INTRODUCTION

At all times and in all lands, wrongful convictions are like a spirit that haunts the castle of criminal justice. They are certainly unexpected disasters to the wrongfully convicted and their families but, at some point, they push the criminal justice system towards a progress and development. In recent years, with the disclosure of more wrongful convictions in the media, the topic has become a grim and sad focus of attention.
in China. There seemed to be a proliferation of wrongful convictions overturned, which led people to ask: What is going wrong in Chinese criminal justice system? Since late 1995, the author of this article led a group of researchers and embarked upon an empirical study of wrongful convictions in China. In one instance, we distributed questionnaires to some 2,000 law enforcement professionals, including judges, prosecutors, police, and lawyers, with which data we discovered that over half believed, directly or indirectly, that torture and forced confession were a major factor leading to wrongful convictions. In addition, we analyzed 50 murder cases of wrongful conviction already exposed by the media, finding that the proportion of cases in which there were false confessions made by the defendant, as well as the possibility of, if not certainty of, torture and forced confession, was 94 percent.¹

As set forth in our empirical study, false confessions extracted with torture are a major evidential cause, or direct cause, for wrongful convictions in China. But why and how could those false confessions go through the criminal proceedings and be taken as basis of the judgments? Why and how could not the judges pick up those illegally obtained evidences and throw them away? To answer these questions, the author analyzed the representative cases with the survey data, and discovered that wrongful convictions are generally the result of several, often interconnected, factors, such as the nominal checks among the police, the procuratorate and the court; the bowing to public opinions in contradiction to legal principles; the unlawfully extended custody with tunnel vision; the nominalization of courtroom trials; and the reducing of punishment in a case of doubt. These factors, or indirect causes of wrongful convictions, reflect the institutional flaws, outdated mentalities, and improper practices in Chinese criminal proceedings.


Criminal justice proceedings in China follow an assembly-line model. Article 7 of the Criminal Procedure Law states: “In conducting criminal proceedings, the people’s courts, the people’s procuratorates and the public security bureaus shall divide responsibilities, coordinate their efforts and check each other to ensure the correct and effective enforcement of law.” Under this system, the public security bureaus are in charge of investigation, the procuratorates authorize approval for arrests and institute public prosecutions, and the courts are responsible for adjudication.² The work of the three branches is both divided and arranged in sequence, with the common goal of maintaining close control over the quality of case procedure, guaranteeing that the criminal justice

² That is a general speaking and has some exceptions. Under the Chinese law, cases of occupational crimes by public officials, such as embezzlement, bribery, and malfeasance, are investigated by the internal investigation divisions of the procuratorates.
system produces “social products” that are up to standard, thus fulfilling their duty to punish crimes and protect the people. Therefore, the first “production stage” of investigation is naturally the most important one in the proceedings, which is to say, investigation by the police is the central stage of criminal justice. Such a model shows a propensity to overlook the importance of the prosecution and the trial, which become merely issues for a production stage further up the line to inspect and review.

There is a wide diversity of opinions on the subtle relations among the people’s court, the people’s procuratorate and the public security bureau. A metaphor goes that the public security bureau slaughters the pig, and then the procuratorate dehairs it, finally the court sells its flesh. The “assembly line” of production includes three stages, slaughtering (detecting), dehairing (prosecuting), and selling (judging). Obviously, the first stage of the production line is the most important one, because whether the pig (case) dies or not depends on the public security bureau’s “knife.” Although the metaphor is not gracious enough, it reflects, to some extent, the characteristic of the relations among the people’s court, the people’s procuratorate and the public security bureau. In this procedural mode, investigating by the public security bureau, prosecuting by the procuratorate and judging by the court, the three departments divide the work and cooperate with one another, with the common aim of guaranteeing the criminal cases being handled properly and ensuring the satisfactory “social product” produced by the criminal judicial system. In such a manner, as the first stage of criminal procedure, the investigation has turned to be the focus in the whole criminal procedure, namely, the investigation plays the essential role in asserting the fact of case. In this sense, asserting the fact of case at the trial is relatively easy to lose its function, since it has turned into a course merely checking its up-streamed course.

There is another metaphor that the public security bureau cooking, and then the procuratorate selling, the court eating last. Embodying “assembly line” mode as well, the remarks are meaningful and thought-provoking in consideration of the relations among production, vending, and consumption. In the vendor’s market, vending (prosecution) is decided by production (investigation), and the consumption (judgment) depends on vending (prosecution). Investigation, therefore, is at the center of the criminal procedure. On the contrary, in the vendee’s market, the vending is decided by consumption, and the production depends on the vending. Thus, it would turn to be “judgment-centered” proceedings. Unfortunately, the criminal procedure in China has not entered the stage of

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3 Properly speaking, “investigation, prosecution and adjudication” should be used here instead of the “the public security bureau, the people’s procuratorate and the people’s court,” because “investigation, prosecution and adjudication” do not identify with “the public security bureau, the people’s procuratorate and the people’s court.” However, according to the conventional habit of expression in Chinese, “the public security bureau, the people’s procuratorate and the people’s court” have often been used in this context.

4 It refers to the cases which should be investigated by the public security bureau. According to the law in China, crimes of bribery, embezzlement, dereliction of duty, and infringe on human rights should be investigated by the people’s procuratorate.
the “vendee’s market,” and the mode of “investigation-centered” is still prevailing for the time being.

Under the “investigation-centered assembly line” mode, the procuratorates and the courts basically deal with the documents and records in the case files, which are sent forward up by the police investigators on this assembly line. The documents and records are the main forms of evidence, and the basis by which the procuratorates decide whether to issue an indictment and by which the courts make judgment. Both the procuratorates and the courts review and evaluate these documents and records, which include transcripts of questioning and interrogation, as well as records of examinations, searches and identifications. In practice, the procuratorate frequently uses a revised version of what is called the “proposal letter for prosecution,” submitted by the police investigators, as the formal indictment, while the court uses a revised version of that formal indictment as the judgment. In this way, it is not uncommon for the written decision of the courts to agree in large part with the documentation of the investigators. The spread of computer technology is of further aid in helping the procuratorates and the courts to save on labor. The quality of the final product of the entire criminal justice system, however, is not guaranteed. Thus, there is nothing unusual in having both the procuratorate and the court accept the decision of the public security bureau. The function of the committee of legal affairs of the Communist Party of China (CPC) is an endorsement for this model.

