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Approaching Visible Justice: Procedural Safeguards for Mental Examinations in China's Capital Cases

By ZHIYUAN GUO*

I. Introduction

The year 2008 not only witnessed China's successful hosting of the Olympic Games, but also the regretful disposition of the Yang Jia homicide case. The case became a national sensation and received worldwide attention, and the ensuing debate over Yang Jia's mental fitness and the legitimacy of mental examinations in the case served as the inspiration for this article. Preliminary research has found this issue not only to be important for protecting the rights of one of the most vulnerable segments of the population, but also to have far-reaching significance in improving due process generally.

Yang Jia, a jobless 28-year-old Beijing resident, was convicted and executed for murdering six police officers and injuring four others. According to court records, on July 1, 2008, Yang Jia armed himself with tear gas, a knife, hammers, a hiking stick, plastic gloves, and eight beer bottles filled with gasoline before launching an all-out assault on a local police station. At about 9:40AM, after starting a fire at the front gate of police headquarters in Zhabei, a Shanghai suburb, Yang slipped inside and began his rampage. He stabbed the security guard who tried to stop him, and then charged onward, stabbing nine unarmed officers at random before police

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managed to subdue him.¹

Yang Jia's trial for premeditated murder was delayed for the 2008 Olympic Games,² but on August 27, he was tried behind closed doors in a one-hour trial at the Shanghai No. 2 Intermediate People's Court, and sentenced to death. The death sentence was sustained in the trial of second instance on October 20, and on November 21, the Supreme People's Court of China upheld that verdict. Yang Jia was executed five days later.

Cop-killers rarely evoke sympathy in any society, and China is no exception. The public generally supports the death penalty in this type of case. Yang Jia, however, almost immediately received unusually sympathetic media coverage. Chinese internet forums and blogs were also largely supportive of Yang Jia, and many expressed concern that he would not receive a fair trial. Yang Jia was even compared to Wu Song, the great hero of Chinese literature who killed a tiger with his bare hands. On October 13, 2008, this popular sentiment moved beyond the internet and a public protest in support of Yang Jia took place outside the Shanghai court in which his appeal was heard.

How did this cop-killer become such an internet sensation in China? One explanation might be the social context in which the case arose. With the Chinese public's increasing awareness of their legal rights, police misconduct, which, of course, is not a uniquely Chinese problem, has met with unprecedented condemnation, and the call for judicial fairness has become more and more intense. The motive behind Yang Jia's attack, avenging past police misconduct, played directly to this sentiment. In 2007, Yang Jia alleged that he was held by police for six hours on suspicion that he had stolen a bicycle he rented while on vacation in Shanghai. Yang claimed that he was abused during detention and that he suffered psychological harm. Yang Jia unsuccessfully sued the police for compensation before his rampage in 2008.³

1. See 上海市高院公布“杨佳袭警案”刑事裁定书(全文), CHINANEWS.COM, Oct. 20, 2008, available at <http://www.chinanews.com.cn/gn/news/2008/10-20/1418701.shtml>.

2. Due to the attention that Yang Jia's case attracted from home and abroad, the Chinese court postponed the trial, for fear that negative reports would affect the successful hosting of the Olympic Games.

3. This was not Yang Jia's first run-in with the police. Yang Jia was also beaten by police officers in Taiyuan Railway Station in 2006, and he had successfully obtained compensation of ¥30,000 after repeated petitions concerning that

Given the social context and background, together with a number of procedural flaws discussed in detail below, it was inevitable that Yang Jia's case would evoke such a heated reaction. He became a symbol for the growing number of people who are challenging Chinese police in order to protest the brutality of the state. The general public seized on Yang Jia's case as an opportunity to express their anger at police violence and to voice their demands for a fairer criminal justice system.

In light of the complexities of Yang Jia's case, this article focuses primarily on the most relevant issue — mental examinations. Part II examines procedural flaws in the handling of Yang Jia's case, particularly problems with his mental examinations. Part III addresses the background issue: what led to the tragic disposition of Yang Jia's case? By providing a general overview of the existing legal provisions relating to mental examinations in criminal cases in China, the author concludes that it is the ineffectiveness — or even total absence — of procedural safeguards that accounts for the unsatisfactory handling of cases like Yang Jia's. Part IV offers a comparative evaluation of procedural safeguards for mentally disabled defendants by looking to the relevant U.S. law. Part V proposes legislative reforms for China based on the lessons learned from Yang Jia's case, and designed to improve procedural protections for mentally disabled defendants in capital cases.

II. Procedural Issues Raised By Yang Jia's Case

A. *Lack of Transparency and Conflict of Interest*

No one doubted what the verdict would be, or was surprised by the sentence, in Yang Jia's case. China has an extremely high conviction rate in criminal trials,⁴ and under Chinese law, a convicted murderer like Yang Jia is invariably sentenced to death. Moreover, while no one but those present will know whether Yang Jia was actually tortured by Shanghai police in 2007, that abuse,

incident. For details, see 南方周末：杀人者杨佳青春档案, ZAOBAO.COM, July 18, 2008, available at <http://www.zaobao.com/special/newspapers/2008/07/others080718y.shtml>.

4. "It is clear from the table that the overwhelming majority of individuals prosecuted for crimes in China are convicted, with the rate of conviction at nearly 98 percent." See *New Figures Highlight Imbalance in Prosecution of Political Cases in China*, 14 DIALOGUE (Dui Hua Found., San Francisco, Calif.), Winter 2004, at 4, http://www.duihua.org/work/publications/nl/nl_pdf/nl_14_1.pdf.

even if proven, could not excuse Yang Jia's crime. Yet people were still troubled by the lack of transparency and questionable handling of the trial. One can see that these core procedural issues – rather than the verdict – make the case worthy of consideration.

Lack of transparency was a central problem in the Yang Jia case: the trial took place behind closed doors with neither family members nor the media allowed to witness the proceedings. This naturally led the public to suspect that the court had closed the proceedings in order to conceal police misconduct. While the seven-hour trial of second instance was open to the families of those involved, and to some supportive lawyers, it was merely a repeat of the trial of first instance in that key witnesses did not take the stand and none of the defense's submissions were accepted.⁵

Many feel that the Shanghai justice system should have made the trials more transparent and accessible to the public. As Yang Jia was apprehended at the scene, there can be no doubt that he committed the crime, and most Chinese citizens have no objection to executing someone who murdered so many innocent police officers. By holding a fair and transparent trial, the justice system could have sent a message to both Yang Jia and his sympathizers that even if the system may have failed them once by allowing unlawful police violence against Yang Jia in 2007, it would not fail them again.

A second issue was that in the trial of first instance, Yang Jia's appointed lawyer, Xie Youming, may have had a conflict of interest in that he also worked as a legal adviser for the municipal district that oversees the police station involved in this case. Xie dismissed the possibility of an insanity plea based on his personal assessment that Yang Jia was in perfectly sound mental health. He also asserted that his client deserved the death penalty.⁶

B. Yang Jia's Mental Examination

Of greatest concern to this article is Yang Jia's mental examination. Yang Jia was examined only once, by four experts

5. See 杨佳袭警案二审加大开放力度 控辩“王牌对对碰”, XINHUANET.COM, Oct. 15, 2008, available at http://news.xinhuanet.com/legal/2008-10/15/content_10197792.htm; 杨佳袭警案“透明二审”主要证人仍未出庭作证, JJXWW.COM, Oct. 16, 2008, <http://www.jjxww.com/html/show.aspx?id=124813&cid=51>.

6. For more detailed discussions, see 质疑杨佳律师谢有明：你不是编外公诉人, LAWSTAR.COM, July 14, 2008, <http://www.law-star.com/cac/195022789.htm>; 谢有明律师应主动回避杨佳案 律协应介入调查, LAWSTAR.COM, July 22, 2008, <http://www.law-star.com/cac/195022802.htm>.

appointed by the Shanghai police department. They determined that he was mentally competent during the attack. In the trial of second instance, Mr. Zhai Jian, the new lawyer appointed for Yang Jia, did claim that Yang was mentally unstable and unfit to stand trial, but prosecutors were still able to portray Yang Jia as a cold-blooded murderer who committed the crime with "premeditated malice and thorough preparation."⁷ The appellate court concluded that Yang Jia was of sound mind.

Throughout the entire process, Yang Jia's relatives made every effort to arrange another evaluation of Yang Jia's mental state, but all of their requests were rejected by the courts.⁸ Critically, the single mental examination allowed presented several problems related to both the methods and the procedure for conducting mental evaluations in capital cases.

The first problem concerns the selection of examiners. Under the Criminal Procedure Law of China ("CPL"), mental examinations "shall be conducted by a hospital designated by a provincial level people's government"⁹ (emphasis added). Regulations issued by the Standing Committee of the National People's Congress ("NPC") provide that "[c]ourts and judicial administrative agencies are not allowed to set up examination centers."¹⁰ In Yang Jia's case, however, the examiners were from the Institute of Forensic Science of the Ministry of Justice, rather than from a hospital. Therefore, the appointment of these examiners was obviously contrary to the law.

