BOOK REVIEW ESSAY

False Convictions: A Systemic Concern in China and the World

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Review of He Jiahong, *Back from the Dead: Wrongful Convictions and Criminal Justice in China*. Honolulu: University of Hawai'i Press, 2016. 236 pages. US$49. ISBN: 9780824856618.

Wrongful conviction has become an important sociopolitical issue in many countries.[1] It is now synonymous with factual innocence, or a *false conviction* for a crime committed by another or for a "crime" that in fact never occurred. Another type of wrongful conviction occurs when the state obtains a conviction, even against a factually guilty defendant, by means of flawed or corrupted procedures. Errors of impunity—excessive leniency to the guilty or false acquittals—are also miscarriages of justice.[2]

The emergence of false conviction as a sociopolitical issue transcends judicial systems' age-old concerns about convicting the innocent. Contemporary concern with false convictions is produced by *innocence consciousness*— "the idea that innocent people are convicted in sufficiently large numbers as a result of systemic justice system problems to require efforts to exonerate them, and to advance structural reforms to reduce such errors in the first place."[3] The traditional judicial dread of false convictions leads to narrow and legalistic corrective measures. Innocence consciousness, however, generates a complex set of systemic reforms aimed at improving the accuracy of police, forensic examiners,

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and prosecutors' decisions, expanding defense attorney capacity, and improving legal procedures. Innocence reform transcends the modification of legal rules and requires changes in legislation, administrative rules, agency practices, and, ultimately, the justice system's culture.

Innocence consciousness coincides with the rise of *innocence movements*,[4] which have cropped up in many countries, including China.[5] Innocence movements take different forms, reflecting a country's political organization and culture. The US innocence movement is primarily a civil society phenomenon, organized by law-school-based or private innocence projects or organizations, which has gained a level of government support and has generated many reforms.[6] In England and Wales the innocence movement has older roots and focuses mainly on appellate court procedural reform, including the creation of an official but quasi-independent agency to funnel worthy cases to the Court of Appeals.[7] Civil society activity in England has not been as robust as in the United States. In China an innocence movement has developed within the governing party-state.[8] China, like England, has responded to public opinion, indeed, public outrage about false convictions, and China's party-state has responded to a real and perceived problem that calls into question the justice system's efficacy and legitimacy.[9]

He Jiahong, Renmin University of China (RUC) professor of law and author of *Back From the Dead: Wrongful Convictions and Criminal Justice in China* (BFTD), specializes in criminal evidence and has played a central role in China's innocence movement. Professor He received a law degree from RUC in the early 1980s (just as China exponentially expanded legal education as part of its unprecedented commercial growth) and a doctor of law degree from Northwestern University in Chicago.[10] His dissertation compared prosecution in the United States and China, and he absorbed America's lawyer culture while observing the police in action (BFTD, p. xxi).[11] At RUC he expanded his expert knowledge of Chinese criminal law doctrines and practices. To boot, he is a popular novelist who explains the workings of China's criminal justice system through his lawyer-sleuth alter ego, Hong Jun (BFTD, p. xxii; 225 n.6).[12] In addition to his academic service, He Jiahong served for two years as a deputy director of a division of China's Supreme People's Procuratorate dedicated to improving prosecutorial standards and adherence to human rights standards throughout China (BFTD, pp. 47, 215, n. 8). He was tapped by the central government to lead several studies of wrongful convictions and has since 2000 been a voice for

progressive change to China's criminal justice system.[13] He's background and activism (for example, in establishing a number of nationwide and international conferences about wrongful convictions and structural change) means that BFTD is more than a scholar's analysis. It reflects a set of positions and criticism allowed by China's party-state as it sorts through possible changes designed to reduce the number of false convictions. If I am correct that China's innocence movement is conducted primarily within the organs of the party-state, then BFTD is a primary document reflecting how China's innocence movement understands false convictions, and pointing to possible avenues of reform.

BFTD clearly reflects modern innocence consciousness. It describes the popular outcry against false convictions and reports on surveys of justice system actors that acknowledge the seriousness of false convictions (BFTD, pp. 1–10, 138–142). Although innocence movements differ in different countries, they are likely to confront similar sources of wrongful convictions, up to a point, meaning that many reforms will take parallel lines. Where problems diverge in different countries, a comparative analysis can provide ideas for reanalysis of local conditions and for innovative solutions. But mainly, BFTD manifests innocence consciousness by identifying multiple sources of false convictions in China, based on empirical research and generalizations drawn from case observations.

