revision 1996 added, “No person shall be found guilty without being judged as such by a People’s Court according to law.” Nevertheless, more scholars believed that no article

acquittals and full sentences.<sup>143</sup> This approach adopted by courts can be explained by the lack of judicial independence in China, though not executed, but its detriment in over-extended incarcerations to innocents become unaffordable and hence deserve serious critics. The 40 cases in which the defendants received reduced sentences but were acquitted eventually indicate that lesser punishment rather than exoneration is essentially a form of miscarriage of justice as well.

### ***Recursive Trials and Delayed Justice***

Those who were not subject to wrongful executions nonetheless struggled with repetitive appeals and retrials, going through cycles of hope and despair when their decisions are upheld and then returned for retrials. As indicated in Tables 2 and Table 5, only 4.1% of them were acquitted by appellate courts after being incarcerated for 896.1 days (2.5 years) on average. The remaining 93.4% of innocent defendants were kept in detention centers or prisons for another 6.5 years, awaiting the outcomes of their releases and exonerations, a long process consisting of recurrent cycles of approvals and order-for-retrials. For cases resulting in the death sentence with immediate execution, the Supreme People's Court may disapprove the sentence, returning it to provincial higher courts for retrials. The latter may in turn transfer the case to intermediate courts for retrial again. This process substantially delays the exoneration of the defendants.

Table 6 highlighted two issues: how many times (verdicts) the defendant is convicted by courts and, on average, for how long the defendant was incarcerated. The two indicators could be used to measure the reluctance of courts and the abuse of due process. Our data suggests that the defendant could be convicted as many as nine times at different level of court, as shown in Hu Dianjie Case. Hu was charged for murder on March

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regarding presumption of innocence existed in law. See Margaret K. Lewis, *Presuming Innocence, or Corruption, in China*, 50 COLUM. TRANS'L. L. 287, 321-328 (2012); Harro von Senger, *The Presumption of Innocence Principle in the People's Republic of China and in the West*, at 148 CHANG FA-LO, NIGEL N.T. LI, TSAI-YU LIN EDS., LEGAL THOUGHTS BETWEEN THE EAST AND THE WEST IN THE MULTILEVEL ORDER (Springer, 2016); MIKE McCONVILLE, SATNAM CHOONGH, PINKY CHOY DICK WAN, ERIC CHUI WING HONG, IAN DOBINSON & CAROL HONES, CRIMINAL JUSTICE IN CHINA: AN EMPIRICAL INQUIRY, 13-15 (Edward Elgar, 2011).

143. Liu Xianquan, Yizui Congqing shi Yuanan Chansheng de Huogen (“疑罪从轻”是产生冤案的祸根), 6 Faxue (法学) 16, 17 (2010) <http://www.ixueshu.com/document/c3667610c2b71577.html> (arguing “Lesser punishment in doubtful conviction is a consequence pursuing negative balance between problematic conviction and avoiding wrongful execution.”).

4, 2001, and received the suspended death sentences four times, all of which were overturned on appeals and return for retrials by Henan Higher Court due to flawed evidence.<sup>144</sup> When this case was heard the ninth time, the Puyang Procuratorate dropped his charge.<sup>145</sup> Hu was detained for 3,233 days (9 years) until he was temporarily released on household surveillance on January 19, 2011. Despite the lack of reliable evidence, Henan Higher Court never acquitted his conviction rather.

On average, innocent defendants were convicted 3.68 and 4.40 times when they are sentenced to the suspended death sentence and the death penalty with immediate execution respectively. Innocent defendants who received the death penalty with immediate execution were convicted even more than those sentenced to the suspended death sentence. This implies that the court would be much more reluctant to acquit the former type of wrongly convicted defendants. For another thing, whether the verdict coming into effect has connection with the trial times, because the effective verdict means the end of proceedings while noneffective verdict means the continuousness of proceedings. In our analysis, the innocents who received non-effective verdicts (4.39 times) and incarcerated in detention center were tried one more time significantly, than whom with effective verdict and then sent to prison (3.64 times). The reason for such gap is simply because the effective verdict means that court at different levels believed that the innocent defendants are guilty and then close the trial, which imply a very low possibility to recycle the trial process. By contrast, if the verdict not come into force yet, the innocent defendants were still in the course of criminal proceedings and being high possibility to retry the case as a result

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144. Li Li (李丽). Yu Yi Sharen Xianfan 4 Ci Beipan Sihuan 4 Ci Beipan Sichuan 4 Ci Bei Fahui Chongshen (豫一杀人嫌犯4次被判死缓 4次被发回重审), *Zhongguo Qingnian Bao* (中国青年报) (Nov. 7, 2011), 03, [http://zqb.cyol.com/html/2011-11/07/nw.D110000zqnb\\_20111107\\_1-03.htm](http://zqb.cyol.com/html/2011-11/07/nw.D110000zqnb_20111107_1-03.htm) (last visited Nov. 12, 2016); Gu Wuming (谷武民), Yizui Conggua shouhairan Hu Dianjie Huopei 85 Wan (“疑罪从挂”受害人胡电杰获赔85万), *Dahe Bao* (大河报) (Feb. 19 2016), A06, [http://newspaper.dahe.cn/dhb/images/2016-02/19/A06/dha06219c\\_h.pdf](http://newspaper.dahe.cn/dhb/images/2016-02/19/A06/dha06219c_h.pdf) (last visited Nov. 12, 2016).

145. The dropped charge, also called charge dismiss, in Hu’s case was a representative of more cases, which is popular in other noncapital cases, since the court would not like to acquit the case directly. See Lyu Juan (吕娟), Yuanan de Cesu Guaiquan (冤案的撤诉怪圈), 20 *法律与生活* (Falyu yu Shenghuo) 15, (2010) [http://www.wanfangdata.com.cn/details/detail.do?\\_type=perio&id=flysh201020006](http://www.wanfangdata.com.cn/details/detail.do?_type=perio&id=flysh201020006); Zhao Xiaoqi (Zhao Xiaoqi), Chehui Qisu, “Qiangjie Mingan Xianfan” de Jiannan Huijia Lu (撤回起诉,“抢劫命案嫌犯”的艰难回家路), 12 *法律与生活* (Falyu yu Shenghuo), 8 (2013) <http://www.ixueshu.com/document/8ba4246917fe19b6318947a18e7f9386.html>.

of recursive trials (*xunhuan shenpan*).<sup>146</sup>

**Table 6 Number of Verdicts and Incarcerations Regarding Innocents**

		Death Sentencing						Taking Effective							
		Capital suspension			Capital execution			No, under trial			Yes, Execution/prison				
		n	Mean	Std.E.	n	Mean	Std.E.	n	Mean	Std.E.	n	Mean	Std.E.		
N. Verdicts	Range 2-9	57	3.68	0.22	65	4.40	0.23	**	69	4.39	0.23	53	3.64	0.21	**
Incarceration 2 Verdicts		15	4039	691.4	12	3421	957.0		11	2143	524.7	16	4879	776.5	***
Days by Verdict Times	3 verdicts	16	3380	546.1	14	2364	533.1	*	16	1811	244.1	14	4157	644.5	***
	4 verdicts	14	2943	604.4	8	1901	670.7		16	1748	297.5	6	4740	1109.3	***
	5 verdicts	2	3717	2306.5	12	3562	429.5		5	2059	286.9	9	4432	460.7	***
	6 verdicts	7	3402	585.2	12	3169	208.1		12	2895	221.9	7	3872	478.5	**
	7 verdicts	0	—	—	1	1589	—		1	1589	—	0	—	—	
	8 verdicts	3	3525	466.4	5	2606	139.8	**	7	2851	254.5	1	3650	—	
	9 verdicts	0	—	—	1	3233	—		1	3233	—	0	—	—	

The significance test conducted is two-sample t test for one tail.

\*  $p \leq 0.1$ ; \*\*  $p \leq 0.05$ ; \*\*\*  $p \leq 0.01$ .

The period of incarceration varies substantially. The difference of

146. Chen Weidong (陈卫东) & Li Fenfei (李奋飞), Xingshi Ershen“Fahui Choangshen”Zhidu zhi Chonggou (刑事二审“发回重审”制度之重构), 1 Faxue Yanjiu (法学研究) (2004) <http://www.ixueshu.com/document/d2ebf07aa4c034db.html>. In China, the recursive trials instead of vindicating the wrongful conviction at higher level court have been concerned for years, entitling “weird proceedings” (in Chinese “*susong guaiquan*, 诉讼怪圈”), “vicious justice circle” (in Chinese “*sifa guaiquan* 司法怪圈”), “reverse procedure” (in Chinese “*chengxu daoliu*, 程序倒流”), “Play Football (in Chinese “*ti piqiu*, 踢皮球”), shift responsibility onto others (in Chinese “*Xianghu Tuiwei*相互推诿”). See Chen & Li, *supra* note 125, at 115; Zhang Guifeng, Fahui Chongshen: Yige Sifa Guaiquan (发回重审，一个司法怪圈), 24公民与法治 (Gongmin Yu Fazhi) 26 (2011) <http://www.ixueshu.com/document/7d80d766ad839dc3318947a18e7f9386.html>; Li Weihua (黎伟华), Falyu Ruhe Tiaochu Fahui Chongshen De Guaiquan (法律如何跳出“不断重审”的怪圈), 2民主与法制 (Minzhu Yu Fazhi) 4 (2004) <http://news.sina.com.cn/c/2004-02-19/10281841107s.shtml>; Li Enshu (李恩树), Zheng Xiaoqiong (郑小琼), Bei Lanyong de Fahui Chongshen (被滥用的发回重审), 7 政府法制 (Zhengfu Fazhi) 22 (2011) <http://www.ixueshu.com/document/8e4a33a4f56fef95318947a18e7f9386.html>.

incarceration between effective and noneffective verdicts indicates that the trial process is unnecessary long, but the close of criminal trial means a much longer incarceration. On average, the innocent defendants were incarcerated 2,143 days (6 years) if the verdict not came into force, but 4,879 days (13.6 years) if the verdict came into force without new trial. In another word, the worse thing for the innocent is the loss of opportunities fighting his conviction, in which the innocent is much harder to be released once his verdict came into effect. Specifically, the period of incarceration varies substantially. Most innocent defendants were tried by courts at different levels and were convicted 2 to 6 times. Ten innocent defendants were tried more than seven times. This suggests that, on average, the higher courts have returned these cases to first-instance courts more than two times. Given the recursive trials process, simultaneously, the innocent defendants wait for eight to 23 years (8,436 days) until their release (see Table 3). Despite the long incarceration and delayed justice, the most incarcerated innocents must be about to be vindicated. The only question is the specific date of exoneration or release; however, the vindication as soon as possible must be very hard without presumption of innocence and reliable regime to guarantee the right of the innocents. An unquestionable truth is the judicial behavior deteriorate the woeful incarceration if the criminal justice in China reject to recognize that the delayed justice is the denied justice.