The committees of legal affairs of the CPC Central Committee and local committees are leaders of the three branches of criminal justice, with their main responsibilities being to support and supervise each branch in exercising their functions and powers, to coordinate relationships among the three, and to oversee cases that are controversial, important, or in doubt. In practice, local political leaders place too much emphasis on the importance of “coordinating efforts.” Especially when a case is important or difficult, the committee urges the three branches to “handle the case cooperatively,” which often means deciding difficult or controversial cases via joint meetings of the heads of the three branches. The three branches are to manage cases with attention to the principles of “coordination in battle” and “unity of command,” which more often than not means that when the public security bureau has finished its investigation, the procuratorate can do no more than issuing the indictment, and the court issuing a guilty verdict. When the committee of legal affairs of the CPC gets involved, it often does no more than to coordinate matters to have the procuratorate and the court align with the public security bureau. Many wrongful convictions are the result of this practice. The SHE Xianglin case is a good illustration.

On April 11, 1994, a badly decomposed body was discovered in an irrigation tank in Jingshan County of Hubei Province. Investigators determined that the body was of ZHANG Zaiyu, a local villager who had been missing for three months. Her husband SHE Xianglin was identified as a suspect, and a confession of guilt was obtained. On September 22, the procuratorate issued an indictment. On October 13, Jingzhou
Intermediate People’s Court found SHE guilty and sentenced him to death. On January 6, 1995, the Hubei Provincial High People’s Court declared this verdict invalid by reason of “facts unclear, evidence insufficient,” ordering a retrial.

When the Jingzhou Intermediate People’s Court received the decision of the court of the second instance, they sent the case back to the procuratorate, who in turn sent the case back to the public security bureau, from whom they demanded further investigation. The public security bureau felt that too much time had passed, leaving little chance to collect new evidence. The defendant had also recanted his confession, making the earlier confession invalid. They therefore submitted only an “Explanation of Circumstance” that reviewed the entire effort to solve the case, emphasizing that “the entire investigation was conducted on a legal basis, with no use of torture and forced confession.” The said document bore the seal of the Jingshan Public Security Bureau. When the procuratorate received the case file, they underwent consultation with the court, and agreed together that this action by investigators would not satisfy the demands of the Hubei High People’s Court, and so sent the case back to investigators again. The public security bureau persisted in its claim to have definitely proven SHE Xianglin guilty of murder, and declined to investigate further. Still at an impasse, the case was put aside.

Since the three branches were not in accord, the Committee of Legal Affairs of the CPC Jingmen Municipal Committee convened a coordinating meeting that called on the chiefs of the public security bureau, the procuratorate, and the court of Jingmen in October 1997. At the meeting, the police chief continued to maintain that SHE Xianglin was ZHANG Zaiyu’s murderer, but the chief of the court said that the questions raised by the Hubei High People’s Court had still not received satisfactory answers. After hearing all sides, the Committee decided to apply the policy of “prescribing lesser punishment in case of doubt.” The specific proposal involved sending the case down from the intermediate court to the basic court. First, the Jingshan County Procuratorate should issue an indictment to the Jingshan County People’s Court. Second, the Jingshan Court should give highest punishment according to its jurisdiction, and that is 15-year imprisonment. Third, the intermediate court, which was the court of second instance, should affirm the original decision, and so resolve the case on the local level, obviating any need to send the case back up to the Hubei High People’s Court. On June 15, 1998 the Jingshan County Court sentenced SHE Xianglin to 15-year imprisonment and deprived him of political rights for 5 years. On September 22, 1998, the Jingmen Intermediate People’s Court rejected SHE Xianglin’s appeal and upheld the original judgment. However, on March 28, 2005, SHE Xianglin’s wife presumed dead for over 11 years, “returned to life.” On April 1, SHE Xianglin was released from prison. On April 13, the Jingshan Court retried the case and found SHE Xianglin not guilty.5

5 For the story of SHE Xianglin case, see HE Jiahong, Back from the Dead: A Landmark Ruling of Wrongful Conviction in China, published as an e-book in English by Penguin in Feb. 2014.
There can be little doubt but that these wrongful convictions arose from errors committed at the investigation stage, but such “facts unclear, evidence insufficient” cases all passed muster with both the procuratorate and the court, flowing swiftly down the line in trial after trial, in the end becoming distinctly “inferior products” of the entire criminal justice system. This reflects a major deficiency in the current Chinese criminal justice, namely that the three branches “overlap more than sufficiently, yet check each other insufficiently or nominally.” The main purpose of having three branches with divided powers in criminal justice was to ensure checks and balances, not to encourage total coordination. Only more real checks among the three branches can help prevent further wrongful convictions.

II. THE BOWING TO PUBLIC OPINIONS IN CONTRADICTION TO LEGAL PRINCIPLES

Broadly speaking, to commit a crime is to go against country, against society, and against the people. For this reason, to oppose crime supports the welfare of the people, and so answers to the call of public opinion. In cases where a victim was hurt directly as a result of crime, the welfare of the victim and his or her family becomes like a concentrated version of the people’s welfare, and so the victim and his or her family become symbols of public opinion. Legal proceedings throughout the three branches of law enforcement, from the public security bureau to the procuratorate, and even the court, may be sorely tested by pressure from public opinion. In the case of SHE Xianglin, the family members of the so-called victim, ZHANG Zaiyu, called for a representative to draw up a petition signed by over 200 local citizens and demanding that the government harshly punish the perpetrator, SHE Xianglin, according to the law. This motion put enormous pressure on the local government, especially the committee of legal affairs of the CPC, who would attach greater importance to comforting the public than protecting the rights of the suspect or defendant.