The second problem was the potential bias of the examiners. In

7. See David Barboza, *Police Officers' Killer, Hero to Some Chinese, Is Executed*, N.Y. TIMES, Nov. 26, 2008, at A18, available at <http://www.nytimes.com/2008/11/27/world/asia/27shanghai.html>.

8. For detailed discussions, see <http://bbs.hsw.cn/thread-603897-1-1.html> (last visited Nov. 10, 2009); Yu Wei, 杨佳家人昨致信最高法, NDDAILY.COM, Nov. 13, 2008, available at http://epaper.nddaily.com/A/html/2008-11/13/content_626925.htm.

9. Zhong hua ren min gong he guo xing shi su song fa [Criminal Procedure Law] (promulgated by the Nat'l People's Cong., Jul. 1, 1979, effective Jan. 1, 1997, amended Mar. 17, 1996), art. 120, translated in The Congressional-Executive Commission on China's "Selected PRC Legal Provisions," available at <http://www.cecc.gov/pages/newLaws/criminalProcedureENG.php> (P.R.C.) [hereinafter CPL] (stating "[M]edical verification of mental illness shall be conducted by a hospital designated by a people's government at the provincial level").

10. Guan yu si fa jian ding guan li de jue ding [Decision on Management of Forensic Analysis] (promulgated by the Standing Committee of the Nat'l People's Cong., Feb. 28, 2005, effective October 1, 2005) art. 7 (P.R.C.) (stating "Courts and judicial administrative agencies are not allowed to set up examination centers").

Yang Jia's case, it was the Shanghai police department who retained the examining experts. Given that the victims in this case were themselves Shanghai area police officers, the examination report was unquestionably brought under suspicion of bias.

The third problem concerns methodological defects in the examination. The process used to examine Yang Jia was kept secret from the public, but internet articles provide some insight.¹¹ What is known suggests that the examination suffered from a number of methodological defects. Under Chinese law, the party retaining an expert to evaluate the mental state of the defendant should gather and provide lay testimony on the defendant's mental well-being in addition to providing medical records and the results of any related prior examinations.¹² Further, the evaluation report should include discussion not only of the defendant's mental state at the time of the crime, but both *before* and *after* the crime was committed as well.¹³ In this case, the experts neither talked to Yang Jia's family, relatives, or friends, nor did they investigate his medical records. Had they done so, they would have discovered that:

1. There is a history of mental illness in Yang Jia's family. One of his grandfathers was diagnosed with a serious mental illness.¹⁴
2. In an unrelated incident in November 2006, Yang Jia was reportedly beaten on his head by the police in Taiyuan, causing a cerebral concussion.¹⁵
3. Yang Jia was found to have unspecified psychological

11. See 杨佳的精神病鉴定，程序严重违法, <http://www.bloglegal.com/blog/cac/2250015815.htm#> (last visited Nov. 10, 2009).

12. See *Jing shen ji bin si fa jian ding zan xing gui ding* [Provisional Regulations on the Psychiatric Evaluation of Mental Illness (精神疾病司法鉴定暂行规定)] (promulgated by the Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, Ministry of Justice, and Ministry of Health, July 11, 1989, effective Aug. 1, 1989) art. 17 (P.R.C.) (providing that, "[t]he party who retains experts to evaluate the mental state of the defendant should provide the following materials: . . . (d) testimony on defendant's mental status by anyone who knows him/her well; (e) Medical records and results of other related examinations.").

13. *Id.* See art. 18 ("The evaluation report should include: . . . (g) the mental status of the defendant at the time of the crime, as well as the mental status before and after the crime was committed.").

14. See 刘锡伟:杨佳有精神病——老党员致十七届三中全会的信, RFA CHINA BLOG, Oct. 14, 2008, <http://www.rfachina.com/?q=node/2663> (last visited Nov. 10, 2009).

15. See 南方周末:杀人者杨佳青春档案, ZAOBAO.COM, July 18, 2008, available at <http://www.zaobao.com/special/newspapers/2008/07/others080718y.shtml>.

problems in May 2007, but was unable to afford treatment.¹⁶

While brief jailhouse interviews may be adequate to identify mental illness in the case of a severely impaired defendant who suffers from obvious symptoms such as hallucinations and delusions, it may be necessary, in some cases, to interview people close to the defendant. In the United States, “relatives of the accused, his employer, co-workers, and others may be interviewed by the psychiatrist, if necessary, to obtain background information essential to an informed opinion.”¹⁷ Without interviewing the family and acquaintances of Yang Jia, the experts are unlikely to have been able to make a comprehensive evaluation of Yang Jia’s mental state.

A fourth problem concerns procedural flaws related to the examination. According to the rules governing the procedure for mental examinations, “the near relatives or guardians of the examinee may be present when a mental examination is conducted if they so choose.”¹⁸ Since this was a highly charged case involving the death of police officers, and prosecution experts were retained by the Shanghai police department, it was especially important that Yang Jia’s family be present during the examination. It is not surprising, however, that no one told Yang Jia’s family that they could attend the examination.¹⁹

The fifth problem is the cursory nature of the examination. It usually takes a reasonably long period to complete psychiatric tests, especially for those who have only intermittent psychiatric problems, because a psychotic episode will be missed if the evaluation period is too short. To accommodate the need for longer evaluations, the Chinese Criminal Procedure Law specifically allows that the period for mental examinations “shall not be included in the

16. See *id.*

17. Abe Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905, 913 (1961) (referring to *Calloway v. United States*, 270 F.2d 334 (D.C. 1959)).

18. See *Si fa jian ding cheng xu tong ze* [Procedural Rules of Forensic Analysis] (promulgated by Ministry of Justice, Aug. 7, 2007, effective October 1, 2007) art. 24, §3 (P.R.C.) (“The party who retains the experts, and the near relatives or guardians of the examinee, can be present when a mental examination is conducted if they so choose.”).

19. Instead, according to internet media reports, Yang Jia’s mother was locked up in a mental asylum for most of the trial. See 李克杰：杨佳母亲“带病现身”考验司法理性, JIXWW.COM, Nov. 12, 2008, available at <http://www.jjxww.com/html/show.aspx?id=131550&cid=31>.

period of time for handling the case.”²⁰ At the same time, to avoid overly prolonged evaluations, Chinese law also provides a maximum time limit for mental examinations.²¹ Both of these legal provisions imply that conducting a mental examination is expected to be time consuming.

It only took a couple of hours for the experts in Yang Jia’s case to reach a conclusion.²² As scholars have indicated, a single examination may be insufficient to elicit adequate material for a mental health evaluation²³ because essential evaluative techniques cannot be employed in a hurried examination,²⁴ and manifestations of mental illness may not surface in a single interview.²⁵

Finally, the last problem, the right to an independent evaluation was critically overlooked in Yang Jia’s case. As mentioned above, only the prosecution had an opportunity to have Yang Jia professionally evaluated. Despite multiple requests, the defense

20. CPL, *supra* note 9, art. 122 (“The period during which the mental illness of a criminal suspect is under verification shall not be included in the period of time for handling the case.”).

21. See Procedural Rules of Forensic Analysis, *supra* note 18, art. 26 (“The appraiser should finish the evaluation within 30 business days after signing the agreement with the party who retains them. If the appraiser needs a longer period of time because the examination involves complex, difficult or special technical issues, or it takes a long time to obtain a result, with the approval of people in charge, the time for evaluation can be extended by another 30 business days.”).

22. See 杨佳的精神病鉴定，程序严重违法/刘晓原律师, BOXUN.COM, Aug. 1, 2008, available at <http://news.boxun.com/news/gb/pubvp/2008/08/200808012235.shtml>. This resembled the situation in a well-known American case, *Ford v. Wainwright*, 477 U.S. 399 (1986), where three Governor-appointed psychiatrists simultaneously interviewed Ford for approximately one-half hour, and concluded that Ford was sane based solely on the half-hour interview. *Id.* at 399. The U.S. Supreme Court held that this procedure failed to meet the requirement of a full and fair hearing, which is a common requirement when a substantive constitutional right is involved. *Id.*

23. See JAY ZISKIN, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTING* 13 (Law & Psychology Press 3rd ed., 1981) (1970) (“[B]ecause psychological states are complex . . . a single and relatively brief examination is . . . inadequate.”).

24. See Brief of Amicus, American Psychiatric Association at 10, *Ford v. Wainwright*, 477 U.S. 399 (1986) (No. 85-5542); SEYMOUR HALLECK, *LAW AND THE PRACTICE OF PSYCHIATRY: A HANDBOOK FOR CLINICIANS* 201 (Sherwyn M. Woods ed., Plenum Medical Book Co. 1980) (“[M]ost patients . . . should be interviewed for several hours.”).