The case of Nian Bin is a pertinent example to explain how justice was delayed and denied in cases involving wrongful conviction. On the evening of July 27, 2006, two children were poisoned to death. The police believed that their neighbor, Nian Bin, was responsible for the deaths and arrested him on August 7, 2006. He was charged in February 2007 for administering poison and was sentenced to the death penalty with immediate execution on February 1, 2008 by Fuzhou Intermediate Court. On appeal in December 2008, Fujian Higher Court reversed the judgement and returned it to the Fuzhou Intermediate Court for retrial on the grounds of unclear and insufficient evidence. On June 8, 2009, Nian was sentenced to death once again by Fuzhou Intermediate Court. Nian appealed again and on April 7, 2010, the Fujian Higher Court confirmed his death sentence and submitted it to the Supreme People's Court for review. On October 28, 2010, the Supreme People's Court ordered a retrial and returned the case to Fujian Higher Court. On May 5, 2011, the Fujian Higher Court reversed his sentence and returned it to Fuzhou Intermediate Court for a retrial. On November 7, 2011, the Fuzhou Intermediate Court, for the third time, imposed the death penalty with immediate execution on Nian. Nian appealed to Fujian Higher Court the third time. His sentence was finally acquitted on

August 22, 2014, eight years after he was arrested.<sup>147</sup> Attorney Li Xiaolin said, during the last trial by Fujian Higher Court, all witnesses were subpoenaed to testify. This reflected the progress of justice.<sup>148</sup> Despite his innocence and acquittal, the police officer restarted the investigation process by registered his name as suspect, and restricted him going abroad.<sup>149</sup> On December 25, 2014, Nian Bin filed a petition to request state compensation in the amount of 15 million. Consequently, he received only 1.12 million from Fuzhou Intermediate Court, which was confirmed by Fujian Higher Court on December 30 2015.<sup>150</sup>

#### IV. Changing Criminal Policy and Law

For years, we always believe that the court must fairly and objectively convict the real offender and acquit the innocent as the textual principles, especially the presentation of real offender. However, neither the court run fairly, nor the confession of real offender change the judicial decision against the blameless.<sup>151</sup> Although wrongful convictions account for a small percentage of the millions of criminal offences Chinese police registers per year, they are increasingly well-known to the public in recent years because

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147. Zhe Jiang v. Nian Bing, 10 CR. & CIV'L ZHE H.C. 2012 ((2012)闽刑终字第10号), <http://www.fjcourt.gov.cn/Page/Court/News/ArticleTradition.aspx?nrId=1e77d372-0ce6-4144-a7ca-92b3d40ee753>; Tian Shaohui, Chinese man compensated for 8-year wrongful custody (Feb. 17, 2015), [http://news.xinhuanet.com/english/china/2015-02/17/c\\_134003624.htm](http://news.xinhuanet.com/english/china/2015-02/17/c_134003624.htm).

148. CCTV, Nian Bing: Cong Sixing Dao Wuzui (念斌：从死刑到无罪) (Sept. 13, 2014), <http://news.cntv.cn/2014/09/13/VIDE1410586738746314.shtml>; Yang Jie, *The Development of China's Death Penalty Representation Guidelines: A Learning Model Based on The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 42 HOFSTRA L. REV. 589, 608 (2013) (arguing "China has recently made progress by listening to the voices of defense attorneys").

149. Cao Jingjing (曹晶晶), Wuzui Nianbing Rengbei Xianzhi Chujing ("无罪"念斌仍被限制出境), Nanfang Dushibao (南方都市报) (Nov. 25, 2014), A19, [http://epaper.oeeee.com/epaper/A/html/2014-11/25/node\\_2749.htm](http://epaper.oeeee.com/epaper/A/html/2014-11/25/node_2749.htm).

150. Fujiansheng Gaoji Renmin Fayuan (福建省高级人民法院), Fujiansheng Gaoji Renmin Fayuan Dui Nianbing Shenqing Guojia Peichangan Yifa Zuochu Peichang Jueding (福建省高级人民法院对念斌申请国家赔偿案依法作出赔偿决定), Dec. 30, 2015, <http://www.fjcourt.gov.cn/Page/Court/News/ArticleTradition.aspx?nrId=34939924-1e96-44f9-bd a7-e113e81e958e>.

151. See Acker, *supra* note 32, at 1067 (arguing "The criminal law would be enforced reliably, equitably, and proportionately against offenders, and only offenders in a perfectly just and error-free world. Unfortunately, we do not live in such a world.").

of media coverage. Media reports play a significant role in the exoneration of innocent prisoners for some cases, but public pressure sometimes miscarries and fails. For instance, the real offender Liu Tiejun confessed to the police in 1998. Yet, Liu Kaili, the wrongfully convicted had not been released until the China Central Television reported his case in 2009.<sup>152</sup> Similarly, social media is important in disclosing the information to the public and putting pressure on courts to exonerate the innocent, but the mass media failed in saving the innocents. For instance, an innocent defendant Chen Guoqing in Hebei province was incarcerated for 10 years awaiting trials and retrials of his case for seven times. After his conviction, Chen was incarcerated for more than 22 years despite his family and defense attorney fought to exonerate him. Early on, *Beijing Youth Newspaper* found an important witness to testify for Chen's innocence. However, Hebei Provincial Higher Court rejected his family's petition on June 29, 2016.<sup>153</sup>

Public opinion plays an important role in pressurizing judges to dismiss false charges or acquit the innocent defendants in some of cases. Yet the most important basis for exoneration is criminal law, judicial policy, and criminal justice. Our analysis about recurrent trials and retrials, as mentioned above, indicates that the power to make decision is held by judges rather than reporters. In other words, public opinions were not enough to motivate the courts to exonerate the defendants. To the innocents and their exoneration, the key issues are simply when the wrongful conviction happened, what reason to make a judgment whether they are innocent, and who admitted the judicial errors and did something right. In this section, we explain why wrongful convictions happen and why innocent defendants are exonerated or released from the perspectives of criminal policy and legal changes.

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152. Wang Ye (王野), Beipan Guyi Sharen Fuxing 17 Nian, Zhenxiong Fufaqian Liu Yizu: Tabei Yuanwang le (被判故意杀人服刑17年真凶伏法前留遗嘱: 他被冤枉了), *华商晨报 (Huangshang Chengbao)* (Oct. 10, 2013), B01, [http://news.ifeng.com/gundong/detail\\_2013\\_10/10/30174399\\_0.shtml](http://news.ifeng.com/gundong/detail_2013_10/10/30174399_0.shtml) (last visited Apr. 20, 2017).

153. Sun Jing (孙静), Zhenxiong Jubaozhe Wei Si Sharenfan Mingyuan 19 Years (“真凶” 举报者为四杀人犯鸣冤19年), *Beijing Qingnian Bao (北京青年报)* (Feb. 1, 2016), A07, [http://epaper.yinet.com/html/201602/01/content\\_181159.htm?div=-1](http://epaper.yinet.com/html/201602/01/content_181159.htm?div=-1); Li Xiaofeng (李显峰), Hebei Gaoyuan Bohui 22 Nianqian Chen Guoqing Sharen Yian Shensu (河北高院驳回22年前陈国清杀人疑案申诉), *Beijing Qingnian Bao (北京青年报)* (June 30, 2016), A10, <http://finance.sina.com.cn/sf/news/2016-06-30/101735403.html>.

### *Hard Strike and Its Changes*

Few criminal polices are important as 'hard strike' to explain wrongful convictions in post-Mao era.<sup>154</sup> Demanding harsh and speedy criminal punishment, hard strike campaigns produced numerous wrongful convictions.<sup>155</sup> The four rounds of 'hard strike' campaigns took place in 1983, 1996, 2001, 2010 respectively have widespread and profound impact on the operation of criminal justice system in China for decades.

As Figure 1 indicates, peaks of arrest of innocent defendants reflect the vicissitudes of criminal justice policies caused by the "hard strike." For example, the highest annual number of arrests in our dataset occurred in 1994 and 1995; 14 and 11 innocent defendants, respectively, were arrested and sentenced to death in the following years. The 1994 Work Report of the Supreme People's Court indicated clearly that "we have to insist on the hard strike principle, and severely punish crimes against social order and corruption."<sup>156</sup> Again, in 1995, the president of the Supreme People's Procuratorate (hereinafter SPP) Zhang Siqing, reported that it was imperative for the criminal justice authorities to "strengthen the war of hard strike, maintain social stableness."<sup>157</sup>

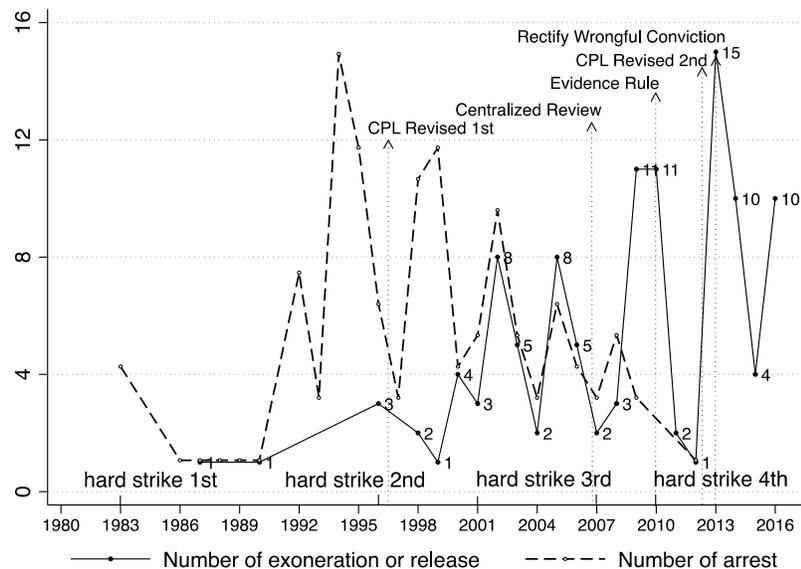
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154. See Trevasques, *supra* note 35, at 486; Stephen B. Davis, *The Death Penalty and Legal Reform in the PRC*, 1 J. CHINESE L. 303, (1987)

155. Xie Wangyuan (谢望原), Sixing Cuoan Zhuyao Chengyin Yu Fangfan (死刑错案主要成因与防范), 3中外法学 (Zhongwai Faxue) 585 (2015) <http://www.cnki.com.cn/Article/CJFDTotal-WFXZ201503008.htm> (arguing, "hard strike failed in controlling the post-crime wave, and lead to a bunch of wrongful conviction").

156. Reng Jianxin (任建新), Zuigao Renmin Fayuan Gongzuo Baogao (最高人民法院工作报告), Renmin Ribao (人民日报) (Mar. 27, 1994), 3, <http://www.china.com.cn/ch-meet/ziliao/renda-eightjie/renda-82-8.htm>.