Heinous crimes often cause an outpouring of popular moral censure, which in some cases can grow into strong, if contained, cases of popular indignation. Even before the Internet age, popular indignation could broadcast itself and even accumulate via the news media or simply by becoming the talk of the town. A powerful sphere of public opinion can form, thus influencing and even warping the opinions and judgments of law enforcement officials. In the face of public indignation, law enforcement officials must keep a stiff resolve, adhere to the letter of the law, continue to uphold the spirit of the law, handle the case according to the law, and issue a fair judgment. But with faith in judicial credibility being so low, political leaders often emphasize the social effectiveness of the judgment. The result is that when law enforcement officials are faced with prejudicial public opinion, or when public indignation is aroused, they are unable to maintain fairness and neutrality, and at times even abandon the basic principle of the law, seeking only to use their powers as adjudicators to bend to public opinion or to pacify popular indignation.

In contemporary China, people may “petition higher authorities” as a method of
expressing popular demand; it is a method that has begun to worry agency leaders at all levels of government. Petitions to higher authorities arise from a diverse combination of factors, the majority of them connected with adjudication: “litigation-related petitions” or “legal petitions.” In some cases of wrongful conviction, the effect of pressure exerted by “petitions” issued by family members of the victims can be seen. The case of LI Huailiang is a typical example.

On the evening of August 2, 2001, when DU Yuhua, a peasant from a small village in Yexian County, Henan Province, took his daughter GUO Xiaomeng with her to the banks of the Shahe River to gather cicada larvae (used for medicinal purposes), and then the daughter disappeared. Two days later, police found her body downstream near another village. Forensic examination concluded that the girl had been choked to death, and the body was subsequently dropped into the river. Further, she had been raped before she was killed. Crime-scene investigators had also collected material evidence including traces of blood and footprints.

Through extensive investigation, the police identified the family’s neighbor, LI Huailiang as the perpetrator. LI was arrested and interrogated, initially denying any involvement; however, after repeated interrogation, he confessed to the crimes. There remained, however, some points of doubt: The blood collected at the scene of the crime was of type O, while LI’s blood was of type AB; and the footprints documented at the crime scene corresponded to the imprints of a shoe size 38, but LI had been wearing size 44 flat-bottomed flip flops on the night of the murder.

Despite these doubts, in August 2003, the Yexian County People’s Court sentenced LI Huailiang to 15-year imprisonment, an effort by the court to “hedge its bets,” given the paucity of evidence and, further, it followed along with the lower-level court’s decision, forming a clear pattern of “prescribing light punishment in case of doubtful guilt.” The defendant filed an appeal. On December 2 the Pingdingshan Intermediate People’s Court issued its decision, setting aside the earlier court’s decision and ordering a new trial by reason of “unclear facts and insufficient evidence.” The family of the deceased, which already had been deeply unsatisfied with the 15-year imprisonment sentence of LI Huailiang, began issuing petitions at every opportunity. The Yexian County People’s Court duly retried the case, but did not issue a decision. Afterward, the Pingdingshan Intermediate People’s Court set aside the decision of the Yexian County People’s Court and ordered that the Pingdingshan Procuratorate issue a new order for prosecution by the Intermediate Court. On August 3, 2004, the Pingdingshan Court issued a both death sentence for LI Huailiang, and deprived him of all political rights for life. LI refused to accept the judgement and once again issued an appeal. On January 22, 2005, the Henan High People’s Court issued a second decision declaring the facts unclear and the evidence insufficient, and again put aside the decision of the lower courts and ordered another retrial. On April 11, 2006 the Pingdingshan Intermediate People’s Court issued a stay of execution. On September 27, the Henan High People’s Court once again issued a decision declaring
the facts unclear and the evidence insufficient, and again put aside the decision of the lower courts and ordered another retrial. From this point forward, both the family of the victim and LI’s family began to petition.

There is a subtle point worth further consideration regarding the legal proceedings of this case: The court of second instance, the Pingdingshan Intermediate People’s Court, declared “the facts unclear, the evidence insufficient,” and so set out to reverse the earlier court decision, while in 2004, the court of first instance declared “the facts clear, the evidence full and sufficient” and subsequently sentenced LI Huailiang to death. During the intervening period, the evidence remained unaltered, so why had the court’s attitude changed so drastically? A “death-sentence agreement” later widely circulated on the Internet supplies the answer. The main contents of the document, dating from May 17, 2004, and written on the official stationery of the Pingdingshan Intermediate People’s Court, were as follows: demands made by the victim’s parents that LI Huailiang be sentenced to “at least life imprisonment, if not death.” There was also documentation of an agreement that if the Pingdingshan Intermediate People’s Court acted in accordance with these demands, then even if the provincial high court sent the case back, the victim’s parents agreed not to issue further petitions. The agreement also bore the signatures of two village cadres as witnesses. At first glance, this “death-sentence agreement” may seem like a promise to the courts on the part of the victim’s family, but outside observers could easily make out the “deal” that had been worked out behind the scenes. And true to their word, after the Pingdingshan Intermediate People’s Court issued a death sentence for LI Huailiang, the victim’s family ceased petitioning.

On April 25, 2013, the Pingdingshan Intermediate People’s Court retried the case. The decision read before the court was as follows: The prosecution had presented five sets of evidence against the defendant, and having examined among these the crime scene report, the autopsy report, and the material evidence report, could verify the identity of the body as GUO Xiaomeng, the precise location of the crime, and the cause of death. Witness testimony from DU Yuhua, GUO Songzhang, and LI Quancheng could only show that LI Huailiang had also been digging up cicada larvae on the night of the event. Material evidence for the prosecution, including the flip-flops, the shorts, and a portable lamp could only be shown to have belonged to GUO Xiaomeng, and bore no connection with LI Huailiang. LI had made a confession, but he had also later recanted, and moreover there were major inconsistencies in his confession, as well as points of contradiction with witness testimony and the crime scene report, with the result that LI’s confession could not be used as a basis for ruling on the case. In the opinion of the Court, the procuratorate’s charges lacked sufficient grounds, there being many unclear facts and the evidence insufficient. Finally, the court declared LI Huailiang was innocent and should be set free. After the decision was announced, the victim’s family reacted with intense emotion, decrying the court for “harboring a murderer.” According to some sources, the public
security organs have already opened a new investigation.6

In such wrongful conviction cases, “public opinion” becomes a tool for those handling the case. In the ZHAO Xinjian case, the words of one judge typify this phenomenon: “Facing the pressure of the victim’s family, law enforcement officials cannot easily release the earliest suspects detained, insufficient evidence or not. And with repeated retrial, family members and others come to make trouble almost every day, so that you say to yourself what can you do, and spend all your time putting out these fires.”7

The judiciary may listen to public opinions in the course of criminal proceedings, but for it to seek a particular judgment to satisfy the demands of society, or to defer, may even pander to the public opinions, and lead to a wrongful conviction. Judicial decision must be made in adherence with the judicial principles, including the burden of proof, the presumption of innocence, and the collection of evidence in accordance with the law. When members of the judiciary abandon these principles under pressure of the public opinion, they run counter to justice.