25. See THE SCHIZOPHRENIC SYNDROME 337-38 (Leopold Bellak & Laurence Loeb eds., 1969) (Manifestations of schizophrenia “are present one day and not the next. They are revealed to one examiner and not to another. . . . A complete account of a patient’s symptomatology, therefore, demands that he be observed over an extended period of time.”).

never had a chance to retain experts of its own choosing. It is clearly unfair for the defense to be unable to offer expert testimony, particularly in the trial of second instance where the insanity defense was raised. It was equally unreasonable for the court to have relied on Yang Jia's own assertion that he had no mental health problems as the basis for its assessment that he was criminally responsible,²⁶ because according to one insightful American scholar's opinion, "a defendant's unwillingness to participate in a psychiatric interview may in itself be a symptom of a severe mental disorder."²⁷

Although Yang Jia's case left many questions open,²⁸ one cannot conclude that he must have been insane at the time of the crime, because further examinations might have gone either way. Yet no one would argue that the defendant should be denied an equal opportunity to provide evidence to support an insanity defense.

C. *Beyond Yang Jia*

One might be tempted to think that the handling of Yang Jia's case was atypical because it happened right before the Olympic Games, and because it aroused so much attention and sympathy at home and abroad. One might also think it was specially handled because it involved the killing of police officers, which is a direct affront to state authority. In terms of its speed and the lack of

26. Zhang Fan, 杨佳案律师：从未见过如此放松的死刑犯，大公报，Oct. 21, 2008, available at <http://www.peacehall.com/news/gb/china/2008/10/200810210716.shtml> (Yang Jia an lvshi: cong wei jianguo ruci fangsong de sixing fan [Lawyer for Yang Jia: "I have never seen such a relaxed defendant in a death penalty case."]).

27. Krash, *supra* note 17, at 919.

28. Aside from the aforementioned problems, there were still other clues that Yang Jia may have been insane at the time of the offense. First, Yang Jia had no previous criminal record, so commission of such heinous acts made him an obvious candidate for a full psychiatric examination. Second, according to the reports, Yang Jia killed or injured ten police officers and climbed over four hundred stairs in less than twenty minutes (the verdict indicated that Yang Jia did all this in five minutes, but that does not appear plausible.). The frenetic nature of the attack alone indicates that Yang Jia was not of sound mind. Third, when insisting at trial that he had been abused by the police, Yang Jia could not remember most of the events at issue, yet he also asserted that he had no regrets. His unusual indifference to the outcome was bizarre. When asked about prison conditions, Yang Jia said that "the food here is quite good." It has also been reported that Yang Jia was very peaceful before his execution. For detailed discussions, see Chen Wu, 昨二审开庭 杨佳对杀人细节均称"记不清", 东方早报, Oct. 14, 2008, available at <http://dfdaily.eastday.com/d/node48790/u1a486016.html>.

transparency, the case was exceptional, but the problems regarding mental examinations raised in Yang Jia's case are not uncommon in practice.

In another high-profile case from 2006, Qiu Xinghua, a Shaanxi villager who suspected that the head of a Taoist Temple had had an affair with his wife, killed the man and went on to kill ten other innocent people for no apparent reason.²⁹ The killings were so vicious that Qiu Xinhua had even removed and fried the deceased's intestines before feeding them to a dog; clearly an indicator that Qiu Xinhua may have suffered from a mental disorder.³⁰ The case incited a nationwide debate over who is entitled to initiate mental examinations.³¹ Before this case, only the court, the prosecution and the police could decide to conduct a mental examination. The defense could neither initiate an evaluation, nor apply to the judicial agencies for one; it could only apply for supplementary evaluations or re-evaluations after the official-initiated examination produced a conclusion. As a result, there was widespread concern that a mentally disabled defendant might be convicted if judicial agencies abused their power or merely misjudged the necessity of a mental examination. Several laws and regulations on forensic analysis have been issued since the Qiu Xinghua case,³² but it remains unclear whether the defense can directly initiate mental examinations. Yang Jia's case was just one more demonstration of this flaw in the Chinese legislative process.

The reaction to the handling of Yang Jia's case can also be understood in terms of traditional Chinese attitudes towards justice. If the case did not involve allegations of past police abuse, few people would have shown any sympathy to Yang Jia, even if he was not afforded a fair trial. Chinese people attach more importance to crime control than due process.

Yang Jia was caught red handed, leaving no doubt that he

29. See Sina.com, <http://news.sina.com.cn/z/qiuxhsx/index.shtml>.

30. See Yuan Xiaobing, 陕西汉阴10人被杀案始末：遇害住持心肺被挖出, 南方新闻网, Aug. 8, 2006, available at <http://news.sina.com.cn/s/1/2006-08-08/091910662894.shtml> (last visited Nov. 11, 2009).

31. See 法学教授称应为邱兴华做司法精神病鉴定, 重庆晨报, Dec. 24, 2006, available at <http://news.sina.com.cn/c/1/2006-12-24/030011870129.shtml>.

32. Major legislation after Qiu Xinghua's case includes the amended Procedural Rules on Forensic Analysis, which were issued on August 7, 2007, by the Ministry of Justice. It replaced the previous procedural rules issued in 2001 and became the only special procedural regulation on forensic analysis in China.

committed the crime, so the justice system felt comfortable racing through the trial and appeals process. The case is just one illustration of how lust for punishment can overcome considerations of law and judicial fairness in China. But arguments about traditions or values should not excuse the denial of due process. There are flaws in China's mental examination system which must be corrected to ensure fairness. The brief normative and comparative study found in the following sections attempts to identify the key problems.

III. Mental Examinations In the Chinese Legal System

A. *Historical Development*

Chinese documents on legal issues related to mental illness can be found as early as the eleventh century B.C.³³ Under the subsection of SiCi in Zhouli Qiuguan, a historical document recording the legal systems in ancient China, sentencing officials (SiCi) should consider mitigating or exculpating factors. One of the mitigating factors was the accused's inability to remember what happened when the crime was committed, and one of the exculpating factors was mental retardation.³⁴ These are commonly regarded as the earliest provisions concerning the implications of mental deficits upon criminal sanctions. While discussion of what procedure was followed to evaluate the mental health of the offender is totally missing from the text, it is safe to conclude that mental deficits were taken seriously in the context of criminal liability.

In the following centuries, mental illness was considered an important factor affecting the substantive disposition of both criminal and civil cases, but again, little is known about how mental evaluations were conducted. By 1925, there were fifty-two legal

33. See Shang shu wei zi [The Book of History (尚书·微子)].

34. See Zhou li qiu guan si ci (周礼秋官·司刺). "Si ci (one of the officials in the Zhou Dynasty - explanation added) is in charge of applying the three punishments law, three leniency law and three pardons law." Three leniency law means three mitigating circumstances, including those who do not know what they have done, those who committed wrongs inadvertently, and those who have forgotten what they have done. Three pardons mean three circumstances under which the responsibility could be excused, and those eligible for pardons include children, seniors and the mentally handicapped. ("司刺掌三刺，三宥，三赦之法。三宥是指减轻罪责的三条规定，宽容的对象包括“不识，”“过失”和“遗忘”；三赦是指赦免罪责的三条规定，赦免的对象包括“幼弱，”“老废，”“蠢愚。")

provisions concerning persons with psychiatric problems in civil, criminal, juvenile and other cases.³⁵ Under that era's Penal Code Article 19, for example, "an insane offender was not liable for his criminal conduct; while an offender with limited mental ability assumed criminal responsibility, but his punishment could be mitigated."³⁶ Unfortunately, due to the unstable political situation at the time, these provisions were only nominally implemented and existed primarily on paper.³⁷

In the 1950s, Chinese psychiatry was greatly influenced by the introduction of psychiatric concepts from the former Soviet Union. It was not until around 1980, however, when the first Penal Code (1979), Criminal Procedure Law (1979), Civil Procedure Law (1982), General Rules of Civil Law (1987), and Public Order Administrative Punishment Regulation (1987) (*zhian guanli chufa tiaoli*) were enacted, that the legal provisions on mental disorders opened the door for mental evaluations.

Generally speaking, the primary Chinese legal sources concerning the role of mental disabilities and mental evaluation in criminal cases include the Criminal Law, Criminal Procedure Law (CPL), and the Provisional Regulations on Psychiatric Evaluation of Mental Illness (1989) (*Jing shen ji bing si fa jian ding zan xing gui ding*).³⁸ In addition, the amended Procedural Rules on Forensic Analysis issued on August 7, 2007 by the Ministry of Justice (*Si fa jian ding cheng xu tong ze*)³⁹ address psychiatric evaluation as a specific type of forensic analysis.

B. Psychiatric Evaluation Law in Modern China: A Comparative Perspective

Psychiatric evaluation is a procedure to ascertain whether or not the defendant has a mental disability (or disorder), which is a broad term that encompasses both mental retardation and mental illness. In the U.S., mental retardation refers to a developmental

35. See *Wo guo si fa jing shen bing jian ding de li shi ji xian zhuang* [History and current situation of psychiatric evaluation in China (我国司法精神病鉴定的历史及现状)], available at <http://www.angelaw.com/medlaw/psycho01.htm>.