157. Zhang Siqing (张思卿), Zuigao Renmin Jianchayuan Gongzuo Baogao (最高人民检察院工作报告), (Mar. 12, 1996), [http://www.spp.gov.cn/gzbg/200602/t20060222\\_16383.shtml](http://www.spp.gov.cn/gzbg/200602/t20060222_16383.shtml).



**Figure 1** Number of judicial behavior against the innocent yearly (1983-2016)

Despite the “hard strike” campaigns, Figure 1 indicated that the number of innocent capital defendants who were arrested declined gradually since 1994, while wrongfully convicted individuals were increasingly exonerated or released. If it is true, this trend matches the execution statistics across non-profit organizations, which indicated China has witnessed a continuous reduction in last decades.<sup>158</sup> This might be evidence that when there are more executions, there will be more wrongful executions.<sup>159</sup> In order to curb errors in adjudication and executions, thus, the best way is to lower the number of executions. This may be part of the rationale behind the criminal policy of “killing fewer, killing cautiously.”<sup>160</sup>

158. David T. Johnson, & Franklin E. Zimring, *THE NEXT FRONTIER: NATIONAL DEVELOPMENT, POLITICAL CHANGE, AND THE DEATH PENALTY IN ASIA*, at 236 (Oxford University Press, 2009); Cornell Center on the Death Penalty Worldwide, Death Penalty Database: China, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=China> (last visited May 18, 2017).

159. See Gross et al., *supra* note 40, at 7230.

160. See Susan Trevaskes, *The Death Penalty in China Today: Kill Fewer, Kill Cautiously*, 48 *ASIAN SURVEY* 393 (2008); Stephen Noakes, “Kill Fewer, Kill Carefully” *State Pragmatism, Political Legitimacy, and the Death Penalty in China*, 61 *PROBL. POST-COMMUNISM* 18 (2014); Jiang Su, *Kill Fewer and Kill Cautiously? A Critical Review of Death*

Nevertheless, to be noticed that there was no single incidence of wrongful convictions discovered after 2012 was not an indication that there have been no wrongful convictions which result in death sentences in the past five years. Rather, if there are wrongful convictions, the lapse of time has been insufficient for these cases to be discovered and reported by the media. There is an incubation period of ten years on average for wrongful convictions to be publicly known, as shown in Table 3 and Figure 1. Every wrongful conviction in China takes a long time to be proved as a result of judicial error or miscarriage of justice, which is a similar with phenomenon in other countries.<sup>161</sup> That is, the wrongful conviction after 2012 must wait years, even ten more years, to identify their erroneous conviction.

China's criminal justice practices has been oscillating between 'hard strike' and 'kill fewer'. China's punitive policies, during hard strike campaigns, insists on retribution and revenge.<sup>162</sup> Meanwhile, the process of penal moderation and international pressures motivated a reconsideration of China's death penalty policies.<sup>163</sup> In particularly, the digital age promotes transparency. Before 2006, political propaganda and the lack of judicial independence bred wrongful convictions and difficulties in the exoneration of innocent defendants. In recent years, China marches towards greater judicial independence and leniency. Luo Gan, the secretary of the Communist Party of China Central Political and Legal Affairs Committee, launched the *Rule of Balancing Leniency and Severity (kuan yan xiang ji)* on December 5, 2005. This ends the two-decades of 'hard strike' campaigns.<sup>164</sup>

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*Penalty Reforms in China*, 2 PEKING U. LAW J. 277 (2014); Stephen Minas, *Kill Fewer, Kill Carefully: An Analysis of the 2006 to 2007 Death Penalty Reforms in China*, 27 UCLA PAC. BASIN L.J. 36 (2010).

161. Jon B. Gould & Richard A. Leo, *The Path to Exoneration*, 79 ALB. L. REV. 325, 356 (2016) (Through 460 samples of wrongful conviction in U.S., the author indicated that "the time between conviction and exoneration and determined that it take a median 159 months, or more than 13 years, for a factually innocent defendant to be exonerated.").

162. See Johnson & Zimring, *supra* note 120, at 302; Børge Bakken, *The Culture of Revenge and The Power of Politics: A Comparative Attempt to Explain The Punitive*, 1 J. POWER 169 (2008); Børge Bakken, *China, A Punitive Society?* 6 ASIAN J. CRIMIN. 33 (2011); Liang Bin, *Severe Strike Campaign in Transitional China*, 33 J. CRIMINAL JUST. 387 (2005); Michelle Miao, *Capital Punishment in China: A Populist Instrument of Social Governance*, 17 THEOR. CRIMINOL. 233(2013); Susan Trevaskes, *Courts on The Campaign Path: Criminal Court Work in The 'Yanda 2001' Anti-crime Campaign*, 42 ASIAN SURVEY 673 (2002); Susan Trevaskes, *Yanda 2001: Form and Strategy in A Chinese Anti-crime Campaign*, 36 AUST. NZ. J. CRIMINOL. 272 (2003).

163. See Scott, *supra* note 132, at 70-72; Randall Peerenboom, *China Stands Up: 100 Years of Humiliation, Sovereignty Concerns, and Resistance to Foreign Pressure on PRC Courts*, 24 EMORY INT'L L. REV. 653, 669-70 (2010).

164. Some of theorists believe Luo Gan tried to maintain continuously the historical policy

Under this changed policy, criminal justice authorities in China started to reconsider how to use the severest punishment to balance the lawful kill and unlawful kill, and how to achieve balance between the maintenance of social stability and greater leniency.<sup>165</sup> A series of rules have been published to implement the new policy. As a result, the number of exonerations or releases grew considerably during this stage.

Criminal policies in recent years followed the pro-lenient trend. On October 11, 2006, the Central Committee of Communist Party of China published the *Decision Regarding the Creation of Harmonious Society*, which stressed the policy of balancing lenience and severity.<sup>166</sup> On February 8, 2010, the Supreme People's Court issued the *Rule of Implementing the Policy of Balancing Lenience and Severity*. In this judicial interpretation, the SPC addressed the importance to maintain social harmony by means of balancing lenience and severity and required judges to punish heinous criminals by imposing the death penalty so that no innocent offender was convicted and no guilty offender could escape.<sup>167</sup> In August 2013, the Central Committee of Communist Party of China published an important regulation—the *Provisions concerning The Prevention of Wrongful Convictions*—which requires Chinese courts to acquit innocent defendants directly based on the presumption of innocence, rather than sentencing them to lesser punishment in case of insufficient evidence.<sup>168</sup> One month later, the SPC and the SPP published judicial interpretations to implement the *Provisions*.<sup>169</sup>

All these policies are important basis upon which Chinese courts are

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of hard strike, but we believe the central politician and judiciary tried to abandon the policy of hard strike. See Trevaskes, *supra* note 160; Margaret K. Lewis, *Leniency and Severity in China's Death Penalty Debate*, 24 COLUM. J. ASIA L. 303 (2011).

165. See Trevaskes, *supra* note 35, at 486.

166. Zhongguo Gongchandang Zhongyang Weiyuanhui (中国共产党中央委员会), *Zhonggong Zhongyang Guanyu Goujian Shehui Zhuyi Hexie Shehui Ruogan Zhongda Wenti de Jueding* (中共中央关于构建社会主义和谐社会若干重大问题的决定) Oct. 11, 2006.

167. Zuigao Renmin Fayuan (最高人民法院), *Guanyu Guance Kuanyan Xiangji Xingshi Zhengce de Ruogan Yijian* (关于贯彻宽严相济刑事政策的若干意见) Feb. 8, 2010.

168. See Zhongyang Zhengfa Wei (中央政法委), *Guanyu Qieshi Fangzhi Yuanjia Cuoan de Guiding* (关于切实防止冤假错案的规定), [http://www.360doc.com/content/15/0105/23/19128036\\_438499196.shtml](http://www.360doc.com/content/15/0105/23/19128036_438499196.shtml) (last visited Mar. 18, 2017).

169. See Zuigao Renmin Jianchayuan (最高人民检察院), *Guanyu Qieshi Lyuxing Jiancha Zhineng Fangzhi he Jiuzheng Yuanjia Cuoan de Ruogan Yijian* (关于切实履行检察职能防止和纠正冤假错案的若干意见), Sept. 9, 2013; Zuigao Renmin Fayuan (最高人民法院), *Guanyu Jianli Jianquan Fangfan Xingshi Yuanjia Cuoan Gongzuojizhi de Yijian* (关于建立健全防范刑事冤假错案工作机制的意见), Oct. 9, 2013.

increasingly encouraged to rectify erroneous convictions, as Figure 1 has shown.<sup>170</sup> The admission of wrongful convictions by authorities reached its peak in 2013, resulting in 15 exonerations. This correlated with the policy shift highlighted above.

### ***B. Legal Progress and Death Review***

In modern society, criminal law and criminal procedure law is the basis of criminal justice and court decisions. The first focuses on whether the actual offence violated laws, and the second regulates all the judicial behaviors such as arrest, prosecution, conviction, and sentence. Naturally, the right and wrongful judicial decisions were interrelated to criminal procedure law and criminal law.

China's first CPL was promulgated in 1979, which stipulated that all death sentences must be review by the SPC.<sup>171</sup> However, during the "hard strike" movements, these requirements were eliminated after the Stand Committee of National People's Congress (hereinafter SCNPC) authorized the provincial higher courts to review death penalty cases in 1981.<sup>172</sup> Two years later, the SCNPC revised the law of the People's Court in 1983, confirming that provincial higher courts held the power to review death sentences.<sup>173</sup> In the following years, more judicial interpretations were issued to enhance the power of higher people's courts to review death penalty in drug-related offenses, offenses involving violence against the person,

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170. See Susan Trevaskes, *The Shifting Sands of Punishment in China in the Era of 'Harmonious Society'*, 32 LAW & POL'Y 332 (2010); Li Enshen, *Towards the Lenient Justice? A Rise of 'Harmonious' Penalty in Contemporary China*, 10 ASIAN J. OF CRIMINOL. 307 (2015).

171. Jerome Alan Cohen, *The Criminal Procedure Law of the People's Republic of China*, 73 J. CRIM. L. & CRIMINOLOGY, 171, 199 (1982) (Article 145 indicating "Cases of first instance where an intermediate people's court imposes a sentence of the death penalty and the defendant does not appeal shall be submitted to the Supreme People's Court for approval after review by the high people's court. ... Cases of first instance where a high people's court imposes a sentence of the death penalty and the defendant does not appeal and cases where a sentence of the death penalty is imposed in the second instance shall all be submitted to the Supreme People's Court for approval.").

172. Quanguo Renda Changwu Weiyuanhui (全国人民代表大会常务委员会), *Guanyu Sixing Fuhe Anjian Hezhun Wenti de Jueding* (关于死刑案件核准问题的决定) June 10, 1981.