“Public opinions” are always complex and diverse. Faced with the same issue or event, public opinions can diverge, or even be opposed with themselves. In criminal cases, the opinions of the defendant and his or her family members and the victim and his or her family members will be plainly opposed. The opinion of the victim’s family may constitute one side of public opinion, but so does the opinion of the defendant’s family; neither side can be said to represent the whole of the public opinion. It is a mistake to confuse the aims of the victim’s family with the aims of the people; to perform a similar substitution with the defendant’s family would be no better. Judicial officials in criminal proceedings must triangulate among three interests: those of the victim and associated family, those of the defendant and associated family, and those of the people or the public. The best way for the judiciary to balance these three interests is to hold fast to the provisions of the law, to handle the case strictly in accordance with the law.

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7 On Aug. 6, 1998, a rape-murder occurred in a small village outside of Bozhou City, Anhui Province. Investigators identified fellow villager ZHAO Xinjian as a suspect based on clothing left at the crime scene. Though investigators obtained a confession from ZHAO, they lacked other forms of evidence, for which reason the procuratorate did not issue an arrest warrant, and ZHAO was consequently released. The victim’s family member was angered by this result, and made appeals in many quarters, finally going so far as to threaten to hang herself at the court. Unable to withstand the pressure, law enforcement organs issued an indictment and a verdict. In 2001, the court of first instance sentenced ZHAO to death, but the court of second instance ordered a retrial. In 2004, the Bouzhou Municipal Intermediate People’s Court gave a suspended death sentence. In 2006, because the true murderer was identified via a different case, ZHAO Xinjian was declared not guilty and released. See LI Guangming, 奇案令人反思 关口为何失守 (A Strange Case Makes Us to Reflect Why Did the Safeguards Fail?), Legal Daily, Nov. 11, 2006; CHEN Lei, 一起奸杀案的若干“真相” (Certain “Truths” in a Rape and Murder Case), 29 Southern People Weekly (2006).
III. THE UNLAWFULLY EXTENDED CUSTODY WITH TUNNEL VISION

The unlawfully extended custody and the forced confession through torture are the two great blots on the Chinese criminal legal system. Unlawfully extended custody refers to the illegal act of detaining any criminal suspects who have been detained or arrested, or any defendants under investigation, under indictment, or in trial proceedings for a duration exceeding the period prescribed according to the Chinese Criminal Procedure Law. Unlawfully extended custody comes in both formal and substantial forms. The former refers to extended custody of the suspect or defendant despite the expiration of the legal detention period and without application for extending the detention through legal means. The latter refers to cases in which an extension has been applied for formally, or else the detention seems to be in order, but in actuality is unlawfully extended custody. Cases that are repeatedly retried or reinvestigated, for example, could be called cases of “protracted non-release.”

A salient aspect of Chinese criminal procedure is high detention rates and long detention periods. In countries with a well-developed rule of law, pretrial criminal suspects are generally released on bail, and relatively few are detained. In the UK, for example, the proportion of pretrial criminal suspects under detention is less than 10 percent. But in China, 80 percent of criminal suspects are detained, and 80 percent of these suspect detentions become formal arrests. According to Article 89 of the Chinese Criminal Procedure Law, normal detention should be 3 days, and can only be extended to 7 days for unusual circumstances. Major suspects like criminals who pose a flight risk, repeat offenders, and gangsters can be detained for up to 30 days, which can be extended 7 additional days with judicial approval. Thus the maximum period a criminal suspect can be detained without an arrest warrant is 37 days. Before the Criminal Procedure Law was revised in 1996, public security officials used the more broadly defined measure “detention pending examination,” or “sheltering for investigation,” in place of criminal detention. This is what happened to TENG Xingshan. He was taken in for “detention pending examination” on December 6, 1987, and kept in detention until his arrest on September 2, 1988 for a pre-arrest detention period just under 9 months.

As for post-arrest detention periods, the 1996 Criminal Procedure Law again provides clear stipulations. Article 124 of the 1996 Criminal Procedure Law stated “The time limit for holding a criminal suspect in custody during investigation after arrest shall not exceed two months. If the case is complex and cannot be concluded within the time limit, an extension of one month may be allowed with the approval of the people’s procuratorate at the next higher level.”

And Article 126 of the 1996 Criminal Procedure Law stipulated: “With respect to the

8 Research Center of the Supreme People’s Procuratorate of the People’s Republic of China, 超期羁押与人权保障 (Extended Custody and Human Rights Safeguard), China Procuratorial Press (Beijing), at 95 (2004).
following cases, if investigation cannot be concluded within the time limit specified in Article 124 of this Law, an extension of two months may be allowed upon approval or decision by the people’s procuratorate of a province, autonomous region or municipality directly under the Central Government: (1) grave and complex cases in outlying areas where traffic is most inconvenient; (2) grave cases that involve criminal gangs; (3) grave and complex cases that involve people who commit crimes from one place to another; and (4) grave and complex cases that involve various quarters and for which it is difficult to obtain evidence.”

Article 127 of the 1996 Criminal Procedure Law further stated: “If in the case of a criminal suspect who may be sentenced to fixed-term imprisonment of ten years at least, investigation of the case can still not be concluded upon expiration of the extended time limit as provided in Article 126 of this Law, another extension of two months may be allowed upon approval or decision by the people’s procuratorate of a province, autonomous region or municipality directly under the Central Government.”