36. *Id.* "心神丧失人之行为，不罚。精神耗弱人之行为，得减轻其刑。"

37. See *id.*

38. Provisional Regulations on the Psychiatric Evaluation of Mental Illness, *supra* note 12.

39. Procedural Rules of Forensic Analysis, *supra* note 18.

disorder, which usually manifests itself during childhood or adolescence and is marked by low IQ and impaired adaptive skills.⁴⁰ Sometimes, organic brain damage can also lead to mental retardation. Mental illness, on the other hand, is marked by characteristic disturbance of thinking, perception, emotion and/or behavior, but is often amenable to medical treatment. In China, however, mental retardation is usually considered a type of mental illness in most legal contexts. Mental illness, disability, and disorder are used interchangeably and include retardation.⁴¹

Mental disability has legal significance in a variety of settings. In American criminal cases, it can be a defense to criminal charges or can entirely preclude the guilty plea, trial, sentencing, or execution of a defendant.⁴² Depending on the procedural stage, mental disability raises different issues, including criminal responsibility, competency to stand trial, competency to be executed, and release from commitment. Since the latter two issues are rarely even discussed in China, this article focuses instead on the impact of mental disorders on criminal responsibility and competency to stand trial.

1. Culpability

Culpability is the touchstone of criminal law, and describes the blameworthiness of an offender in the commission of a crime. Only those who commit acts with the requisite criminal intent are culpable, and should therefore be eligible for punishment. In the U.S., there is a widely observed principle of sparing the “insane” from execution. Such people are not held responsible for their crimes because severe mental illness impaired their judgment or their ability to exercise self-control at the time of the offense, making it impossible for them to have had the requisite criminal intent. Defendants with mental disabilities can plead insanity as their

40. See Christopher S. Cook, *The Death Penalty and Mentally Retarded Criminal Defendants: A Re-examination in Light of Penry v. Lynaugh*, 19 CAP. U. L. REV. 869, 870 (“The American Association on Mental Retardation defines mental retardation as ‘significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.’”).

41. For example, under the Chinese Penal Code, mental retardation is not addressed separately. Instead, any provision concerning mental illness is applicable to both mentally ill and mentally retarded defendants and witnesses.

42. See SANFORD H. KADISH, STEPHEN J. SCHULHOFER, & CAROL S. STEIKER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 863 (2007).

primary defense. If the plea prevails, the defendant will be found not guilty, or guilty but insane and committed to a psychiatric hospital. Mentally retarded defendants are not eligible for the death penalty after they are diagnosed.

Does China recognize similar basic principles in the context of mentally disabled defendants? Article 18 of the Criminal Law of the PRC states:

If a mental patient causes harmful consequences at a time when he is unable to recognize or control his own conduct, upon verification and confirmation through legal procedure, he shall not bear criminal responsibility.⁴³ . . . If a mental patient who has not completely lost the ability of recognizing or controlling his own conduct commits a crime, he shall bear criminal responsibility; however, he may be given a lighter or mitigated punishment.⁴⁴

This provision resembles the American Law Institute's Model Penal Code (hereinafter "MPC"), Section 4.01, which states, "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law."⁴⁵ And in Chinese practice, mentally disabled offenders are either not held responsible for their crimes, or allowed to use their disability as a mitigating factor to avoid the death penalty.

2. *Competency to Stand Trial*

In the U.S., the question of competency (also referred to as

43. Although defendants with mental illness do not bear criminal responsibility, Article 18 of the Criminal Law of the People's Republic of China stipulates that "his family members or guardian shall be ordered to keep him under strict watch and control and arrange for his medical treatment. When necessary, the government may compel him to receive medical treatment." Zhong hua ren min gong he guo xing fa [Criminal Law] (adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, revised at the Fifth Session of the Eighth National People's Congress on March 14, 1997), translated in The Congressional-Executive Commission on China's "Selected PRC Legal Provisions," available at <http://www.cecc.gov/pages/newLaws/criminalLawENG.php> (P.R.C.). Article 18 also emphasizes, "[a]ny person whose mental illness is of an intermittent nature shall bear criminal responsibility if he commits a crime when he is in a normal mental state." *Id.* This is the same as in the American model, where the mental status at the time of crime is relevant in determining criminal responsibility.

44. *Id.*

45. See Model Penal Code § 4.01(A).

fitness or capacity) to stand trial refers to whether a defendant is so mentally incompetent that he/she is “unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.”⁴⁶ It has been stated that,

the universally accepted rule prohibiting the trial of a mentally incompetent defendants rests, in part, upon humane considerations, in part, upon the view that the judicial process would be denigrated by the spectacle of a prosecution of a severely disoriented person; and perhaps most basically, upon the realization that the reliability of a conviction is reduced if individuals incapable of self-defense are forced to stand trial.⁴⁷

Section 4.04 of the MPC provides that “no person who as a result of mental disease or defect lacks capacities to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures.”⁴⁸

In China, Article 9 of the Provisional Regulation on Psychiatric Evaluation of Mental Illness (1989) (hereinafter “Provisional Regulation”) provides, “[p]sychiatric evaluation in criminal cases should include: . . . (b) Ascertaining the mental status of the defendant and if he/she is competent to stand trial.” Although there is no specific provision on how to handle cases where the defendant is not competent to stand trial in the CPL, there is guidance in related judicial interpretations.⁴⁹ Articles 241 and 273 of Supreme People’s Procuratorate’s Rules on Criminal Process, and Articles 181 and 229 of Supreme People’s Court’s Interpretations on Several Issues Regarding Implementation of the P.R.C.’s Criminal Procedure Law state that during investigation, prosecution or trial, if the defendant or other parties suffer from mental illness, the relevant proceeding should adjourn until he/she regains his/her mental capacity. Clearly, competency to stand trial is a concept recognized in China.

In addition to recognizing the principle of “*non reu nisi mens sit*

46. 18 U.S.C. § 4241 (2006).

47. Krash, *supra* note 17, at 908.

48. Model Penal Code § 4.04.

49. Provisional Regulations on the Psychiatric Evaluation of Mental Illness, *supra* note 12, art. 9. In China, both the Supreme People’s Court and Supreme People’s Procuratorate have the authority to issue judicial interpretations. Given that the CPL of the People’s Republic of China is quite general, judicial interpretations are important supplementary legal sources to CPL.

rea" (no mens rea, no responsibility) in substantive law, four articles involving mental disorders and mental evaluations can be found in the CPL. Article 48 indicates that mental disability can disqualify a witness,⁵⁰ which is another type of competency issue. Article 119 provides that "when certain special problems relating to a case need to be solved in order to clarify the circumstances of the case, experts shall be assigned or invited to give their evaluations."⁵¹ Whether a person is insane falls within the special problems referred to in this article, and thus requires a professional evaluation. Article 120 creates a general obligation for expert evaluators to prepare a final report,⁵² and grants the authority to administer the medical examination.⁵³ Article 122 excludes the time spent conducting a mental examination from the time limit set for concluding cases.⁵⁴ These four articles of the CPL are either general provisions on forensic analysis or very limited references to mental examinations.

The Provisional Regulation was issued jointly by the Supreme People's Court, Supreme People's Procurator, Ministry of Public Security, Ministry of Justice, and Ministry of Health on July 11, 1989, and came into effect on August 1, 1989. It is technically provisional, but this special legal document is still binding. Although it was designed to cover almost all major issues related to forensic analysis,⁵⁵ this Provisional Regulation is fairly empty and lacks concrete standards or procedures, and is therefore quite difficult to

50. CPL, *supra* note 9, art. 48 ("Every person who has information about a case shall have the duty to testify . . . Persons with physical or mental defects, minors who cannot distinguish right from wrong or persons who cannot properly express themselves shall be disqualified as witnesses.").

51. *Id.* art. 119.

52. *Id.* art. 120 ("After evaluating a matter, the experts shall write a conclusion of expert evaluation and affix his signature to it.").

53. *Id.* ("Reverification necessitated by disputes over medical verification of personal injuries and *medical verification of mental illness* shall be conducted by a hospital designated by a people's government at the provincial level. After verification, the expert shall make a conclusion in writing, to which his signature and the hospital's seal shall be affixed. If an expert intentionally makes a false verification, he shall assume legal responsibility." (emphasis added)).

54. *Id.* art. 122 ("The period during which the mental illness of a criminal suspect is under verification shall not be included in the period of time for handling the case.").

55. *See supra* note 12. The Provisional Regulation consists of seven chapters, namely, the General Provisions, Appraisal Agency, Objects and Issues to be Appraised, Appraiser, Delegation and Expertise Report, Evaluation on Capacity of Liability and Litigation, and Supplementary Provisions.

implement.