173. Quanguo Renda Changwu Weiyuanhui (全国人民代表大会常务委员会), *Guanyu Xiugai Zhonghua Renmin Gongheguo Renmin Favuan Zuzhifa de Jueding* (关于修改<中华人民共和国人民法院组织法>的决定) Sept. 2, 1983.

robbery, and other crimes.<sup>174</sup> As indicated in Figures 1 and 2, the arrests of innocent defendants increased during the years provincial courts were allowed to review death penalty cases. These figures peaked in 1994 and 1995. It is reasonable to believe that the delegation of death penalty review power to provincial courts correlates with the spread of wrongful convictions across China. As mentioned above, cases of Dong Wei, Nie Shubing, Teng Xinshan, Wei Qingan, and Huge Jiletu are good examples in this regard.<sup>175</sup>

Concerned that provincial higher courts then are permitted to confirm death sentences without the final check by the SPC, legislators reaffirmed in *Articles 199 and 200* of the first amendment to the CPL in 1996 that death sentences must be reviewed by the SPC, intending to prevent wrongful convictions. As a result, wrongful convictions declined significantly to the lowest historical point in the 1990s. The exonerations and releases of innocent defendants in that year also increased. However, the number of arrests did not change too much after 1996. A possible explanation for this is that judicial authorities did not implement the amendment to the CPL and the provincial higher courts still review death sentences in practice.<sup>176</sup> This is also because the ‘hard strike’ campaigns continued in 1996, resulting in harsh punishment and speedy trials across the nation.

As an analytical result of Figure 1, the authority of death review in

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174. Zuigao Renmin Fayuan (最高人民法院), *Guanyu Shouquan Yunnansheng Gaoji Renmin Fayuan Hezhun Bufen Dupin Fanzui Sixing Anjian de Tongzhi* (关于授权云南省高级人民法院核准部分毒品犯罪死刑案件的通知), June 6, 1991; Zuigao Renmin Fayuan (最高人民法院), *Guanyu Shouquan Guangdongsheng Gaoji Renmin Fayuan Hezhun Bufen Dupin Fanzui Sixing Anjian de Tongzhi* (关于授权广东省高级人民法院核准部分毒品犯罪死刑案件的通知) Aug. 18, 1993; Zuigao Renmin Fayuan (最高人民法院), *Guanyu Shouquan Guangxi Zhuangzu Zizhiqu, Sichuansheng, Gansusheng Gaoji Renmin Fayuan Hezhun Bufen Dupin Sixing Anjian de Tongzhi* (关于授权广西壮族自治区、四川省、甘肃省高级人民法院核准部分毒品犯罪死刑案件的通知) Mar. 19, 1996; Zuigao Renmin Fayuan (最高人民法院), *Guanyu Shouquan Guizhousheng Gaoji Renmin Fayuan Hezhun Bufen Dupin Fanzui Sixing Anjian de Tongzhi* (关于授权贵州省高级人民法院核准部分毒品犯罪死刑案件的通知) June 23, 1997; Zuigao Renmin Fayuan (最高人民法院), *Guanyu Shouquan Gaoji Renmin Fayuan he Jiefangjun Junshi Fayuan Hezhun Bufen Sixing Anjian de Tongzhi* (关于授权高级人民法院和解放军军事法院核准部分死刑案件的通知) Sept. 26, 1997.

175. See Huang, *supra* note 12, at 1220-23; Jiang, *supra* note 12, at 44-46; He *supra* note 12, at 67; Wang, *supra* note 13, at 188-93; Niu, *supra* note 14; Zheng, *supra* note 14; Jiang, *supra* note 130; Xie, *supra* note 130.

176. Zuigao Renmin Fayuan (最高人民法院), *Guanyu Shouquan Gaoji Renmin Fayuan he Jiefangjun Junshi Fayuan Hezhun Bufen Sixing Anjian de Tongzhi* (关于授权高级人民法院和解放军军事法院核准部分死刑案件的通知) 关于授权高级人民法院和解放军军事法院核准部分死刑案件的通知) Sept. 26, 1997.

provincial higher court caused another three peaks to arrest death-sentenced innocents and three bottoms of exoneration and release. Witnessing an unprecedented increase of executions and wrongful convictions since 1997, the SCNPC and SPC decided to restore the review power to the SPC on October 30, 2006.<sup>177</sup> With the new amendment to the CPL and reformed death penalty review mechanism, the number of death sentences decreased significantly since 2007.<sup>178</sup> Meanwhile, the number of innocent defendants who received death sentences also significantly decreased.<sup>179</sup> This tendency suggests that the centralized review regime may have curbed wrongful executions, resulting in not only the fewer death sentences but also the approval reduction in provincial higher court.<sup>180</sup>

In our dataset, over 90% of innocent defendants who received death sentences were arrested prior to 2007, and only 43 individuals were exonerated or released during the 25 years since 1981. Although the innocents were exonerated during that time, as indicated by Figure 1, the number of defendants under incarceration exceeded the number of exonerations. The prevalence of wrongful convictions caught the attention of the legal authorities. In 2010, the SPC, together with four judicial organs, published two judicial interpretations: the *Rules on Certain Issues Relating to Examining and Judging Evidence in Death Penalty Cases* and the *Rules*

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177. Ouanguo Renda Changwu Weivuanhui (全国人民代表大会常务委员会), *Guanyu Xiugai Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhifa de Jueding* (关于修改<中华人民共和国人民法院组织法>的决定) Oct. 31, 2016; Zuigao Renmin Fayuan (最高人民法院), *Guanyu Tonevi Xineshi Sixing Anlian Hezhunquan Youguan Wenti de Jueding* (关于统一行使死刑案件核准权有关问题的决定) Dec. 28, 2006.

178. See Scott, *supra* note 132, at 63-64 (indicating, “China reduced the number of prior year death sentence in 2007 as much as thirty percent after revising its procedure for reviewing capital cases”); Amnesty International Report 2013: *The State of The World’s Human Rights*. [http://files.amnesty.org/air13/AmnestyInternationalAnnualReport2013\\_complete\\_en.pdf](http://files.amnesty.org/air13/AmnestyInternationalAnnualReport2013_complete_en.pdf) (last visited Aug. 15, 2016); *Dui Hua Foundation, Criminal Justice: Death Penalty Reform*, [http://duihua.org/wp/?page\\_id=136](http://duihua.org/wp/?page_id=136) (last visited June 2, 2017); World Coalition, China, Asia (Eastern Asia), <http://www.worldcoalition.org/China> (last visited June 2, 2017).

179. See Carolyn Hoyle, Michelle Miao, *Thinking Beyond Death Penalty Abolitionist Reformation: Lessons from Abroad and the Options for China*, 2 CHINA LEGAL SCI. 121 (2014); Susan Trevaskes, *Lenient Death Sentencing and the “Cash for Clemency.”* Debate, 73 CHINA J. 56 (2015).

180. See Tian Yu (田雨), Zhou Shengwen (邹声文) & Zhang Zongtang (张宗堂), *Sixing Hezhun Quan Zhibian, Zunzhong Baozhang Renquan, Fangzhi Yuanjia Cuoan* (死刑核准权之变：尊重保障人权，防止冤假错案) Oct. 11, 2006, [http://news.xinhuanet.com/legal/2006-11/01/content\\_5275030.htm](http://news.xinhuanet.com/legal/2006-11/01/content_5275030.htm) (last visited June 2, 2017); Yuan Xiang (袁祥), *Sixing Hezhunquan Shougui Zuigao Fayuan Youliyu Fangzhi Yuanjia Cuoan* (死刑核准权收归最高法院有利于防止冤假错案), 央视国际 (Yangshi Guoji) (Nov. 1, 2006), <http://news.cctv.com/law/20061101/100719.shtml>.

on *Certain Issues relating to the Exclusion of Illegal Evidence in Criminal Cases*.<sup>181</sup> The two judicial interpretations provided detailed rules according to which exclusion of illegal evidence obtained through torture or other means became possible.<sup>182</sup> Two years later, the second amendment of Criminal Procedure Law was enacted and took force. This new amendment stipulated that cases can only be returned for retrial once because of potentially factual error,<sup>183</sup> and the higher court may order another lower court, other than the first-instance or appellate court, to hear the case.<sup>184</sup>

With restrict control of retrial process, the new provisions encourage and facilitate provincial higher courts to directly acquit the death-sentenced-defendants who they believe are innocent. This ends the repeated trials and retrials at first-instance and second-instance levels. Ultimately, provincial higher courts must make decisions themselves, rather than returning the cases for retrial at first-instance level. Article of 244 of CPL also encourages the provincial higher courts to direct a court at the same level with the court who has original jurisdiction over the case, if the latter is reluctant to hear the case in a timely manner. Consequently, it is the hope that the abuse of procedures may have been controlled, although our data is limited to test this

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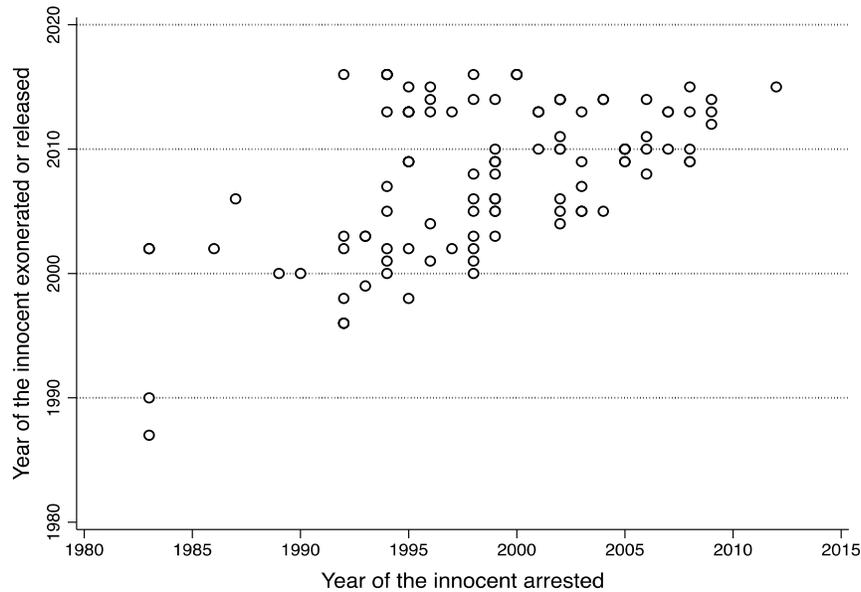
181. See Zuigao Renmin Fayuan (最高人民法院), Zuigao Renmin Jianchayuan (最高人民检察院), Gonganbu (公安部), Guojia Anquanbu (国家安全部), Sifabu (司法部), *Guanyu Banli Xingshi Anjian Paichu Feifa Zhengju Ruogan Wenti de Guiding he Guanyu Banli Sixing Anjian Shencha Panduan Zhengju Ruogan Wenti de Guiding de Tongzhi* (<关于办理刑事案件排除非法证据若干问题的规定>和<关于办理死刑案件审查判断证据若干问题的规定>的通知) June 30 2010; Dui Hua, *China's New Rules on Evidence in Criminal Trials*, 43 N.Y.U. J. INT'L L. & POLITICS 739 (2011).