BFTD is divided into three parts, each spinning the author's pedagogic goals and insights around explanatory narratives. The narratives—each a recent and well-known back-from-the-dead case in which a murder "victim" returns to the place of the crime years after the conviction to the amazement and consternation of all—are written with a novelistic flair that captures the reader's imagination and reveals the pathos of lives marked by tragedy. While some of the dialogue and internal monologue seems invented, especially the dwindling rationalizations of Teng Xingshan as the day of his wrongful execution nears, the author offers copious citations to primary trial sources. Part I elaborates on five sources of false conviction that occur at the investigation stage. Part II discusses five problems that prevent prosecution and trials from screening out erroneous investigations. Part III explores potential reforms that could logically reduce the number of false convictions. The core information in Parts I and II recently appeared in journal articles, including one published in this journal.[14]

As the meat of Professor He's work is available to interested readers in these articles, this review will compare each of his ten proffered

reasons for false convictions in China to information about false convictions in the United States, where comparison seems warranted. To a degree, this exercise in comparative law may act as a corrective to He's seemingly overreliance on adversarial procedure as a "cure" for "weaknesses" of Chinese procedure. At several points He Jiahong contrasts Chinese procedure to those of systems with a better established rule of law, and notes that he took risks in advancing an online "mock retrial" of a prominent lawyer who was convicted and imprisoned for the effective trial advocacy of a person accused of organized crime (BFTD, pp. 170–182).

A comparison risks being taken either as an apology for intolerable procedures or as a competitive claim that one system is "better" than another. The difference between China's criminal justice system (especially its courts) and its Western counterparts is so great that a reader unfamiliar with China's government and legal system may not be able to properly contextualize BFTD. It therefore becomes necessary to ask whether the book is addressed to a Chinese or a general audience. Two significant empirical studies of criminal procedure in China by McConville et al. and Ni He provide Western readers with some orientation. McConville et al.'s massive analysis of 13 courts across China in the early 2000s provides an overview of the system's operations, an examination of the impact of the 1996 Criminal Procedure Law (CPL) (which realigned the orientation of its written law if not its practices), and references to previous research that provide a deeper understanding of Chinese criminal justice.[15] Ni He's empirical study of legal representation in nine criminal courts in one province (2009–2011) goes much farther in guiding the non-Chinese or non-China-specialist reader through historical and sociopolitical thickets to contextualize Chinese criminal procedure.[16] He Jiahong, however, offers no such preparation, suggesting that BFTD is aimed mainly at insiders.

The book's preface is a biographical sketch that begins with a stark announcement that He Jiahong hails from a "black family," with his patrilineal line linking to the Chinese Kuomintang Army and his matrilineal line to a "landlord family." His travails during the Great Cultural Revolution and his improbable rise from plumber to law professor will speak volumes to every Chinese reader, and convey a sense that the specific issues discussed in BFTD are a part of larger changes rippling through a great country and situating the author in them. By not making concessions to general Western readers, BFTD focuses its attention on

listing and explaining causes of false convictions and sketching possible reforms to readers who will be in a position to act on them to make positive change.

This review is pitched toward the nonspecialist reader even though this journal's subscribers may be familiar with the sociopolitical and perhaps the legal context of BFTD. A reader unfamiliar with China's justice system will find Ni He's study a useful contextual guide to BFTD. China's autocratic governing structure is led by the 85-million-strong Communist Party (CCP), which strives to maintain political control.[17] Unlike Western nations where state, Constitution, and political parties are distinct entities, China is described as a party-state with party representatives involved in all governing activities. Of the judges, procurators, and public safety personnel among Ni He's respondents, 80 percent were CCP members, compared to 32 percent of the defense lawyers.[18] The organizational structure of the Basic People's Court in J Province includes a "Political Department" that included a Court CCP Committee and subcommittees.[19] This is initially shocking to American readers. However, party influence "is not itself a meaningful basis for critique" according to Zhu Suli because "the CCP is a kind of alternative source of Chinese constitutionalism" and plays a positive, if not perfect, role in governance.[20] Several factors sustain party dominance. One is the great fear of massive disorder that tore the nation apart repeatedly throughout the 20th century and a concern that unraveling the warp and woof of party control might make governing a unified China impossible.[21] Another is China's 2,000-year history of imperial rule and its communitarian ethos. Imperial rule combined a Confucian rule of man (by an ideal wise ruler) ethic with a more legalist/authoritarian (rule *by* law) tradition.[22] Reconciling the Western individualistic, rights-oriented, and state-limiting political-legal rule *of* law theory and its complex practices with China's legislative changes and legal practices has generated a cottage industry of academic analysis.[23] Ni He helpfully suggests that Chinese legal thinking and practice today reflect a triangular tension between the dominant rule of man (Confucian) and rule *by* law traditions, along with a halting importation of the more Western notion of rule *of* law (whose ethos is not grasped by many Chinese judges, procurators, and police officials, and perhaps many defense lawyers), into a complicated reality labeled "socialist legality with Chinese characteristics."[24] This huge subject cannot be canvassed here, but readers should note that Western criticism of the legal repression of political dissidents, which has increased under

the present party leadership, is countered by Chinese rejoinders about Western failings,[25] and by a deep Chinese response to Western 19th- and 20th-century humiliation and incursions of "learning from the West to defeat the West."[26]