C. China's Legal Reforms Relating to Mental Evaluations

Mental health law in China is not yet as mature as it is in the U.S. or other jurisdictions. However, as an essential part of forensic analysis (*si fa jian ding*),⁵⁶ mental evaluation has been impacted by a variety of legal reforms over the past few years. Due to the significant role that expert opinions play in handling cases, forensic analysis has been regarded as one of the most important areas of judicial reform in China. A series of regulations regarding the administration of forensic analysis have been issued since 2000,⁵⁷ culminating in the release of the Decision of the Standing Committee of the National People's Congress on Administrative Issues of Forensic Analysis (hereinafter "Decision").⁵⁸

This document embodies all of China's efforts and achievements in this area of judicial reform. It involves the scope and registration of forensic analysis, the qualification of evaluators

56. In this article, the Chinese phrase "司法鉴定" is being translated as "forensic analysis" as an approximation.

57. These regulations include but are not limited to: *Si fa jian ding zhi ye fen lei gui ding (shi xing)* [Regulation on Practice Classification of Forensic Analysis (provisional) 《司法鉴定执业分类规定(试行)》] (promulgated by the Ministry of Justice, Nov. 29, 2000, effective Jan. 1, 2001); *Si fa jian ding xu ke zheng guan li gui ding* [Management of License for Forensic Analysis 《司法鉴定许可证管理规定》] (promulgated by the Ministry of Justice, Feb. 20, 2001, effective Feb. 20, 2001); *Si fa jian ding cheng xu tong ze (shi xing)* [Procedural Rules on Forensic Analysis (provisional) 《司法鉴定程序通则(试行)》] (promulgated by the Ministry of Justice, Aug. 31, 2001, effective June 1, 2002); *Ren min fa yuan si fa jian ding gong zuo zan xing ban fa* [People's Courts' Provisional Regulation on Forensic Analysis, 《人民法院司法鉴定工作暂行办法》] (promulgated by the Supreme People's Court, Nov. 16, 2001, effective Nov. 16, 2001); *Guan yu ren min fa yuan dui wai wei tuo he zu zhi si fa jian ding guan li ban fa* [Regulation on how the People's Court Retains and Organizes Forensic Analysis 《关于人民法院对外委托和组织司法鉴定管理办法》] (promulgated by the Supreme People's Court, Mar. 27, 2002, effective April 1, 2002); *Si fa jian ding ji gou deng ji guan li ban fa* [Registration Management of Forensic Analysis Institutes 《司法鉴定机构登记管理办法》] (promulgated by the Ministry of Justice, Sep. 30, 2005, effective Sep. 30, 2005); *Si fa jian ding ren guan li ban fa* [Management of Forensic Examiners 《司法鉴定人管理办法》] (promulgated by Ministry of Justice, Sep. 30, 2005, effective Sep. 30, 2005).

58. *Quan guo ren min dai bai da hui chang wu wei yuan hui guan yu si fa jian ding guan li Wen ti de jue ding* [Decision of the Standing Committee of the National People's Congress on Administrative Issues of Forensic Analysis] (promulgated by the Standing Committee of National People's Congress, Feb. 28, 2005, effective Oct. 1, 2005) (P.R.C.).

and evaluating institutions, the administration of forensic evaluations, and the evaluator's responsibilities. The most significant achievement of the Decision may be its explicit requirement that the evaluating institution be neutral and independent.⁵⁹ By prohibiting the investigative agencies' own internal evaluation institutions from providing for-profit service to the public and by forbidding the courts and judicial administrative agencies from establishing their own evaluation institutions, the Decision attempts to sever the connection between evaluators and judicial agencies, thereby ensuring neutral evaluations.⁶⁰

The Decision, however, is merely an administrative regulation on forensic analysis. It hardly even touches on the procedural issues of forensic analysis except in reiterating the obligation of expert witnesses to take the stand,⁶¹ which is already implicitly provided for in the CPL.⁶² Ultimately, forensic analysis is a comprehensive subject that involves administrative, procedural, and evidentiary issues, but as mentioned above, there are only four articles in the CPL regarding forensic analysis. The need for legislation on procedural issues concerning forensic analysis has become increasingly pressing, especially since the release of the Decision further highlighted the weakness in the current law.

To fill the gaps in procedural legislation, the Ministry of Justice enacted the amended Procedural Rules on Forensic Analysis (hereinafter "Procedural Rules") on August 7, 2007, and effective from October 1, 2007. This document provides some procedural mechanisms to address the problems of multiple and repeated forensic analysis, such as stricter requirements for approving re-examination, co-examination by multiple evaluators, and supervisory review following an examination.⁶³ It has not, however, resolved the key problem: addressing who has the right to initiate the examination process, which was the most controversial issue in both Qiu Xinhua and Yang Jia cases. Despite the modest

59. Before the Decision was issued, police stations, prosecutor's offices and the court all had their own evaluating departments. This situation not only raised questions of neutrality, but it also led to multiple and repeated evaluations.

60. See Decision of the Standing Committee of the Nat'l People's Cong. on Administrative Issues of Forensic Analysis, *supra* note 58, art. 7.

61. See *id.* art. 11.

62. See CPL, *supra* note 9, arts. 151, 154, 156.

63. Procedural Rules on Forensic Analysis, *supra* note 18, arts. 29, 19, 32 (2005) (P.R.C.).

improvements it made, the Procedural Rules left many important issues unresolved, meaning that procedural guarantees are still missing from legislation on forensic analysis.

In conclusion, the Chinese statutes convey a message to both the domestic and international audiences that the country does not tolerate application of the death penalty against those with mental disorders at the time of crime. Unfortunately, the absence of procedural safeguards undercuts the power of that message. A comparison of the relevant Chinese and American law indicates that it is not the lack of recognition of mental disabilities as an exculpating or mitigating factor of criminal responsibility, but the absence or ineffectiveness of basic procedural safeguards that accounts for cases like Yang Jia's. As the saying goes, "justice must not only be done, but must also be seen to be done." What is needed then, is not only appropriate criminal punishment, but also a fair criminal procedure – visible justice.

IV. Comparative Study On Procedural Safeguards For Mentally Disabled Defendants

The experience of Chinese legal reform in the past two decades has shown that China can always look to other legal systems for inspiration. Since mental examinations are becoming routine in major criminal cases, those legal systems recognizing insanity as a defense must resolve questions such as competence of responsibility and competence to stand trial. Therefore, the problems China is facing are not unique. As a country that still retains the death penalty, the U.S. is undoubtedly an ideal subject for comparison. This section explores how the U.S. has been trying to cope with procedural issues relating to mental examinations in capital cases.

A. American Jurisprudence

"Anglo-American law has long recognized that serious mental disorders diminish a person's responsibility for criminal conduct and that execution is often a cruel and excessive punishment for offenders who were severely disabled at the time of the offense."⁶⁴

64. See *Mental Illness and the Death Penalty in North Carolina: A Diagnostic Approach*, at 66, May 2007, available at http://www.common-sense.org/text_files/charlottestudy.pdf; see also *Diminished Responsibility in Capital Sentencing*, American Psychiatric Association, Dec. 2004, available at <http://www.psychiatry.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatemen>

However, American jurisprudence has taken different approaches towards the mentally retarded and mentally ill.

In *Atkins v. Virginia*,⁶⁵ the execution of a mentally retarded person was held to violate the concept of the "dignity of man" found in the Eighth Amendment's prohibition against cruel and unusual punishment.⁶⁶ In *Atkins*, the United States Supreme Court first considered the evolving standards of decency as indicated by such objective sources as legislation enacted by the states, the direction of change in states' legislation, and the broader social and professional consensus.⁶⁷ Although the evolving standards offered guidance to the Court, the Court made certain to note that it was not determinative. The Court's own judgment would "be brought to bear on the question of the acceptability of the death penalty. . . ."⁶⁸ In analyzing this case, the Court held that the execution of the mentally retarded does not serve either of the accepted goals of the death penalty (retribution and deterrence) set forth in *Gregg v. Georgia*.⁶⁹ Because the mentally retarded are less culpable for the crimes they commit, the goal of retribution would not be served by their execution.⁷⁰ The deterrent force of the death penalty as to those who are not mentally retarded is not lessened by exempting the mentally retarded from execution.⁷¹

ts/200406.aspx.

65. 536 U.S. 304 (2002). Daryl Renard Atkins "was convicted of abduction, armed robbery, and capital murder, and sentenced to death. At approximately midnight on August 16, 1996, Atkins and William Jones, armed with a semiautomatic handgun, abducted Eric Nesbitt, robbed him of the money on his person, drove him to an automated teller machine in his pickup truck where cameras recorded their withdrawal of additional cash, then took him to an isolated location where he was shot eight times and killed." *Id.* at 307. "In the penalty phase, the defense relied on one witness, Dr. Evan Nelson, a forensic psychologist who had evaluated Atkins before trial and concluded that he was 'mildly mentally retarded.' His conclusion was based on interviews with people who knew Atkins, a review of school and court records, and the administration of a standard intelligence test which indicated that Atkins had an IQ of 59." *Id.* at 308.

66. *Id.* at 311 (quoting *Trop v. Dulles*, 356 U.S. 86 (1958)).

67. *Id.* at 313-16, *see also supra* note 21.

68. *Id.* at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

69. 428 U.S. 153, 183 (1976).

70. *See* R. A. DUFF, TRIALS AND PUNISHMENTS 16-35 (1986) ("[O]ne of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose. . . .").