182. To the rules, *NYU International Law and Politics* organized a special issue to celebrate Jerome J. Cohen's 80th birthday, and published a special paper and three comments. See Lewis, *supra* note 25, at 632; Jeremy Daum, *Tortuous Progress: Early Cases Under China's New Procedures for Excluding Evidence in Criminal Cases*, 43 N.Y.U. J. INT'L L. & POLITICS 699 (2011); Yu-Jie Chen, *One Problem, Two Paths: A Taiwanese Perspective on the Exclusionary Rule in China* 43 N.Y.U. J. INT'L L. & POLITICS 713 (2011); Hyeon-Ju Rho, *The Exclusionary Rule in China and a Closer Look at the Dynamics of Reform* 43 N.Y.U. J. INT'L L. & POLITICS 729 (2011).

183. Criminal Procedure Law of The People's Republic of China, Article 225, March 14, 2012, <http://www.ceolaws.net/Info/View.Asp?id=2865> (regulating "all case should be adjudicated by the second instance court, if the adjudication in first instance has already been revoked and returned one time for trial").

184. Criminal Procedure Law of The People's Republic of China, Article 243 CPL, March 14, 2012, <http://www.ceolaws.net/Info/View.Asp?id=2865> (regulating "the Supreme People's Court or courts at higher level have the power to bring the case up for trial itself, or may direct the court at the lower level to conduct a retrial, though, once finds some definite error in a legally effective judgment or order").

point. As indicated in Table 2 and Figure 1, 17.21% of erroneous convictions have taken place since 2007, but 62.39% (68 innocents) of innocent defendants who received the death sentence have been exonerated in recent ten years, particularly since 2010. This provides evidence that the new law has taken effect.



**Figure 2 The Year of Arrest and Exoneration Each Capital Case (1983-2013)**

Changed law and criminal justice policies should have made it easier for the innocent defendants to obtain exoneration and shortened term of incarceration than before. As Figure 2 indicates, the gap of years between arrests (*X* axis) and exonerations or releases (*Y* axis) indicates that innocent defendants who received the death sentence have been incarcerated for shorter periods of time and exonerated or released faster than before, due to changes brought by the centralized review power and the amendment to the criminal procedure law. In our dataset, 30 innocent defendants were exonerated or released between 2007 and 2012 while 38 between 2013 and 2016. By contrast, only 41 were exonerated from 1987 to 2006. Nevertheless, the fact of long incarceration for the innocents did not change too much, and fighting for freedom were not easy as we expected. The options faced by innocents were still bad and worse, and there might be no better choice for the wrongly convicted given the absence of presumption of innocence.

As indicated, the wrongful conviction stimulates the SPC to retrieve centralized review punishable by death cases.<sup>185</sup> Despite the small number in Figure 1 and Figure 2, the black number of capital defendants who were wrongfully convicted or executed might be far more than what has been reported in the media. We predict that more innocent prisoners will be exonerated or released in the coming years.

### *C. New Initiatives to Rectify Wrongful Conviction*

In recent years, there has been signs of progress towards recognizing presumption of innocence by Chinese criminal justice authorities.<sup>186</sup> In this section, we will review some new developments in the field of criminal justice to rectify wrongful convictions. These include supervised retrials (zaishen 再审),<sup>187</sup> procuratorate protest (*jianchayuan kangsu* 检察院抗诉),<sup>188</sup> and the restriction on the number of retrials. These new initiatives imply a change of attitudes of the judicial authorities towards miscarriage of justice.<sup>189</sup> Specifically, the supervised trials, in combination with off-site

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185. See Jiang, *supra* note 25, at 394; Jiang Na, *The Adequacy of China's Responses to Wrongful Convictions*, 41 INT. J.L. CRIME JUST. 390 (2013).

186. Joshua Rosenzweig, Flora Sapio, Jiang Jue, Teng Biao and Eva Pils, *The 2012 Revision of the Chinese Criminal Procedure Law: (Mostly) Old Wine in New Bottles*, CRJ OCCASIONAL PAPER (17 May 2012), <http://www.law.cuhk.edu.hk/en/research/crj/download/papers/CRJ%20Occasional%20Paper%20on%20CPL%20revision%20120517.pdf> (last visited July 29, 2017); Mou Luye, *Breakthroughs and Limitations of Judicial Reform: A Brief Review of China's New Criminal Procedure Law*, 1 PEKING U. L.J. 459 (2014), available at <https://www.tandfonline.com/doi/abs/10.1080/20517483.2014.11424480>.

187. Chen Guangzhong & Zheng Weimei, *On the Reform of China's Criminal Procedures for Trial Supervision*, 2 FRONTIERS L. CHINA 255 (2007); Yi Yanyou, *State Ideology Transition and Procedure Model Reformation: China's Criminal Procedure Law and Its Revisions*, 4 TSINGHUA CHINA L. REV. 155, 177 (2012).

188. According to CPL, procuratorate may protest against the effective verdict, if they believe the existence of wrongful convictions, wrongful acquittals, inappropriate sentencing. See Li Meng (李蒙), *Zuigao Jianchayuan Diyili Xingshi Kangsu de Beihou* (最高检察院第一例刑事抗诉的背后), 12 民主与法制 (Minzhu yu Fazhi) 12 (2016); Sun Qian, *Procuratorate System Reform*, 4 CHINA LEGAL DEV. Y. B. 201 (2010); *Criminal Procedures in Contemporary China: Socialist, Civilian or Traditional?* 59 INT'L & COMP. L.Q. 1099, 1171 (2010); Huang Shiyuan, *Chinese Wrongful Convictions: Discovery and Rectification*, 80 U. CIN. L. REV. 1195, 1205-08 (2012).

189. Jiang Anjie, *The Scholarship Contribution promote the Prevention and Rectification of Wrongful Conviction* (以学术研究推动冤假错案的防范与救济), LEGAL DAILY (法制日报), 12, Oct. 16, 2013. <http://epaper.legaldaily.com.cn/fzrb/PDF/20131016/12.pdf> (The journalist Jiang indicated, Henan Provincial Higher Court admitted and rectified error bravely,

trials (*yidi zaishen* 异地再审) and SPC reviews, facilitate the process of exonerating innocent defendants. Following the new amendments, most wrongful convictions have been acquitted by the second-instance courts which did not have the original jurisdiction.

One of the most influential cases concerning off-site supervised trial is Chen Man's Case. Chen was convicted and sentenced to the suspended death penalty by Haikou Intermediate Court in first instance, which was upheld by Hainan Provincial Higher Court. On February 22, 2015, the SPP decided to issue a supervised prosecution to the SPC. Two months later, on April 27, 2015, the SPC published the decision of the supervised trial, and ordered Zhejiang Provincial Higher Court to retry Chen's case. The collegiate panel from Zhejiang Higher Court acquitted Chen on January 26, 2016.<sup>190</sup> The judges indicated clearly that Chen's confession was insufficient to prove his case. Another case of off-site trial is Nie Shubing's case. Shandong Provincial Higher Court, rather than Hebei Provincial Higher court, review Nie's death sentence and then concluded, based on insufficient and flawed evidence, that the SPC should retry his case.<sup>191</sup> Finally, the second circuit court of SPC heard Nie's case, Justice Hu Yunteng, who was nominated as the presiding judge, exonerated Nie. Nie's case was the first acquittal granted by the SPC in the past decades. The cooperation between prosecutors and lawyers is an important factor which facilitated Nie's exoneration.<sup>192</sup>

According to the CPL, the People's Procuratorate play a role in supervising trials. For most cases of exoneration, procuratorates contributed significantly by taking efforts to examine whether the defendants are innocent. This cautious attitude paves the way to exonerate the defendants and generate significant influences on courts. For example, prosecutors in Nie Shubing and Chen Man's case required courts to exonerate the

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and adopted measures to prevent wrongful conviction in the recent years, without covering and evading errors. Particularly the Henan court set up a *Warning Date of Wrongful Conviction* on every May 9, when the innocent Zhao Zuohai was exonerated in 2010 by Henan Higher Court.)

190. Zhejiangsheng Gaoji Renmin Fayuan (浙江省高级人民法院), Zhejiang V. Chen Man ((2015)浙刑再字第2号) (Feb. 15, 2016), <http://www.xingtao.cn/news/6839.html>.

191. Zuigao Renmin Fayuan (最高人民法院), Zui Gao Renmin Jianchayuan V. Nie Shubing, [http://news.china.com.cn/2016-12/02/content\\_39835782.htm](http://news.china.com.cn/2016-12/02/content_39835782.htm) (last visited Feb. 2, 2017).

192. See Lewis, *supra* note 142, at 287, 319 (Margaret K. Lewis, *Presuming Innocence, or Corruption, in China*, 50 COLUM. TRANS'L. L. 287, 321-328 (2012); Lan Rongjie, *A False Promise of Fair Trials: A Case Study of China's Malleable Criminal Procedure Law*, 27 UCLA PAC. BASIN. L.J. 209 (2010).

defendants in the course of supervised retrial. Yang Ming, who was arrested on March 29, 1995, was exonerated on December 22, 2015.<sup>193</sup> Guizhou Provincial Procuratorate played an important role in his exoneration by issuing, in April 2014, a motion of supervised trial to Guizhou Provincial Higher Court. The prosecutor believed the evidence supporting the original conviction was unclear and insufficient.<sup>194</sup> During his retrial, his attorney and the prosecutor indicated that the evidence against Yang was flawed and could not collaborate with other facts. Consequently, Guizhou Provincial Higher Court acquitted Yang. In the case of Huang Zhiqiang, Fang Chunping, Chen Fagen, and Chen Lihe, the prosecutor acknowledged all evidence against the four defendants could not form a concrete chain of evidence, and the defendants' confession alone was insufficient to prove their case and required the judge to acquit the defendants.<sup>195</sup>

Given the courts hearing the case in the first place were unwilling to acquit the innocent defendant, the new criminal procedure law was an effective mechanism to facilitate exoneration. Previously, return for retrials rather than acquittal was the preferred outcome of the second-instance courts (see Table 5). The recent tendency, however, has been growing exonerations. For example, the crucial reason why Fujian Provincial Higher Court acquitted Nian Bin on August 22, 2014, was that the new law forced the provincial higher court to choose between upholding the death sentence and acquitting the innocent as his case had already been returned for retrial three times. Facing disapproval from the SPC, the Fujian Provincial Higher Court eventually acquit Nian.