According to these articles, the maximum time between arrest and the closing of the case is 7 months. Article 138 of the 1996 Criminal Procedure Law added that the indictment review period is generally limited to one month but can be extended by half a month. Article 202 of the 2012 Criminal Procedural Law stipulates that the trial in the court of first instance should generally last two months but can be extended by one month. Article 232 of the 2012 Criminal Procedural Law stipulates the trial in the court of second instance should generally last two months but can be extended by two months. According to these provisions, the period a criminal suspect (the defendant) should spend in detention remains common. In the cases previously mentioned, SHE Xianglin was detained on April 11, 1994 and held until his verdict was issued on September 22, 1998, a total of four years and five months; and LI Huailiang was held from August 2, 2001 until he was declared not guilty and released on April 25, 2013, a total of eleven years and eight months.

Unlawfully extended custody clearly infringes the legal rights of criminal suspects and defendants. In addition, it prevents the establishment of an environment for developing the rule of law, and it lowers respect for the law. By the turn of the century, unlawfully extended custody had become an extremely severe problem in China. According to the most authoritative statistics, between 50,000 and 80,000 people were detained unlawfully every year between 1993 and 1999 by various political organs around China.9 To address

9 WANG Leiming & WU Huanqing, 阳光行动，路有多远？—政法机关清理超期羁押透视 (How Far is the Way of Sunshine Action? — An Perspective on Cleaning up the Cases of Extended Custody by Law Enforcement Organs), Procuratorate Daily, Nov. 11, 2003.
this issue, on July 23, 1999 Committee of Legal Affairs of the CPC Central Committee announced its “Notice regarding the Handling of Cases According to Law and Resolutely Correcting the Problem of Unlawfully Extended Custody.” In its wake, the Supreme People’s Court (SPC), the Supreme People’s Procuratorate, and the Ministry of Public Security one after the other announced their own notices regarding the correction and prevention of unlawfully extended custody.10

Our research found that unlawfully extended custody plays a role in wrongful criminal conviction. In August of 2006, members of our study group conducted a series of symposia with law enforcement officials from all three departments in Harbin, Heilongjiang Province. During one seminar about the factors leading to wrongful conviction, a participant said the situation they feared most was to end up “riding the tiger and unable to get off.” In other words, the suspect might have been locked up for a long time, but there had not been enough evidence collected, so that neither could a verdict be established, nor could they be released, consequently the case could go neither forward nor backward. And the longer the suspect was detained, the harder it became to contemplate releasing the person. In the end, the only solution would be to sentence the suspect to fewer years.11 When unlawfully extended custody occurs, and when further investigation has already proven ineffective, both release and convict begin to look like bad choices. One might give freedom to a criminal, while the other deals a great wrong to an innocent person. Finding themselves riding the tiger, many law enforcement officials would have a tunnel vision and select to stiffen their resolve to seek a conviction. Thus, it becomes clear that a course of ending unlawfully extended custody will also lead to some wrongful convictions, as the example of ZHAO Zuohai can well show.

On May 8, 1999, a body with no head and missing limbs was found in an abandoned well in a village of the Shangqiu City, Henan Province. Public security investigation determined that the body was that of ZHAO Zhenshang, a local villager who had been missing for more than a year. They also determined the prime suspect to be ZHAO Zuohai, also from the same village. ZHAO Zuohai confessed to the murder during interrogation. The public security bureau sent the case to the procuratorate, which found the evidence insufficient and ordered the public security bureau to complete DNA analysis to verify the identity of the deceased. Public security officials ordered four separate DNA analyses, but none were able to certify that the body was actually that of ZHAO Zhenshang. At this point the case reached an impasse: Public security officials refused to release ZHAO Zuohai, and the procuratorate refused to issue an indictment, leaving ZHAO in a detention limbo.

In January 2001, the Supreme People’s Procuratorate issued its “Notice regarding Taking the Next Step to End and Rectify Unlawfully Extended Custody,” which called for a

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10 See Research Center of the Supreme People’s Procuratorate of the People’s Republic of China, fn. 8 at 72.

comprehensive approach to ending the practice. During this period, the Zhecheng County Public Security Bureau handed the ZHAO Zuohai case over to the committee of legal affairs of the CPC for deliberation. In July the Committee convened a joint case-handling meeting, but finding themselves unable to gain a consensus on the prosecution, then they put it aside. On May 31, 2002, in Weifang City of Shandong Province, the Supreme People’s Procuratorate convened a Experience Exchange Meeting of Rectifying Unlawfully Extended Custody. In the meeting the high-level leaders in the procuratorate urged their agencies across the country, at all levels, to apply greater intensity of purpose to the project of resolving unlawfully extended custody cases, thereby to rectify all existing cases within law enforcement by the end of June 2002. In the wake of the meeting, ZHAO Zuohai’s case was put on the list of cases targeted for rectification. In the end, the Committee of Legal Affairs of the CPC Shangqiu Municipal Committee held a joint meeting of the three branches and then made a decision to “issue an indictment within twenty days” in October 2002. On October 22, the Shangqiu People’s Procuratorate issued the indictment. On December 5, the Shangqiu Intermediate People’s Court gave ZHAO Zuohai a suspended death sentence. On February 13, 2003, the Henan High People’s Court reviewed and approved the decision of the lower court.

However, this was not the end of the case. Seven years later, on April 30, 2010, the victim, ZHAO Zhenshang, turned up alive! On May 8, the Henan High People’s Court reversed its decision and gave ZHAO Zuohai a verdict of not guilty and released him the following day. After ZHAO Zuohai had been rehabilitated, the procurator general of the Shangqiu People’s Procuratorate remarked, “Our biggest mistake here at the Procuratorate was not steadfastly maintaining our original opinion.”

Certainly the decision to end unlawfully extended custody was the correct one, but judicial officials in some areas issued indictments and guilty verdicts on doubtful cases. Because of the tunnel vision, they were afraid of letting guilty persons go free, and the unlawfully extended custody led to further wrongful convictions. This turns to the next misleading zone that this article will consider.