71. In his dissenting opinion in *Kansas v. Crane*, Justice Scalia stated, "Ordinary recidivists choose to reoffend and are therefore amenable to deterrence through the criminal law; those subject to civil commitment under the SVPA, because their

Atkins established that mentally retarded defendants are not eligible for the death penalty. As to the mentally ill, although American legal scholars speculate that, based on *Atkins*, the Court may someday categorically exclude severely mentally ill offenders from the death penalty; defendants with mental illness remain eligible for execution. Yet the Supreme Court has been gradually boosting the constitutional protections in capital cases, ruling that in the sentencing phase of a capital trial, judges and juries must have the opportunity to learn of the defendant's character and to weigh mitigating factors when deciding whether or not to impose the death penalty.⁷² Such mitigating factors include any history of mental illness.⁷³

In *Ford v. Wainwright*,⁷⁴ which was not concerned with the culpability of offenders at the time of their offenses, but rather with the mental state of death row inmates at the time of their scheduled executions, the Court prohibited the execution of insane criminals.⁷⁵ Even though the *Ford* Court did not specify standards or procedures for evaluating and determining mental illness, it correctly held that a full and fair hearing on the issue of sanity is a fundamental due process requirement whenever constitutional rights are involved.⁷⁶

Another landmark Supreme Court decision, *Ake v. Oklahoma*,⁷⁷ made some efforts to strengthen procedural protections for mentally ill defendants by setting forth a minimum standard for capital defendants to have access to psychiatric consultation. In that case,

mental illness is an affliction and not a choice, are unlikely to be deterred." *Kansas v. Crane*, 534 U.S. 407, 420 (2002). This analysis is also applicable to mental retardation cases.

72. *Eddings v. Oklahoma*, 455 U.S. 104, 113-17 (1982).

73. *Id.* at 109 (stating that the judge considered the defendant's youth to be a mitigating factor).

74. 477 U.S. 399 (1986).

75. *Id.* at 409-10 ("This court is compelled to conclude . . . [that it] prohibits a State from carrying out a sentence upon a prisoner who is insane.").

76. A full hearing "embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." *BLACK'S LAW DICTIONARY* 605 (5th ed. 1979). A fair hearing contemplates "the right to present evidence, to cross-examine, and to have finding supported by evidence." *Id.* at 537. But the standards required in order to provide a full and fair hearing have never been explicitly defined.

77. 470 U.S. 68, 74, 77-83 (1985). In *Ake v. Oklahoma*, the Supreme Court finally addressed the issue of the states' obligation to provide psychiatric examination and assistance in evaluation, preparation, and presentation of an insanity defense and evidence on relevant issues at the sentencing phase.

the Supreme Court held that states must provide appropriate mental examinations and assistance for indigent defendants who show the likelihood that their sanity at the time of the offense will prove significant during trial, and the Court cited many of its prior decisions concerning the constitutional rights of indigent defendants and concluded that "meaningful access to justice" was the unifying rationale for the decisions.⁷⁸ Meaningful access to justice requires that a state provide the essential elements necessary to present an adequate defense or appeal for a defendant who cannot afford them.

As exemplified in *Atkins*, the evolving consensus has been to afford greater protection to those unable to control their actions. "As a society, we have always treated those with mental illness differently from those without. In the interest of human dignity, we must continue to do so. . . ."⁷⁹ It is fair to say that the Supreme Court's interest in criminal mental health cases "has manifested itself through intense focus on *procedural* justice⁸⁰ rather than on the contours of substantive regulation"⁸¹ (emphasis added).

B. *International Standards*

Significant portions of the international community oppose capital punishment as a general matter, but more specifically for individuals with mental disorders.⁸² In 1984, the United Nations' Economic and Social Council ("ECOSOC") adopted the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (hereinafter "Safeguards"),⁸³ which were endorsed by the General Assembly that same year.⁸⁴ Among other things, the

78. *Id.* at 77, 83.

79. *Ohio v. Scott*, 92 Ohio St. 3d 1, 11 (2001) (Pfeifer, J., dissenting).

80. For reasons why Supreme Court focused more on procedural safeguards, see *The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1165 (2007-2008) ("Psychiatric evidence is often tough to interpret, and courts tend to lack the institutional competence to make such determinations. Instead, their comparative advantage lies in judging the adequacy and design of procedural protections.").

81. *Id.* at 1156.

82. See ACLU, HOW THE DEATH PENALTY WEAKENS U.S. INTERNATIONAL INTERESTS 5 (2004), available at http://www.aclu.org/files/FilesPDFs/idp_report.pdf; see also U.N. Comm'n H.R., *Questions of the Death Penalty*, U.N. Doc. E/CN.4/RES/1999/61 (Apr. 28, 1999).

83. U.N. Econ. & Soc. Council [ECOSOC], *Safeguards Guaranteeing Protection of Rights of Those Facing the Death Penalty*, Res. 1984/50, U.N. Doc. E/1984/92 (May 25, 1984)).

84. U.N. General Assembly, *Human Rights in the Administration of Justice*, G.A.

Safeguards protect “people with mental diseases” from execution.⁸⁵ In 1989, ECOSOC clarified that Safeguard 3 includes elimination of the death penalty for “persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution.”⁸⁶

Since 1997, the U.N. Commission on Human Rights has called on countries that maintain the death penalty to observe the Safeguards.⁸⁷ The resolution has, since 1999, added wording urging retentionist countries not “to impose the death penalty on a person suffering from *any* form of mental disorder or to execute any such person”⁸⁸ (emphasis added). The European Union has also expressed disapproval of the practice of executing those with severe mental illness, through letters urging states to commute death sentences of mentally ill death row prisoners.⁸⁹

Even though these international agreements are not legally binding in some countries, such as China, they are still relevant because they demonstrate a trend towards categorical exemption of the “insane” from the death penalty.

V. Recommendations for Legislative Reforms on Mental Examinations in China’s Capital Cases

Yang Jia has already been executed, and it accomplishes nothing to continue discussing whether he was insane or not. It is

Res. 39/118, ¶ 2, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/RES/39/118 (Dec. 14, 1984).

85. Res. 1984/50, *supra* note 83, ¶ 3.

86. ECOSOC, *Implementation of the Safeguards Guaranteeing Protection of Rights of Those Facing the Death Penalty*, Res. 1989/64, ¶ 1(d), U.N. Doc. E/1989/91 (May 24, 1989).

87. U.N. Comm’n. H.R., *Question on the Death Penalty*, U.N. Doc. E/CN.4/RES/1997/12 (Apr. 3, 1997). In 1997, the U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions stated in a report that governments that continue to use capital punishment on “the mentally ill are particularly called upon to bring their domestic criminal laws into conformity with international legal standards.” ECOSOC, Comm’n on H.R., *Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye, Submitted Pursuant to Commission on Human Rights Resolution 1996/74*, ¶ 116, U.N. Doc. E/CN.4/1997/60 (Dec. 24, 1996).

88. U.N. Comm’n. H.R., *Question on the Death Penalty*, U.N. Doc. E/CN.4/RES/2001/68 (Apr. 25, 2001).

89. See Letter from Eva Nowotny, Ambassador of Austria, Pekka Lintu, Ambassador of Fin., and John Bruton, Head of Delegation, European Comm’n, to Governor Timothy M. Kaine of Virginia (May 24, 2006) available at <http://www.eurunion.org/legislat/DeathPenalty/WaltonvVA2006.JPG>.

more meaningful to learn lessons from his case so as to improve the procedural safeguards for mental examinations in China's future capital cases. This section examines some proposed reforms through the lens of American mental health law.

A. *Mandatory Pretrial Examination*

"Due to the fact that the disease may be of such a type that the defendant or his or her defense counsel do not recognize the fact that he or she is sick, or because lack of money is often an obstacle in assessing the mental health of a defendant,"⁹⁰ a mandatory pretrial examination of defendants' mental status should be required at the state's expense in all capital cases.

Mandatory pretrial examination might be opposed on the belief that an accused person is presumed to be sane, and that the duty of producing evidence of insanity rests *in the first instance* upon the defendant.⁹¹ However, as Herbert Packer once stated, "the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were."⁹² One must then consider whether "[f]or offenders suffering from a mental disorder which at times causes them to be incapable of controlling their actions, the law's treatment of their conduct as deliberate for the sake of judicial convenience or to avoid complication is an injustice."⁹³

A trend has emerged in American practice wherein pretrial mental examination is sought shortly after the defendant's arrest in many major cases.⁹⁴ The theory is that immediate psychological

90. Liliana Lyra Jubilut, *Death Penalty and Mental Illness: The Challenge of Reconciling Human Rights, Criminal Law, and Psychiatric Standards*, 6 SEATTLE J. FOR SOC. JUST. 353, 378 (2007).

91. An accused who claims that he was not responsible has the initial duty of introducing some evidence showing that he suffered from a mental disease or defect at the time of the offense. Once sanity is in issue the prosecution has the ultimate burden of proof of proving beyond a reasonable doubt that the accused is sane.

92. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 74-75 (1968).