To sum up, following the new developments in the field, courts in China have rectified a growing number of erroneous convictions in recent years.<sup>196</sup> As scholars pointed out, the best way to save innocent defendants is to ensure courts are willing to admit errors rather than addressing the detriment of

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193. Zhou Xian (周娴). Guizhou vi sharenfan hanvuan 20 nian huoban wuzui. cengiu renzui jianxing (贵州一“杀人犯”喊冤20年获判无罪 曾拒认罪减刑). Zhongguo Xinwen Wang(中国新闻网) (Aug. 30, 2015), <http://www.chinanews.com/sh/2015/08-11/7460479.shtml>.

194. Yan QiLei (闫起磊), Meiyou Zhenxiong Guilai, Sixingfan Hanyuan 20 Nian (“没有“真凶”归来,“死刑犯”喊冤20年终获无罪“), Xinhua Meiri Dianxun (新华每日电讯) (Aug. 24, 2015), A6, [http://www.xinhuanet.com/mrdx/2015-08/24/c\\_134548353.htm](http://www.xinhuanet.com/mrdx/2015-08/24/c_134548353.htm).

195. Jiangxisheng Gaoji Renmin Fayuan (江西省高级人民法院), Jiangxi V. Huang Zhiqiang et al., 1 CRIMINAL S. GAN. 2016 ((2016) 赣刑再1号) (Dec. 21, 2016), [http://www.360doc.com/content/16/1223/20/12509739\\_617148061.shtml](http://www.360doc.com/content/16/1223/20/12509739_617148061.shtml).

196. Celia Hatton, *China Judge Warns on Wrongful Convictions*, BBC NEWS (Mar. 12, 2015), <http://www.bbc.com/news/world-asia-china-31845874>.

wrongful conviction.<sup>197</sup> Courts at different levels have started to implement the rule that the case of the defendants must be proved beyond reasonable doubt. Taking Song Xinfu case as example, Neijiang Intermediate Court directly acquitted him due to flawed evidence, after Sichuan Provincial Higher Court disapprove his death sentence.<sup>198</sup> In recent years, there seems to be some positive changes in the practices and attitudes towards miscarriage of justice.<sup>199</sup>

## V. Discussion and Conclusion

There has been a growing body of literature on the death penalty in China. To supplement the focus of the existing literature on theories and policies of China's death penalty regime, this article provided an empirical assessment of these crucial topics. This article revealed the common features of wrongful convictions resulting in death sentences. It also studied the changes of law and policies. Most importantly, our research on wrongful convictions in capital cases provided some evidence to indicate that widespread wrongful convictions might have promoted a reform of the capital punishment regime in China.

We employed multivariate regression analysis to consolidate the topics. As indicated in Table 7, we used four models to analyze the how innocent defendants were convicted and exonerated. Specifically, we consider variables such as the type of death sentences, the type of the offenses,<sup>200</sup> the

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197. See Epps, *supra* note 41, at 1151 (the author indicated, “contrary to our intuitions, a system more avowedly tolerant of convicting the innocent than ours might not treat them as badly as we tend to think—while also producing generally saner criminal policies”); Moulin Xiong, Richard G. Greenleaf & Jona Goldschmidt, *Citizen Attitudes toward Errors in Criminal Justice: Implications of the Declining Acceptance of Blackstone's Ratio*, 47 INT. J. LAW CRIME JUST. 14 (2017) (the author reported “a significant and growing rejection of the Blackstone ratio principle over the time period studied”); Jeffery Reiman & Ernest Von Den Haag, *On the Common Saying That It Is Better That Ten Guilty Persons Escape Than That One Innocent Suffer: Apro and Con*, SOC. 7 PHILOS. & POLICY 226, 230 (1990) (The author believed that “failure to punish the guilty is as bad as committing a crime against an innocent victim, then it is as bad as punishing an innocent person.”).

198. Neijiang Intermediate Court (内江市中级人民法院), 4 CRIMINAL. F. N.J. C. 2014 (2014) 内刑初字第4号, Sept. 25, 2014, <http://wenshu.court.gov.cn/content/content?DocID=30cae5f1-484f-406f-a86c4077cd5654e4>.

199. *Wrongful convictions overturned as Chinese laws progress*, CHINA DAILY/ANN, Sept. 9, 2014, <http://www.asiaone.com/asia/wrongful-convictions-overturned-chinese-laws-progress>; Stephen Noakes, *The Death Penalty and Institutional Reform: The Case of China*, <https://www.cpsa-acsp.ca/papers-2012/Noakes.pdf> (last visited May 30, 2017).

200. Given the rareness of some crime, we incorporated rape, embezzlement, assault, drug

stage during which the sentence was imposed,<sup>201</sup> when exoneration was granted,<sup>202</sup> how many times the defendants were convicted, the outcome of the second-instance trials, and days of detention at the first and second instance trials. Model 1 uses logistic regression to examine the impact of the types of offense, offender's gender, and the stage during which the sentence is imposed. Model 2 uses logistic regression to measure the impact of variables on whether the innocents were released. Models 3 and 4 incorporated the Ordinary Linear Regression to examine the factors of the duration of incarceration, including the number of trials and retrials the defendants experienced, the outcome of the second-instance trials, and the total days of detention at the first instance and second instance courts.<sup>203</sup>

As Table 7 reveals, several critical findings here echo our analysis above. First, as indicated in model 1, sentences imposed by courts after the revision of 1996 CPL resulted in fewer wrongful executions while more suspended death sentences were imposed, particularly significant after restoration of centralized review. During the stage between 2007 and 2012, the probability of wrongful convictions dropped to 23.3%, compared to the pre-1996 era (odds ratio=0.233,  $p=0.020$ ). Combining with the odds ratio between 1997 and 2006, this implies that the 1996 CPL Revision, particularly in the stage of the restoration of centralized review between 2007 and 2012, reduced the incidences of wrongful executions and enabled judges to sentence defendants to the suspended death penalty as an alternative. Given the absence of death penalty review by the highest judiciary, nevertheless, hard strike campaigns prior to 1997 resulted in a higher risk of

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SSTM, explosion, and poisoning together as *Other*. We believe that such treatment do not impact the general finding what we had.

201. The specific year of first death sentence verdict against the innocents, i.e., the date the innocent was first time sentenced to death penalty with immediate execution or death penalty with suspension. The 1996 revision Criminal Procedural Law of the People's Republic of China took effective on January 1, 1997, and the restoration of centralized review of death penalty took effective on January 1, 2007. Given the fact that no samples were sentenced to death penalty after the 2012 Criminal Procedural Law revision, we designed three stages, prior to 1996, 1997-2006, and 2007 aftermath as table 7 indicated.

202. We designed four stages, prior to 1996, 1997-2006, 2007-2012, and 2013 aftermath, to cover the time of exoneration, based upon the specific year when the innocents were exonerated. Because the 2012 Amendment of Criminal Procedural Law took effective on January 1, 2013, we separated the last stage by the effective date instead of promulgation date March 14, 2012.

203. As we explained before, the first instance means the first verdict reached by intermediate court, while the second instance means the appeal verdict reached by provincial higher court.

wrongful executions.<sup>204</sup>

Secondly, Model 2 indicates that more innocent prisoners were released after the 1996 CPL Revision, in comparison to the pre-1997 stage. The probability to release the innocent convicted between 1997 and 2006 was 69.807 times ( $p=0.015$ ) of that during the stage prior to 1997, and 46.311 times ( $p=0.057$ ) of that during the stage of 2007-2012. Reasons for such disparity stem possibly from five executed innocents prior to 1997, and four incarcerated innocents as a gang member in Chen Guoqing case,<sup>205</sup> which produced 60% of non-released samples( $n=15$ ). To be addressed, we failed to generate the impact of exoneration on release among stages, because only one or two innocents in the four stages are respectively incarcerated in prison. Despite an absence of statistical significance, this did not deny the cluster effect that most of the exonerations issued between 2007 and 2016, particularly 38 exonerations within only four years from 2013 to 2016 (see Figures 1, 2).

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204. See Scott, *supra* note 132, at 65-67.

205. See Li, *supra* note 93; Guo, *supra* note 93.

**Table 7 Multivariate Analysis regarding Death-Sentenced Innocent: Sentence, Release, and Wrongful Incarceration**

Variable	Sentence		Release	Wrongful Incarceration	
	Model 1 Logit	Model 2 Logit	Model 3 OLS	Model 4 OLS	
	Odds Ratio	Odds Ratio	Coef.	Coef.	
DEPENDANT VARIABLE	Capital E=1	Released=1	Jailed Days	Jailed Days	
Death Sentence	Capital S.	<i>Ref.</i>			
	Capital E.		0.92	-748.46**	-536.99
Crime	Murder	<i>Ref.</i>			
	Robbery	2.22*	5.60	74.66	142.72
	Other	1.98	3.19	-673.33	-592.52
Sex	Female	<i>Ref.</i>			
	Male	3.09	14.85*	453.46	210.21
Law Stage	-1996	<i>Ref.</i>			
(Sentence)	1997-2006	0.43*	69.81**	-292.13	-257.57
	2007-	0.23**	46.31*	-2339.32***	-2522.90***
Law Stage	-1996	<i>Ref.</i>			
(Exoneration)	1997-2006		14.51	1526.85*	620.94
	2007-2012		2.30	1987.02**	1338.28
	2013-		8.32	4179.27***	3227.02***
	Not Applicable		0.02*	3710.70***	2826.21***
N. Verdicts				-1.93	73.76
Verdict 2nd Instance	Maintain			<i>Ref.</i>	
	Return			-314.90	-345.45
	Sentence Reduction			661.52	695.18
	Acquit			-712.70	—
	Not Applicable			608.31	-0.13
Jailed Days at 1st instance					0.90***
Jailed Days at 2nd instance					1.36***
_cons	0.58	0.04***	1240.74***	3799.81***	
Number of obs	122	122	122	107	
F / LR Chi2	13.57**	53.36***	8.24***	9.75***	
R <sup>2</sup> / Pseudo R <sup>2</sup>	0.081	0.587	0.538	0.634	

\* $p \leq 0.1$ ; \*\* $p \leq 0.05$ ; \*\*\* $p \leq 0.01$ 

Thirdly, the model of incarceration confirms our previous findings regarding the increasing use of the suspended death sentences, the

prevalence of extensive incarceration, and the abuse of criminal proceedings. Innocent defendants who received the death sentence with immediate executions were incarcerated for 748.46 fewer days ( $p=0.024$ ) in comparison to the suspended death sentences. This is because trials resulting in the death penalty with immediate execution at the first instance and the second instance were significantly shorter than those resulting in the suspended death sentences. In sum, we have found that those received the death sentences between 2007 and 2012 were incarcerated (coefficient=2,339.324,  $p=0.000$ ) for shorter periods, in contrast with the defendants who received their sentences prior to 1997 and during the period of 1997 to 2006. To the stage of exonerations, it appears that the delayed exoneration could produce significantly a longer incarceration term among three applicable stage, particularly in the stage 2007-2012 (1,987.02 days) and afterwards 2013 (4,179.27 days). On holding other variables, the adjudicated outcome at second instance fails to indicate significant difference among respective verdicts. But the acquit reflect a direction to shorten the incarceration term, and sentence reduction will possibly extend the incarceration term against innocents. Given the complicatedness in each case, we believe the insignificant difference is hugely because of the recursive trials after the second instance. This account for again the ineffective appeal trial fail to vindicate innocents, and the contentious abusiveness of retrial in next proceedings deteriorate the situation of incarceration.