**IV. THE NOMINALIZATION OF COURTROOM TRIALS**

In Chinese, adjudication by the judges in the courts can be called, for short, “courtroom trials,” which “refers to legal proceedings that begin the opening of proceedings by the people’s court, with the participation of the public prosecutor, the litigants, and other participants in the proceedings, and also include the reception to and interpretation of evidence and exposition of the facts presented by the two sides, the unfolding of argumentation in accordance with the law, and finally includes the determination of the guilt of the defendant according to the law, as well as whether punishment is warranted,

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12 LI Lijing, 赵作海冤案疑点明显 公检法均失职致一错再错 (Clear Doubts in the Case of ZHAO Zuohai Breach of Their Duties by People’s Court, People’s Procuratorate and Public Security Authority Lead to Wrongful Conviction of the Case Further), Xinhua Net, May 10, 2010.
what, if any, punishment is appropriate.

Since the essential function of the criminal proceedings is to determine whether the defendants are guilty or not, the core stage for criminal justice should be the courtroom trial and the substantive phase in the proceedings should be the trial. Now in China, unfortunately, the courtroom trial is just a nominal formality to go through in many criminal cases. In other words, the judgments are not reached by the judges according to hearing and examining the evidence in the courtroom, and in some cases, the judgments are even not determined by the judges who sit in the trial, but by judges behind them. The author pondered over the existing criminal trial system in China, asking myself again and again whether it is really necessary to hold a courtroom trial at the price of human and financial resources when the judges could reach the same conclusion without hearing the case directly. In responding to this question, the author led a group of researchers to conduct an empirical study on courtroom trials in criminal cases in China.

Since the spring of 2009, members of Empirical Study on Criminal Trials Project in Renmin University Law School have conducted the empirical research on the current situation and problems of criminal trials in China by the way of questionnaire surveys, informal discussions, interviews, auditing trials, and collecting case materials on the internet. For instance, members of this project have audited 45 trials in Beijing and Hangzhou in 2009, and analyzed 292 actual criminal cases broadcasted by the internet program named Trial Now in the Net of China Court. We found that, to a significant extent, the nominalization of criminal trials in China has spread widely, which could be reflected in the whole proceedings of the court.

By “nominalization,” we mean that court determination of the facts of the case and the relevant evidence is not in fact accomplished by presenting testimony and cross-examination before the court, but rather through examinations of a case file prepared before or after the court hearings. In other words, a court verdict is not the product of court hearings presided over by a judge, but rather of the “judges behind the judges.” Court hearings, in fact, do not have a substantial role to play in criminal procedure. Judicial officials would come to the same verdict without holding courtroom hearings at all. Court hearings, being so inessential, become a mere formality. A major reason for this strange situation is that the trial committees overstep their boundaries.

Article 149 of the 1996 Criminal Procedure Law stated: “After the hearings and deliberations, the collegial panel shall render a judgment. With respect to a difficult, complex or major case, on which the collegial panel considers it difficult to make a
decision, the collegial panel shall refer the case to the president of the court for him to
decide whether to submit the case to the trial committee for discussion and decision. The
collegial panel shall execute the decision of the trial committee.”

In practice, when the collegial panel meets with a “difficult, complex or major case,” it
will often submit the case to the trial committee for discussion because the verdict of the
committee is more authoritative, and if the verdict should turn out to have been issued in
error, the committee takes responsibility. In such cases, the verdict comes not from the trial
judge, but rather from judges who have not participated in the trial. In such cases, the
opinion of the trial committee may not agree with that of the collegial panel, but the latter
can only defer to the former, even if the result would be a wrongful conviction.

Early in the morning on April 21, 1998, a murder was committed in the city of Dandong,
in Liaoning Province. ZHANG Yiguo, an ordinary worker, was stabbed fourteen times.
Police examination determined that LI Yongcai, who had had a dispute with the deceased
before the event, was the murderer. Because LI’s defense attorney had, during court
hearings, brought significant evidence to prove the innocence of his client, the collegial
panel ruled in favour of the defendant. However, the trial committee of Dandong City
Intermediate People’s Court determined after its own deliberations that while the evidence
had been insufficient, LI Yongcai could still be found guilty, and issued a suspended death
sentence. The collegial panel instituted the trial committee’s decision. On February 3, 1999,
LI Yongcai was imposed a death sentence with a two-year suspension of execution. Two
years and two months after he was wrongly convicted and locked in prison, LI Yongcai was
rehabilitated.16

In another case, ZHANG Jinbo, a police officer in Harbin of Heilongjiang Province,
was accused of rape. Because the case relied only on the testimony of the victim, as well as
of her daughter-in-law, a full determination was not forthcoming, and so the decision was
reached during the “joint handling meeting,” which involved the heads of the public
security bureau, the procuratorate, and the court. The Nangang District People’s Court of
Harbin sentenced ZHANG to ten-year imprisonment in 1998. ZHANG filed an appeal that
was examined by judges of the collegiate panel of the court of second instance, who found
the case to lack any major evidence, and further found contradictions in the testimony
supplied by the victim. The collegiate panel thus issued an opinion concluding that the
defendant was innocent. But when the case was deliberated by the trial committee of the
court, the collegiate panel would have to accept the opinion of the trial committee, drawing
up a decision that rejected the appeal and upheld the original decision. ZHANG Jinbo was
held in custody for over 3,644 days before being declared innocent and released.17

Court hearings ought to be the last line of defense against unjust verdicts. Criminal

16 HU Jiating, 死囚八百天 (The 800 Days of the Man Who Was Sentenced to Death), 4 律师与法制

17 ZHANG Yue & QI Shuxin, 民警张金波的十年冤狱 (10-Year Unjust Imprisonment of the Policeman
court hearings should be a stage of the criminal proceedings where a decision can be made, but they are now undermined to such a degree that they are an inessential part of the process. This not only harms the justice of the legal system, but also harms substantial justice. Lurking in the background of many wrongful convictions is the undermining of court hearings. Even if not every wrongful conviction can be traced to this factor, that undermining bears some responsibility is undeniable. The fact that false evidence obtained by illegal methods such as forced confession makes it into the courts without obstruction is yet another sign of this defunctionalized process at work.