93. Helen Shin, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants*, 76 FORDHAM L. REV. 465, 465 (2007-2008).

94. In the U.S., a pretrial mental examination can be triggered by a motion. Such examinations are usually authorized on the basis of affidavits of defense counsel, who affirm that the defendant's behavior during consultations and his personal history indicate the need for a psychiatric examination. A previous record

evaluation more accurately reflects the defendant's mental state at the time that the crime was committed, and is therefore of greater evidentiary value than a report based on a later examination. "Presumably the less time that elapses between the act and the psychiatric examination, the more accurate will be the medical opinion."⁹⁵

Apart from the foregoing, there are several other justifications for requiring mandatory pretrial mental examinations. First, the death penalty is "qualitatively different" from all other punishments. There are two features of the death penalty that justify extraordinary procedural safeguards. One is the irreversibility and irrevocability of death. The other is the enormity or severity of this ultimate punishment. For these reasons, the U.S. Supreme Court has long insisted that "the need for procedural safeguards is particularly great where life is at stake."⁹⁶

Secondly, the mentally disabled criminal suspect is more susceptible than ordinary offenders to police coercion and forced waivers of his procedural rights.⁹⁷ In the U.S., post-conviction DNA testing has exonerated a number of convicts on death row.⁹⁸ Among them, the mentally disabled account for a high percentage, because they were more vulnerable to the psychological pressures applied during police interrogation and thus more likely to make false confessions.⁹⁹ This, of course, is equally true in China.

Third, the quick processing of capital cases in China requires that mental examinations be held as soon as possible. In contrast to the extensive opportunities for reviewing convictions and sentences

of hospitalization in a mental institution, discharge from the armed forces on psychiatric grounds, or the nature of the offense itself may be sufficient to warrant the examination. But the prosecution itself has increasingly taken the initiative in requesting the court to order pretrial mental examinations, particularly in capital cases. See, e.g., *Winn v. United States*, 270 F.2D 326 (D.C. 1959).

95. *Blunt v. United States*, 244 F.2d 355, 364 n.23 (D.C. 1957).

96. *Barefoot v. Estelle*, 463 U.S. 880, 913 (1983) (Marshall, J., dissenting).

97. See THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL 2 (Stanley S. Herr, Lawrence O. Gostin, & Harold H. Koh eds., 2003) ("From a human rights perspective, the intellectually disabled rank among the world's most vulnerable and at-risk populations, both because they are different and because their disability renders them less able either to assert their rights or to protect themselves against blatant discrimination.").

98. Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. (forthcoming 2010).

99. *Id.*

available to capital prisoners in the U.S., Chinese capital offenders enjoy significantly fewer post-conviction remedies. The rapid progression of the Yang Jia case illustrates how capital defendants in China can usually file only one direct appeal, followed by a mandatory review by the Supreme Court.¹⁰⁰ Retrial is very difficult to initiate in criminal cases, especially after the death sentence is confirmed by the Supreme Court.¹⁰¹ The result is that there is a very short window between conviction and execution. China actually has very few prisoners living on death row, as they are usually executed immediately after their verdicts are approved by the Supreme Court. While in the U.S. new evidence exonerates quite a number of death row prisoners, including some who are mentally disabled. This could never happen in China where capital prisoners do not have the luxury of waiting until, for example, the actual culprit is caught or an opportunity for DNA testing arises. For this reason, the necessity of avoiding trial error in capital cases is even greater in China.

Fourth, economic considerations also play a certain role in the need for a mandatory examination prior to trial. If the determination of mental disability is made before trial, substantial costs associated with capital litigation might be avoided if the defendant is found insane.

Fifth, mandatory pretrial examination is consistent with China's long-held principle of narrowly confining the death penalty to the most serious criminals.¹⁰² Although China still retains the death penalty, the author anticipates that it will be abolished in the future, consistent with the global trend in this direction. To achieve this goal, the scope of the death penalty should be incrementally

100. July 1, 2008 – commission of crime; August 27, 2008 – trial of first instance; September 1, 2008 – sentenced to death; October 13, 2008 – trial of second instance; October 20, 2008 – death sentence sustained; November 21, 2008 – SPC confirmed the death verdict; November 26, 2008 – execution.

101. In China's criminal cases, retrial is a special procedure where the prisoner can ask for a new trial after the verdict has been returned. This is usually the last remedy for prisoners. However, the percentage of retrials in criminal cases is as low as 1%, due to very strict criteria that have to be met in order to initiate a retrial.

102. The current official policy regarding the death penalty is to retain it but to control it strictly and use it cautiously in practice. The Supreme People's Court of China's reclaiming of the power to review all death sentences since January 1, 2007 may be seen as an effort to reform the implementation of this policy. See Liu Wen, 死刑复核权收归最高人民法院有四大好处, IOLAW.ORG, available at <http://www.iolaw.org.cn/showNews.asp?id=5803> (last visited Nov. 16, 2010).

reduced. Psychiatric evaluations are commonly regarded as a procedural shield, which thwarts an especially egregious misuse of the death penalty.¹⁰³ Ensuring that capital punishment is not applied to those suffering from mental illness is one more step towards total abolishment of the death penalty.¹⁰⁴

B. Right to Witness and Participate in Prosecution's Mental Examination

Assuming mandatory pretrial examination becomes routine in all capital cases, the defense should be entitled to retain its own mental health professionals to witness and participate in this mandatory examination or any other mental examination initiated by the prosecution.

Such a provision is found in the MPC,¹⁰⁵ and ensures the fairness of the examining process by allowing for the presence of a representative from each side. At the same time, such a rule can increase the acceptability of the examination report, thus avoiding the need for a second examination by defense experts. In other words, if the defense's expert consultant and attorney were able to monitor a mandatory or prosecution-initiated evaluation, and could be convinced that the process was both fair and reliable, the likelihood that they would call for an independent examination by defense experts would be enormously reduced.

C. Right to Initiate a Mental Examination

The defense's right to initiate another examination should be granted and respected. The MPC grants the defense the right to retain *a qualified psychiatrist or other expert of his own choice*.¹⁰⁶

103. ARTHUR R. MATTHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW 23 n.4 (American Bar Foundation, 1970).

104. *Atkins*, *supra* note 65 (in which the Court held that states should develop procedures for the adjudication of claims of mental retardation) has opened the path not only to other proportionality limitations on the reach of the death penalty, but also to the prospect of the judicial abolition of the death penalty itself. See Carol S. Steiker & Jordan M. Steiker, *Atkins v. Virginia: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 725 (2007-2008).

105. Model Penal Code § 4.05(1) (Official Draft 1962) ("The court . . . may direct that a qualified psychiatrist retained by the defendant be permitted to witness and participate in the examination.").

106. Model Penal Code § 4.07(2) ("When, notwithstanding the report filed pursuant to Section 4.05, the defendant wishes to be examined by a qualified

However, the defense in China can only apply for a supplementary examination or a re-examination, and cannot take the initiative to start the examination process. This issue caused a nationwide debate concerning the Qiu Xinghua case and was still unresolved in Yang Jia's case. Many scholars criticized the current situation for its unequal treatment of the prosecution and defense, in violation of the principle of "equal arms" familiar to those in adversarial systems.¹⁰⁷

Studies have shown that psychiatric assessment is often colored by clinicians' own personalities, value systems, and attitudes.¹⁰⁸ Psychiatrists disagree widely and frequently in their diagnoses and there is often no single, accurate psychiatric conclusion in a given case. Under such circumstances, fact finders "cannot accurately determine competency without a full airing of both parties' evidence."¹⁰⁹ Moreover, if only one mental health examiner is involved, that examiner likely will become the "de facto decision maker," as laypeople tend to defer to the examiner's expertise.¹¹⁰

When a person's life is at stake, no matter how heinous his offense, a requirement of maximum reliability should prevail. A defendant's access to independent medical evidence is "inextricably intertwined with his very ability to obtain a fundamentally fair trial."¹¹¹ Thus, China should adopt the MPC approach and grant the

psychiatrist or other expert of his own choice, such examiner shall be permitted to have reasonable access to the defendant for the purpose of such examination.").

107. Currently, the Chinese criminal justice system is not an adversarial one, but considering that all of the criminal justice reform efforts during the past fifteen years point in the direction of an adversarial system, equal arms should be a goal of these reforms.

108. See Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 726-27 (1974); see also Daniel Pugh, *The Insanity Defense in Operation: A Practicing Psychiatrist Views Durham and Brawner*, 1973 WASH. U. L. Q. 87, 94-95 (1973).

109. See Ford, 477 U.S. at 414 (plurality opinion); see also Abraham S. Goldstein & Edith W. Fine, *The Indigent Accused, The Psychiatrist, and the Insanity Defense*, 110 U. PA. L. REV. 1061, 1071-76 (1962) (recommending the prisoner be furnished his or her own expert to ensure presentation of differing evaluations); D.C. Gramlich, Note, *An Indigent Defendant's Constitutional Right to A Psychiatric Expert*, 1984 U. ILL. L. REV. 481, 500-04 n.2 (state must provide an impartial psychiatrist, but need not provide the prisoner his or her own choice of experts, to comfort with due process).

110. ABA Criminal Justice Mental Health Standards Std. 7-5.7: Evaluation and adjudication of competence to be executed; stay of execution; restoration of competence (1987), available at http://www.abanet.org/crimjust/standards/mentalhealth_blk.html#7-5.7.