We have found that wrongful convictions of innocent defendants are highly related to criminal policy and criminal procedure law. The frequency of wrongful executions and convictions are correlated with harsh penal policies which only focuses on crime reduction during the past decades, namely 'hard strike' campaigns. The policy transition from "strike harshly and strike fast" to "execute fewer and execute with caution" coincides with a change of attitudes towards wrongful convictions in China.<sup>206</sup>

Despite a series of efforts made by China to tackle wrongful convictions, we haven't observed fundamental changes of judges' mindset towards presumption of innocence. The reluctance to exonerate defendants cannot prevail over the fundamental demands of due process of criminal justice in past thirty years. Rather, they subject defendants to multiple rounds of trials and retrials and impose lesser punishment in lieu of the death

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206. See Trevaskes, *supra* note 160, at 393-413; Noakes, *supra* note 160, at 18; Jiang, *supra* note 160, at 277; Minas, *supra* note 160, at 36 (2010); Mingxing Zhao, *The Death Penalty in China and its Impact on Sino-Canadian Criminal Justice Cooperation*, 117 HUHUA CAO & JEREMY PALTIEL EDS., *FACING CHINA AS A NEW GLOBAL SUPERPOWER: DOMESTIC AND INTERNATIONAL DYNAMICS FROM A MULTIDISCIPLINARY ANGLE*, (Springer, 2016).

penalty. Thus, we address the importance to control the recursive trials, and to improve the efficiency in acquitting the death-sentenced innocents.<sup>207</sup> Given the inescapable judicial errors, we believe that the core to save the innocents is to admit the miscarriage of justice and exonerate the innocent swiftly.<sup>208</sup> The changes of criminal procedure law and the death penalty reform in China have contributed to the exoneration and release of the innocent defendants.<sup>209</sup> However, 13 innocent defendants in our dataset have not been exonerated and nine are still under incarceration. We call for a continuous and active exoneration to them, at least to release the incarcerated innocents enlisted in Appendix 1.

Although all cases we selected have been published by the media, they are not randomly selected and therefore might not reflect the overall scenario of wrongful conviction in China. Even with selection bias, we have been able to demonstrate some common characteristics of the wrongful conviction cases. Moreover, it has been shown that our analysis matches and the general trends of penal policy change. With figures on death penalty classified as state secrecy in China, it is impossible to make a precise estimation how

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207. See Chen & Li, *supra* note 125, at 127-131 (Chen Weidong (陈卫东) & Li Fenfei (李奋飞), Xingshi Ershen "Fahui Choangshen" Zhidu zhi Chonggou (刑事二审“发回重审”制度之重构), 1 Faxue Yanjiu (法学研究) (2004) <http://www.ixueshu.com/document/d2ebf07aa4c034db.html>) (recommending six suggestion to legal reform in encouraging acquittal and controlling recursive retrial); Li Changcheng (李长城), *Fahui Chongshen Yu Chengxu Lanyong* (发回重审与程序滥用), 1 Shandong Jingcha Xueyuan Xuebao 46, 50 (2013) <http://www.ixueshu.com/document/e033efcf03a9fbb7318947a18e7f9386.html> (the author call for a reform to restrict retrial in precudral issues, and abolish the retrial concerning factual issues); Zhang Yulu (张玉录), *Jianyi Quxiao Fahui Chongshen Zhidu* (建议取消发回重审制度), 2 Shandong Shenpan (Shandong Shenpan) 33 (1999) <http://www.ixueshu.com/document/ec0f1070b1f7c8e8318947a18e7f9386.html> (recommending to abolish retrial for various reasons); Wu Jinping (伍金平), *Xin Xingsufa Ershen Fahui Chongshen Zhidu Xiugai de Lifa Jiedu yu Sikao* (新刑诉法二审发回重审制度修改的立法解读与思考), 8 Zhongguo Xingshifa Zazhi (Zhongguo Xingshifa Zazhi) 86, 91 (2012) <http://www.ixueshu.com/document/80f62e491fee6702318947a18e7f9386.html> (recommending to establish procuratorate supervision and judicial management policy to control retrial); Shi Limei (史立梅) & Liu Linna (刘林呐), *Woguo Xingshi Ershen Fahui Chongshen de Fansi yu Chonggou* (我国刑事二审发回重审的反思与重构), 3 Guojia Jianshiguan Xueyuan Xuebao 60 (2004) <http://www.ixueshu.com/document/dc2e7596522322bb.html> (indicating the verdict of retrial at second instance based on problematic fact is not correct and recommending acquittal instead).

208. See Epps, *supra* note 41, at 1123; Liu, *supra* note 91, at 1, 14; Trevaskes, *supra* note 35, 487-90 (2013); Miao, *supra* note 91, at 27-28.

209. Bian Jianlin, *Legislative Progress in Chinese Criminal Proceedings System: The Second Amendment to the Criminal Procedures Law of China*, 7 FRONTIERS L. CHINA 175 (2012).

many innocent defendants were sentenced to the death penalty, and how many of them were exonerated, released, and executed. There has been a crucial body of literature in United States studying wrongful convictions in published capital cases. We follow this tradition to make a contribution to the field of capital punishment and judicial errors, long awaited by international comparatists and criminologists.<sup>210</sup> We hope our research will provide useful data to scholars, legal practitioners and policy makers to think over death penalty and its irrevocable error.

All variables employed in this study are law-related, including the duration of incarceration, the historical period during which the death sentence is imposed, and how many times the defendant has been convicted. Due to data limitations, some extra-legal factors, such as judicial intervention (*sifa ganyu* 司法干预),<sup>211</sup> political pressure (*zhengzhi yali* 政治压力),<sup>212</sup> judicial accountability (*sifa zuize* 司法追责),<sup>213</sup> appeal for help

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210. See Bedau & Radelet, *supra* note 17, at 21, 37-39, 90-172; Radelet & Zsembik, *supra* note 55, at 289, 295-97, 306-314; Radelet et al., *supra* note 55, at 923-63.

211. See Jiang, *supra* note 12, at 244-46 (indicating, “similar to the ‘outdated Soviet-style model that treats the courts as just another government agency’ in which judges’ decisions are reviewed by court leaders and courts are financed by local governments, the operations of the procuratorates or judiciary is encountered with intervention from all sides, including local PLCs”).

212. See Jiang, *supra* note 12, at 268 (arguing “under pressure to severely and swiftly solve cases, due to political intervention though rate rankings, slogans and the manipulation of a hostile atmosphere . . . the police often seek false and coerced confessions”).

213. Zhao Lei (赵蕾), *Yuanzhang Lianzuo Cuoan Nanfan* (院长连坐 错案难翻), 20法律与生活 (Falyu yu Shenghuo) 21 (2012) (the author indicated that the administrative accountability of wrongful conviction made the exoneration much harder, because the chief director of courts at intermediate and district level have to assume the responsibility for the existence of innocence); Fu Hualing, *Police Accountability: The Case of the People's Republic of China*, 14 POLICE STUD. INT'L REV. POLICE DEV. 140 (1991) (the author introduce the police accountability as police internal regulation applied to control misconducts); Jacob Blacklock, *Practitioners' Perspective on Advance in China's Judicial Reform*, 8 TSINGHUA CHINA L. REV. 213, 220-36 (2016) (the author introduced the background of judicial reform in China to increase the judicial transparency and accountability); Ying Yan, *Judicial Independence and Individual Legal Case Supervision in China*, 12 US-CHINA L. REV. 1002, 1012 (2015) (arguing “the accountability system of false accusation case is also accounts for the obedience of the judges to supervisors”).

(*shangfang* 上访)<sup>214</sup> and media exposure,<sup>215</sup> have not been reported in this paper. We hope our research will inspire future studies on extralegal causes for wrongful convictions in China. Besides, all our samples are limited to death sentence only. Other wrongful conviction with life imprisonment and limited imprisonment were left out. Methodologically, we do believe that access to more samples might be solid to our readers. Nevertheless, wrongful conviction with noncapital punishment is not our concern in this paper, though we have already collected another hundreds of samples with imprisonment penalty in our data set. A further study involving more capital and non-capital cases will be conducted in near future.

Despite drawbacks in this study, we recognize the limitation of empirical studies in wrongful capital cases, and believe the principle “better than nothing.” Our study fills an important gap in the existing literature on wrongful convictions in capital cases in China. It also sheds light on important changes in law and policies regarding the prevention and correction of mistaken criminal conviction. The recent legal reform provides opportunities for scholars to study wrongful convictions and exonerations of innocent defendants.<sup>216</sup> Given these pro-reform policy trends, we are optimistic that there will be meaningful reforms in the future to eliminate the hurdles to exoneration and transform the attitudes of legal professionals.

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214. Zeng Yesong (曾业松), Yuanan Shizai Mingaoguan, Tianren Xiangzhu De Pingfan (冤案十载民告官, 天人相助得平反), 5炎黄春秋 (Yanhuang Chunqiu) 63 (1995) <http://www.ixueshu.com/document/5235015887772876318947a18e7f9386.html> (the journalist Zeng report that how appeal for help become important to exonerate the innocent); Xie Ruiqing (谢锐勤), Jiannan de Tiaozhan: Yuanan de Faxian yu Zhengming (艰难的挑战 冤案的发现与证明), 5 法律与适用 (Falyu Yu Shiyong) 68, 69 (2011) <http://www.ixueshu.com/document/469e966de9612323318947a18e7f9386.html> (the author confirmed the role of appeal for help in convicting and exonerating She Xianglin).

215. See Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1 (2005) (arguing “over the past decade, the Chinese media have emerged as among the most the influential actors in the Chinese legal system . . . Their role in the legal system, however, has brought them increasingly into conflict with China’s courts”); Huang, *supra* note 188, at 1210 (arguing “the media has played an important role in the correction of many wrongful convictions”).

216. See Huang, *supra* note 188, at 1203-1212; Jiang, *supra* note 25, at 393-403. (Jiang Na, *The Adequacy of China’s Responses to Wrongful Convictions*, 41 INT. J.L. CRIME JUST. 390 (2013)).