The nominalization of criminal trials reflects the tendency, common in Chinese legal practice, towards bureaucratization of the law. The trial committees at all levels are concerned first and foremost with administrative decisions, leaving judicial officials to deal with judicial decisions. But lower levels defer to higher levels, and in important cases the highest officials must decide — under this type of administrative system, such is the unwritten rule, which is also an unwritten factor that continues to undermine the court hearings. In short, only by making court hearings the true centre of criminal proceedings, and allowing those who try the case to make the decision, can the Chinese criminal justice system strengthen its ability to avoid wrongful convictions.

V. THE REDUCING OF PUNISHMENT IN A CASE OF DOUBT

Criminal cases all involve incidents that happened in the past, which means that investigators cannot possibly gain first-hand knowledge of the crime. Instead, they must rely on evidence to gain indirect knowledge. To investigators, the actual facts of the case must always remain “the moon in the water, the flowers in the mirror.” Of course the moon and flowers we speak of here have an objective existence, but what investigators can perceive is always already reflected and refracted through the water and the mirror. Here, the “water” and “mirror” of which we speak both refer to evidence. This is to say, without evidence, investigators have no way to find the facts of the past events. Moreover, knowledge of facts gained through evidence is not necessarily equal to the facts of the case as they happened. In situations when the “water” is not clear enough or the “mirror” is not bright enough, the “moon” and the “flowers” will appear distorted, sometimes so much so that there will appear to be two distinct moons or flowers. Which is the false one and which is the real one? The question will remain a mystery to the investigator. In other words, the criminal suspect or defendant might be guilty, or might be innocent. This is what is meant by “a case of doubt.”

In cases of doubt, there is a shortage of evidence and the facts remain unclear. This makes errors all but inevitable, whether we speak of the investigators, the preliminary examiners, prosecutors, or judges, because they have to rely on the evidence at hand. In terms of results, errors are of two basic types: one type taking a guilty party for innocent, allowing the bad guy to escape; the other type taking an innocent party for guilty, wrongfully sentencing the good guy. “Never wronging the innocent, never letting loose the
guilty,” cannot serve as more than an ideal, never to be fully manifested the criminal justice system of any country. This means that investigators must make a choice between wrongful release and wrongful conviction.

As the saying goes, choose the lesser of two evils. But whether wrongful release or wrongful conviction is the lesser evil lies in the mind of the investigator. Traditional Chinese law would probably prefer wrongful conviction to wrongful release. Indeed, while no people would support the old slogan “having 3,000 wrongfully killed rather than letting a single one escape,” 18 still, many people are similarly loathe to agree with the Western precept, “it is better that ten guilty persons escape than one innocent suffer.” 19 Many law enforcement officers think that to let a guilty person escape is to damage the public interest, while to punish the innocent only damages the individual interest. And if they are so reluctant to let any guilty party remain at large, then how much more reluctant would they be to release criminals that might continue to harm society. This, then, is the ideological underpinning of the policy of prescribing lesser punishment in case of doubt, although in terms of the principle of presumed innocence, such propositions put the cart before the horse.

From the establishment of the PRC all the way up until the 1990s, the Chinese legal world has consistently maintained that presumption of innocence was a principle from capitalist countries’ criminal procedure. Chinese criminal procedure presumed neither innocence nor guilt, but rather “seeking truth from facts.” But even before the 1996 revised version of the Chinese Criminal Procedure Law, some scholars suggested that not all of the problems associated with presumption of innocence were avoidable. In reality, any criminal justice system that does not presume innocence presumes guilt.

Presuming innocence on principle is the hallmark of progress in criminal justice: China must learn to apply it. Article 12 of the 2012 Criminal Procedure Law state, “No person shall be found guilty without being judged as such by a people’s court according to the law.” Even though officials associated with Legislative Affairs Committee of the National People’s Congress Standing Committee, who completed the revision to the law, have stated that this article does not articulate presumption of innocence and only emphasizes the authority of the courts to determine guilt, still, many scholars have agreed on that the article expresses the spirit of presumption of innocence.

There are three propositions inherent to the principle of presumption of innocence. First, before any person is judged guilty by a court according to law, they should be assumed to be not guilty. Second, during a criminal trial, the prosecution assumes the burden of proof, not the defendant. The defendant need prove neither his or her guilt nor his or her innocence. Third, when the evidence brought forward by the prosecution fails to meet the

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18 It is said to have been used by some leaders of Kuomintang in the war against the Communist Party of China in late 1920s and early 1930s.

court’s standards of proof, the court must rule the defendant not guilty. In other words, the
court should adhere to the maxim, “No conviction in a case of doubt.” Though the Chinese
Criminal Procedure Law does not give clear stipulations as to who bears the burden of
proof in criminal proceedings, Article 162 of the 1996 Criminal Procedure Law stated, “If
the evidence is insufficient and thus the defendant cannot be found guilty, he shall be
pronounced innocent accordingly on account of the fact that the evidence is insufficient and
the accusation unfounded.”20 This clause exhibits the spirit of the principle of presumed
innocence. In legal practice, however, this rule meets with resistance from traditional
notions, and the rule has no bearing on the standards for evidence in criminal proceedings.

Neither the 1979 nor the 1996 versions of the Criminal Procedure Law directly
stipulated positive provisions regarding the standards of proof in criminal proceedings. But
based on formulations in related parts of the law, scholars generally summarize such
standards by saying, “the facts of the case are clear, and the evidences are reliable and
sufficient.” Law enforcement officials frequently refer to these explanations of the standard
as “the two basics.” The first person to use this expression was PENG Zhen, then the
chairman of the National People’s Congress Standing Committee. In May 1985, in part of
his remarks at a five-city security forum, he said, “Now, in some cases where the evidence
is incomplete, there is no way to arrive at a verdict. But in truth, as long as there is reliable
basic evidence, and the basic facts of the case are clear, a verdict can still be reached.” From
then on, the standards for issuing a guilty verdict would forever be explained as “the basic
facts are clear, and the basic evidence is reliable and sufficient.”21 But, in addition,
excessive zeal for fighting crime also caused law enforcement officials to relax the
standards for evidence. Fearing that insufficient evidence would trigger the “no conviction
in a case of doubt” rule, allowing criminals to go free, they instead applied the policy of
“prescribing lesser punishment in case of doubt.” This was especially evident in cases
involving the death penalty. When the evidence was insufficient, and there were doubts
about the facts, the courts would not issue a death sentence to be carried out immediately,
but rather a suspended death sentence, or else life imprisonment, as a means of hedging
their bets, and preventing wrongful convictions — though in some cases this manner of
handling cases became the excuse for a wrongful conviction. In the wrongful conviction
cases narrated previously, the defendants were accused of murder and so would generally
merited immediate death sentences if a guilty verdict had been returned, but applying the
notion that insufficient evidence dictated lighter sentencing, as mentioned earlier, ZHAO
Zuohai was handed suspended death sentences instead, and SHE Xianglin was sentenced to
only 15 years in prison. As this makes clear, the policy of prescribing lesser punishment in
case of doubt is itself misleading, and may then lead to more wrongful convictions.