111. See Brief of Amicus for the New Jersey Department of the Public Advocate at 8-10, *Ake v. Oklahoma*, 470 U.S. 68 (1985) (No. 83-5424).

defense the right to initiate an independent mental examination.

D. Right to Confront Expert Witnesses

In the U.S., confrontation with witnesses, either lay or expert, has long been established as a constitutional right of defendants. In China, however, psychiatric testimony in criminal cases is almost always presented only by deposition. Unlike lay witnesses, who merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the factfinder *why* their observations are relevant. Further, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, offering evidence in a form that is useful for the task at hand. For all these reasons, both parties' right — not only the defense's — to confront the opposing examiner should be guaranteed.

To enforce the right to confront witnesses, two practices should be introduced in China. First, it seems plain that oral testimony and cross-examination would uncover faults in examination procedures as well as any personal biases of expert witnesses. These experts should thus be called to testify before the court, and both the defense and the prosecution should have the opportunity to cross-examine opposing experts and present their own psychiatric evidence.

Second, the defendant should also be able to hire his own psychiatrist to assist counsel in confronting opposing experts. As it has been argued in the American context, "A defense attorney, in a criminal trial involving the insanity defense, who is realistically expected to fulfill his proper role of adducing probative evidence in support of his client's claim and *in challenging the State's evidence*, must acquire the requisite psychiatric expertise to accomplish that task"¹¹² (emphasis added). While probative and rigorous cross-examination of an opposing psychiatrist may partially fulfill this goal,¹¹³ "calling to the stand a psychiatrist who disagrees with the opposing psychiatrist is an even better way of forcing judges and juries to use their common sense."¹¹⁴ Since a Chinese defense attorney has no more psychiatric expertise than his American

112. *Id.* at 43.

113. See Michael L. Perlin & Robert L. Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 L. & CONTEMP. PROBS. 161, 166 (1982).

114. Ennise & Litwack, *supra* note 108, at 746.

counterpart, assistance from a psychiatrist is just as necessary to fulfill his task of cross-examining the State's experts.

E. Right to Psychiatric Assistance at State Expense

Psychiatry has an important function in criminal actions¹¹⁵ when a state has made the defendant's mental condition a factor in determining his criminal responsibility and punishment.¹¹⁶ In most legal systems around the world, the defendant may rely solely on the testimony of lay witnesses to support his insanity defense despite the availability of expert testimony. Lay witnesses, however, are likely to consider only the most severe symptoms as indications of mental illness. Furthermore, it is difficult for lay testimony to convince the factfinder (who is also a lay person), particularly if the prosecution's experts were to disagree. As the U.S. Supreme Court sensibly pointed out, "without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witness, the risk of an inaccurate resolution of sanity issues is extremely high."¹¹⁷ In the U.S., for example, indigent defendants' inability to obtain payment for expert witnesses and investigators has resulted in erroneous convictions.

In China, given the current degree of reliance on psychiatric experts, as a practical matter, a defendant has little chance of succeeding with an insanity defense without expert assistance, and unfair prejudice to the defendant may result if he cannot rebut the testimony of the prosecution's experts.

Yet as in the U.S., not every Chinese defendant possesses the resources to hire his own psychiatric expert. Therefore, based on

115. See Seymour L. Halleck, *The Role of the Psychiatrist in the Criminal Justice System*, in *PSYCHIATRY: THE AMERICAN PSYCHIATRIC ASSOCIATION ANNUAL REVIEW* 386, 391 (Lester Grinspoon ed., 1982) ("Psychiatric testimony in insanity cases serves three purposes: first, it supplies the court with facts concerning the offender's illness; second, it presents informed opinion concerning the nature of that illness; and third, it furnishes a basis for deciding whether the illness made the patient legally insane at the time of the crime . . .").

116. See Ake, *supra* note 111, at 80.

117. *Id.* at 81 (quoting, in part, Gardner, *The Myth of the Impartial Psychiatric Expert - Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy*, 2 L. & PSYCHOLOGY REV. 99, 116 (1976)).

rationales similar to those justifying the legal aid system, i.e., equal protection, due process,¹¹⁸ and meaningful access to justice,¹¹⁹ the indigent defendant should be entitled to psychiatric assistance at state expense. Courts should appoint the indigent defendant's choice of psychiatrist. The appointed psychiatrist would not only provide a mental examination, but also act as a defense consultant. This ensures that indigent defendants would not be in a worse position than wealthy defendants with regard to psychiatric assistance.

F. Solution to Conflicting Expert Testimonies

Conflicting expert testimony is a serious problem in China's mental examination system, which presents a severe challenge for the judges deciding the ultimate issue.¹²⁰ To address the problem of conflicting expert testimony, an additional impartial psychiatrist could be appointed by the court to perform another independent assessment to aid the court in determining the mental condition of the defendant. Since judges are not mental health professionals either, another examination by a court-appointed neutral psychiatrist could be helpful to their determination on the defendant's mental condition.

In addition, appointing a neutral examiner to offer an opinion is preferable to permitting the parties to continue bringing in a parade of experts or an endless series of examinations. As the majority opinion of Chinese academics has recommended, the criminal

118. Before the equal protection clause and due process clause became the rationales for free defense services for indigent criminal defendants, *United States ex rel Smith v. Baldi* (344 U.S. 561 (1953)) formulated at least seven overlapping but distinct rationales for providing necessary defense services to indigents: "(1) establishment of the defendant's innocence; (2) equality of access to justice as between the poor and the rich; (3) equality of access to justice as between the indigent defendant and the prosecutor; (4) access to that which is fundamental for a 'fair trial'; (5) access to that which assures an 'adequate defense'; (6) access to that which 'assists counsel,' and (7) access to that which assures an 'effective defense.'" Ephraim Margolin & Allen Wagner, *The Indigent Criminal Defendant and Defense Services: A Search for Constitutional Standards*, 24 HASTINGS L.J. 647, 652 (1973).

119. In *Ake v. Oklahoma*, the Court noted that "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Ake*, *supra* note 111, at 77.

120. In China, capital cases are usually tried by a panel of career judges. See CPL, *supra* note 9, art. 147.

procedure reform of P.R.C. is adopting some adversarial aspects rather than the entire adversarial system. The goal of criminal justice reform is a kind of "reformed adversarial system" that emphasizes debate between parties, but confines that debate to a certain extent. For this purpose, after both parties have obtained equal opportunities to present their expert testimonies, the court is expected to intervene by appointing a neutral expert to make an independent examination.

G. Right to Effective Representation

Finally, effective assistance of counsel should be emphasized in capital cases involving mentally disabled defendants. There is an emerging recognition that capital representation requires vigorous investigation of potentially mitigating evidence. The goal is to ensure that capital trials are momentous events in which defendants can match the resources and experience brought by the prosecution side.

In the U.S., since the monumental decision of *Gideon v. Wainwright* held that indigent defendant's right to the assistance of counsel in a criminal trial was one of the "fundamental safeguards of liberty . . . protected against state invasion by the Due Process Clause of the Fourteenth Amendment,"¹²¹ the Supreme Court has expanded this right both horizontally (through other stages of the criminal process) and vertically (beyond mere placement of "a warm body with a legal pedigree next to an indigent defendant").¹²² Although the Court's efforts to clarify constitutional standards concerning an "effective defense" or "adequate defense" still continue,¹²³ there is a consensus that effective defense should be emphasized to a greater extent in capital cases, because defense counsel's performance "is a crucial component of the system of protections designed to ensure that capital punishment is administered with some degree of rationality."¹²⁴

121. 372 U.S. 335, 341 (1963).

122. David L. Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L. J. 811, 819 (1976).

123. For development of standards for effective defense, see *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 110 (2003); and *Rompilla v. Beard*, 545 U.S. 374 (2005).

124. *Strickland*, 466 U.S. at 715. In fact, the "Constitution requires a stricter adherence to procedural safeguards in capital cases than in other cases." *Id.*

Although legal representation is mandatory in capital cases in China, the quality of representation afforded criminal defendants is far from satisfactory. It seems too ambitious to require the effective defense in China at this time because we are still making efforts to ensure any access to legal counsel in criminal cases. However, why not make capital cases a laboratory for experimenting with increased due process protections? If we cannot require that all criminal defendants be granted an effective defense, why not start with capital cases, especially those involving the mentally ill or mentally retarded, who are among the most vulnerable and in the greatest need of effective defense.

VI. Conclusion

In any jurisdiction that applies the death penalty, due process in criminal procedure, or approaching visible justice, should be the essential goal of legal reform. This article argues that procedural safeguards should be established in Chinese capital cases to better address the needs of people who suffer from mental disorders. This is not only because this population is one of the most vulnerable, but also because capital cases involving the mentally disabled can be an ideal legal arena for experimenting with enhanced procedural protections. Any procedural safeguards that work well in this type of case might eventually be extended to ordinary capital cases, and possibly even to non-capital cases involving serious crimes. A gradualist approach should be taken in the long march of criminal justice reform in China, because it is better to make modest progress with obtainable goals than to accomplish nothing with ambitious aims.

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