### Appendix 1. List of The Death-Sentenced Innocents in China, 1983-2012

ID.	Name-Eng.	Name-Chi.	Arrest	DRE <sup>a</sup>	Main Crime	Death Sentence	Jail Days
1	Li zhiping	李志平	1983	1990	murder	capital execution	2475
2	Ma Zhilan	马志兰	1983	-2002	murder	capital execution	551 <sup>c</sup>
3	Wang Jinsheng	王金生	1983	2002	murder	capital execution	6609
4	Wei Qingan	魏清安	1983	-1987	robbery	capital execution	418 <sup>d</sup>
5	Li Huawei	李化伟	1986	2002	murder	capital suspension	5667
6	Teng Xingshan	滕兴善	1987	-2006	murder	capital execution	419 <sup>d</sup>
7	Han Jianxun	韩建勋	1988	NA <sup>b</sup>	murder	capital suspension	6863
8	Sun Shaohua	孙邵华	1989	2000	murder	capital execution	3976
9	Wang Baiyuan	王柏元	1990	2000	robbery	capital execution	2315
10	Yang Wenli	杨文礼	1992	1996	robbery	capital execution	1149
11	Dong Wenlie	董文榭	1992	2003	drug SSTM	capital execution	2964
12	Yang Liming	杨黎明	1992	1996	robbery	capital execution	1153
13	Chen Man	陈满	1992	2016	murder	capital suspension	8436
14	Zhang Wenjing	张文静	1992	1996	robbery	capital suspension	1148
15	Ding Zhiquan	丁志权	1992	2002	murder	capital suspension	4263
16	Jiang Ziran	姜自然	1992	1998	murder	capital execution	2199
17	Huang Yaquan	黄亚全	1993	2003	robbery	capital suspension	3295
18	Huang Shengyu	黄圣育	1993	2003	robbery	capital suspension	3245
19	Shi Yansheng	史延生	1993	1999	robbery	capital suspension	1980
20	Nie Shubin	聂树斌	1994	-2016	murder	capital execution	216 <sup>d</sup>
21	Chen Guoqing	陈国清	1994	NA <sup>b</sup>	robbery	capital execution	3790
22	Zhu Yanqiang	朱彦强	1994	NA <sup>b</sup>	robbery	capital execution	3790
23	Yu Kuiliang	于奎亮	1994	2002	murder	capital suspension	2509
24	He Guoqiang	何国强	1994	NA <sup>b</sup>	robbery	capital execution	3790
25	Wang Benyu	王本余	1994	2013	murder	capital suspension	6793
26	Ye Qiusheng	叶求生	1994	2000	murder	capital execution	3420
27	Yang Yunzhong	杨云忠	1994	2001	murder	capital execution	2498
28	Yang Shiliang	杨士亮	1994	NA <sup>b</sup>	robbery	capital execution	3790
29	She Xianglin	佘祥林	1994	2005	murder	capital execution	4009
30	Xu Jinlong	许金龙	1994	2016	robbery	capital execution	8057
31	Xu Yuseng	许玉森	1994	2016	robbery	capital execution	8057

32	Zhang Meilai	张美来	1994	2016	robbery	capital execution	8057
33	Cai Jingseng	蔡金森	1994	2016	robbery	capital suspension	7513
34	Mei Jixiang	梅吉祥	1995	NA <sup>b</sup>	murder	capital suspension	7621
35	Yang Hongyi	杨洪义	1995	2009	murder	capital execution	3611
36	Tian Weidong	田伟冬	1995	2013	robbery	capital execution	6121
37	Dong Liming	童立民	1995	2002	murder	capital suspension	2777
38	Chen Jinchang	陈金昌	1995	1998	robbery	capital execution	1013
39	Zhu Youping	朱又平	1995	2013	robbery	capital suspension	6121
40	Shang Zhihong	尚志红	1995	2009	murder	capital execution	3611
41	Wang Jianping	王建平	1995	2013	robbery	capital suspension	6121
42	Cheng Jianyang	陈建阳	1995	2013	robbery	capital execution	6121
43	Chen Ruiwu	陈瑞武	1995	2009	murder	capital execution	3611
44	Yang Ming	杨明	1995	2015	murder	capital suspension	7441
45	Liu Kaili	刘凯利	1996	2013	murder	capital suspension	6138
46	Liu Zhongming	刘钟明	1996	NA	rape	capital execution	53 <sup>d</sup>
47	Huge Jiletu	呼格吉勒图	1996	-2014	murder	capital execution	61 <sup>d</sup>
48	Sun Wangang	孙万刚	1996	2004	murder	capital suspension	2956
49	Liu Minghe	刘明河	1996	2001	murder	capital execution	1670
50	Xu Hao	徐浩	1997	NA <sup>b</sup>	murder	capital suspension	6988
51	Zhang Congming	张从明	1997	2002	robbery	capital execution	2087
52	Ren Wenhui	任文辉	1997	2013	murder	capital execution	6020
53	Xu Hui	徐辉	1998	2014	murder	capital suspension	5842
54	Liu Jiqiang	刘吉强	1998	2016	murder	capital suspension	6649
55	Hao Jinan	郝金安	1998	2008	murder	capital suspension	3654
56	Xu Dongchen	徐东辰	1998	2005	murder	capital execution	2681
57	Huang Aibin	黄爱斌	1998	2001	murder	capital execution	1082
58	Qing Yanhong	秦艳红	1998	2002	murder	capital execution	1391
59	Chen Shijiang	陈世江	1998	2006	murder	capital suspension	2690
60	Zhao Xinjia	赵新建	1998	2003	murder	capital execution	2877
61	Du Peiwu	杜培武	1998	2000	murder	capital execution	811
62	Zhang Yun	张云	1998	2015	murder	capital suspension	6050
63	Zhao Fenrong	赵粉绒	1998	NA <sup>b</sup>	murder	capital suspension	6492
64	Liang Wenjin	梁文锦	1999	2009	murder	capital suspension	3007
65	Zhang Xinliang	张新亮	1999	2005	murder	capital execution	2263
66	Tu Jingxin	涂景新	1999	2006	embezzle	capital suspension	1884

67	Zhou Anxiang	周安相	1999	2004	robbery	capital execution	1804
68	Zhao Zuohai	赵作海	1999	2010	murder	capital suspension	4018
69	Tan Junhu	覃俊虎	1999	2003	robbery	capital suspension	1580
70	Ma Quanbao	马全保	1999	2009	murder	capital suspension	3007
71	Zhang Shaoyou	张绍友	1999	2008	murder	capital execution	2915
72	Li Yunguo	李云国	1999	2009	murder	capital suspension	3007
73	Zhang Guangxiang	张光祥	1999	2014	robbery	capital suspension	3769
74	Cheng Fagen	程发根	2000	2016	robbery	capital execution	5233
75	Fang Chunping	方春平	2000	2016	robbery	capital execution	5237
76	Huang Zhiqiang	黄志强	2000	2016	robbery	capital execution	5241
77	Cheng Lihe	程立和	2000	2016	robbery	capital execution	5244
78	Wang Zifa	王子发	2001	2010	robbery	capital execution	3221
79	Chen Keyun	陈科云	2001	2013	explosive	capital suspension	4250
80	Zhu Jifeng	朱继峰	2001	NA <sup>b</sup>	murder	capital suspension	3650
81	Wu Changlong	吴昌龙	2001	2013	explosive	capital suspension	4214
82	Yang Botao	杨波涛	2001	2013	murder	capital suspension	3508
83	Zhuo Fakun	卓发坤	2002	2006	murder	capital execution	1609
84	Li Jiuming	李久明	2002	2004	murder	capital suspension	864
85	Li Chao	李超	2002	2014	murder	capital suspension	2662
86	Dai Keming	代克民	2002	2014	murder	capital execution	2662
87	Li Baochun	李保春	2002	2014	murder	capital execution	2662
88	Lin Dian	林帝安	2002	2010	assault	capital suspension	3075
89	Gao Jinfa	高进发	2002	2005	murder	capital suspension	1410
90	Hu Dianjie	胡电杰	2002	2011	murder	capital execution	3233
91	Liao Weirong	廖位荣	2002	2010	assault	capital execution	3084
92	Wang Hongwu	王洪武	2003	2005	murder	capital suspension	823
93	Zhang Hui	张辉	2003	2013	rape	capital execution	3595
94	Dai Chuanyu	戴传玉	2003	2007	murder	capital suspension	815
95	Cao Weibin	曹红兵	2003	2006	robbery	capital execution	857
96	Liu Cuizhen	刘翠珍	2003	2009	murder	capital suspension	1489
97	Wang Hongxue	王洪学	2003	2005	murder	capital suspension	823
98	Xie Shiyong	谢石勇	2004	2014	robbery	capital execution	3734
99	Gao Ruju	高如举	2004	2014	robbery	capital execution	3734
100	Yin Yongguo	尹用国	2004	2005	murder	capital execution	505
101	Wang Yewen	王业文	2005	2010	assault	capital suspension	1871

102	He Shiming	何世明	2005	2010	robbery	capital execution	2094
103	Sun Xueshuang	孙学双	2005	2009	murder	capital execution	1589
104	Zhangliujun	张留军	2005	2010	robbery	capital suspension	2059
105	Lu Shoulin	卢寿林	2005	2010	robbery	capital execution	2094
106	Song Qingfang	宋庆芳	2005	2009	drug SSTM	capital execution	1517
107	Nian Bin	念斌	2006	2014	poisoning	capital execution	2937
108	Han Yafu	韩亚福	2006	2008	murder	capital suspension	1070
109	Liu Zhilian	刘志连	2006	2011	murder	capital suspension	1926
110	Wu Daquan	吴大全	2006	2010	murder	capital execution	1433
111	Chang Linfeng	常林锋	2007	2013	murder	capital suspension	2002
112	Zhang Zhenfeng	张振风	2007	2010	robbery	capital suspension	1191
113	Pang Zongxiang	庞宗祥	2007	2013	robbery	capital suspension	2295
114	Xie Kaiqi	谢开其	2008	2009	drug SSTM	capital suspension	429
115	Wang Shicai	王什彩	2008	2013	murder	capital suspension	1508
116	Luo Xiaolin	骆小林	2008	2010	drug SSTM	capital execution	738
117	Mo Weiqi	莫卫奇	2008	2009	drug SSTM	capital execution	451
118	Yong Kuikui	雍奎魁	2008	2015	murder	capital execution	2830
119	Leng Guoquan	冷国权	2009	2013	murder	capital execution	1774
120	Zhang Shengxian	张盛贤	2009	2012	murder	capital suspension	1019
121	Chen Qinqin	陈琴琴	2009	2014	murder	capital suspension	1827
122	Song Xingfu	宋兴富	2012	2015	murder	capital suspension	670

Note: <sup>a</sup> DRE, Died/Released/Exonerated, means the year the innocents were released or exonerated, because of bail, parole, or finishing imprisonment, unless the innocents died in jail center and were executed (labeling “-“), or still incarcerated.

<sup>b</sup> NA, the offender was still incarcerated in prison until October 26, 2016.

<sup>c</sup> Died in the jail center since torture;

<sup>d</sup> The innocent have been wrongfully executed.

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