20 The 2012 Criminal Procedure Law states in Art. 49, “In public prosecution cases, the burden of
proving the defendant guilty accrues to the prosecution.”
21 LIU Jinyou eds. 证据法学 (Evidence Law), China University of Political Science and Law Press
(Beijing), at 327–333 (2001).
The notion of “no conviction in a case of doubt” gets at the gist of the principle of presumption of innocence, and also represents a crystallization of much judicial practice. The author certainly does not wish to argue that individual good does not defer to the good of the collective, but that the conventional way of evaluating the relative risks of “wrongful acquittal” and “wrongful conviction” makes an error in calculation. As practical experience shows, “wrongful acquittal” entails only one mistake, while “wrongful conviction” entails two. “Wrongful acquittal” does no more than to release, in error, a guilty party back into society, but “wrongful conviction” leaves a real criminal on the loose even as it punishes an innocent person in error. For example, while ZHAO Zuohai was unjustly imprisoned, the true perpetrators in the case, LI Maofu and LI Haijin remained at large, and we may never know the identity of the real murderer in the case of SHE Xianglin. The danger posed by two mistakes exceeds that posed by one, which means that when faced with a case of doubt, the logical choice is “wrongful acquittal” not “wrongful conviction.”

SHEN Deyong, vice president of the SPC, recently remarked, “The rate of wrongful conviction is still unacceptably high, especially in the current situation in which the notion of presumed guilt has not been eradicated and the principle of presumed innocence has not yet been truly established. We must keep a clear awareness of this problem and strengthen still more the consciousness that will guard against wrongful conviction. We must work to prevent wrongful conviction just as we work to prevent floods and other disasters. It is better to wrongfully acquit than to wrongfully convict. If we wrongfully release one true criminal, the sky will not fall, but if we wrongfully convict one innocent citizen, especially if we wrongfully execute a citizen, then the sky will fall.”

Wrongful convictions occur in the course of the legal system’s fight against crime. Yet the generation of a wrongful conviction is in itself a crime, one that harms or even kills innocent citizens in the name of the law. Such a crime presents an even greater threat to the society. This crime not only damages individual rights, and causes the people involved to suffer a great wrong, it also damages the public good, destroys the justice of the legal system and the social order. This crime could go so far as to cause the public to lose its faith in the law, or even its faith in the government! Wrongful conviction is the shadow of the criminal justice system. Under this shadow are the flaws and deficiencies of the system, which must be shed light on in order to instigate and promote reforms and improvements to the system. In China, discoveries and revelations of wrongful criminal convictions have, to a certain degree, promoted systematic reforms and improvements. For example, Article 53 of the 2012 Criminal Procedure Law stipulates more specific standards for admitting evidence into criminal justice proceedings, evidence that is reliable and sufficient should adhere to the following conditions: (1) All facts for conviction and sentencing are supported by evidence; (2) All evidence used to decide a case has been verified under legal procedures; and (3) All facts found are beyond reasonable doubt based on all evidence of

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22 SHEN Deyong, 我们应当如何防范冤假错案 (How Should We Guard against Wrongful Convictions?), People’s Court Daily, May 6, 2013.
the case. This rule will be of use, to a certain extent, in putting into effect the principle of presumption of innocence and in transforming the custom of “prescribing lesser punishment in case of doubt.”

**CONCLUSION**

In summary, there are five major causes of wrongful convictions in Chinese criminal proceedings. Gaining awareness of these causes is just the first step towards the prevention of wrongful convictions. With awareness as our basis, we must push forward judicial reform. The author has made four specific suggestions for judicial reform in some occasions\(^{23}\), which include: The committees of legal affairs of the CPC should not interfere with the judicial work in any individual cases; the trial committees of the courts should not hold deliberations on the factual issues in the cases; the people’s jurors should play a more substantive role in the judicial decision-makings; and the defense lawyers should play a more active role in the criminal trials. Some of the suggestions have been taken into consideration by the decision-makers in China. For example, Committee of Legal Affairs of the CPC Central Committee released its Rules for Conscientiously Preventing Wrongful Convictions in August 2013. It is the policy of the Committee to reaffirm the handling of criminal cases in accordance with the law, to strengthen the criminal defense, and to prohibit the committees of legal affairs of the CPC local committees from interfering with the judicial work in individual cases. Also, the SPC made a decision to select some ten courts as experimental courts nationwide for the reform of the people’s juror system in December 2013.

We have a very good slogan in criminal justice: “to make no innocent person convicted and to let guilty person not escape.” However, it is a dream impossible to realize. In the criminal justice system of any country, wrongful convictions cannot be avoided absolutely. Legal officers are not gods or immortal beings. They cannot know everything or cross the “time tunnel.” They can only find facts on limited and insufficient evidence, and unavoidably make mistakes. We are not exculpating legal officers, but to face the inevitability of wrongful convictions and to analyze their causes, so as to ensure a minimum level of the rate of mistakes. We are not making excuses for wrongful convictions, but letting people know the causes of wrongful convictions in an effort to establish a better criminal justice system and to prevent wrongful convictions in our society.

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\(^{23}\) The author made those suggestions in an expert advisory meeting held by the SPC on Apr. 26, 2013, in a TV lecture of the Phoenix Century Classroom on Sep. 8, 2013, and in an article published in a journal of the SPC, see HE Jiahong, 诉讼制度的改良与刑事错案预防 (Procedural Reform and Precaution against Wrongful Convictions), 9 法律适用 (Journal of Law Application) 7, (2013).