BFTD's context also requires some understanding of the nature of policing, the role of the procuratorate, and the stature and role of law and courts in China, and how they differ from law and courts in the United States. In the post-Mao period, policing in China has been modernized, structured by a complex legal and bureaucratic framework, and subject to disciplinary controls. While geared to crime fighting and suppressing riots and demonstrations, it simultaneously provides services to citizens.[27] What this modernizing picture does not include is any meaningful check by courts. Despite legal reforms to China's criminal procedure law in 1996 and 2012 that resemble American-style procedures, those laws were superimposed on a profoundly inquisitorial criminal justice system and culture that is not rights-oriented.[28] The police and prosecutors, for example, produce dossiers in criminal investigations that are far closer to the continental style than the American.[29] The courts are not a separate branch of government that acts as a political counterweight as in the United States. The government of China includes two branches (executive and legislative), and "the Chinese judiciary functions more as a department of the executive than as an independent check on the other two arms of government."[30] Courts instead are structured to work in cooperation with police and prosecutors to control crime subject to CCP coordination.[31] How this plays out in practice will be further explored below in a discussion of "nominal position of courtroom trials."

We now explore the specific reasons offered for false convictions in BFTD, beginning with five categories that focus on police investigation and forensic science evidence.

1. Setting Deadlines

The jaw-breaking phrase translated into English is "time-restricted case breaking." It means that criminal investigators are under deadlines to *solve* (not close) investigations. This seemingly irrational policy is justified by the need to stimulate lazy cops who would otherwise shirk their duty (BFTD, p. 13). The rule reflects entrenched values inherited from military traditions and seen in China's strike-hard anti-crime campaigns. To confirm this mandatory policy, some regions required that 100

percent of all cases eligible for the death penalty be solved within the deadline, a policy upheld at the national level in 2004. It is little wonder, then, that under such pressure some police framed mentally ill people to meet their quotas (BFTD, p. 14). He Jiahong contrasts inflexible deadline rules to high-quality investigations in "countries with a well-developed rule of law" based on "high-quality evidence," noting that investigators "do not have complete control" over evidence that criminals seek to keep hidden. There is no rule in the United States *requiring* police to solve cases where the evidence of guilt is not available. Many instances exist of cases going unsolved for years until "cold-case" reanalysis or the fortuitous advent of new evidence led to the true perpetrator's conviction. Included are cases solved through DNA technology in rape and homicide cases that occurred before DNA profiling became common in the 1990s.

Yet, investigators in the United States work under deadlines. They are allowed to close a number of cases, usually low-level crimes, without solving them, but a detective who fails to solve a certain number of cases can be demoted back to a patrol officer.[32] The pressure to close cases by producing suspects becomes intense in homicide and other cases that capture public attention; many false convictions in the United States occur in part because of such pressures. Even without a rigid rule requiring police to arrest a suspect, "investigators' thought processes may become distorted by the desire to alleviate the pressure that comes from not being able to assure the public that the offender has been caught and the community is safe."[33] Thus, even if Chinese police agencies come to admit that not all cases can be solved and drop rigid deadlines, psychological pressures to solve crimes may still generate false convictions, a point reinforced by He Jiahong, who notes that a deadline "clouds the eyes of investigators, sending them into a zone of misperception, where hopes are too easily taken for reality" (BFTD, p. 16).

2. The "From Confession to Evidence" Model of Criminal Investigation

This theme, also a mouthful in English, reflects an orientation to criminal law that is antithetical to the common law approach and seems to reflect the classical inquisitorial model. Although Chinese law prohibits extorted confessions, these recent procedural and rights-oriented rules go against "traditional Chinese criminal justice [which] puts great emphasis on oral testimony and confessions" (BFTD, p, 25). It is worth noting that

the medieval continental European use of lawful judicial torture was based on a desire to achieve absolute justice and was grounded in theological fears of eternal damnation for spilling innocent blood.[34] Professor He attributes the reliance on confessions by police, prosecutors, and judges to a "stubborn love of confession" that "breeds a lack of industriousness and a lack of professionalism" (BFTD, p. 26).

A reader unfamiliar with China's criminal procedure rules should know that police are *required* to interrogate suspects, which reinforces the cultural predisposition to confessions. Rates of full or partial confessions occur in 95 percent of Chinese convictions, compared to 60 to 80 percent in the United States and England. Although confessions are not as necessary to convictions in common law courts, American and British police also highly prize confessions for bringing about convictions and reinforcing police belief that their judgments are correct.[35] The American false conviction literature is replete with stories of prosecutors' staunch resistance to clear evidence of innocence when a confession was obtained. Even in recent cases where DNA evidence was inconsistent with convictions, prosecutors fought so hard that they "prolonged the litigation for years before ultimately acceding to exonerations." [36] In contrast to the "confession-first" model, Professor He properly recommends an evidence-first approach to police investigation. It is worth noting, however, that American police are not legally required to have evidence of guilt, but can conduct interrogations based on hunches. An interesting academic idea—that interrogation should be considered an evidentiary search and controlled by an "interrogation warrant" —unfortunately remains just that, although the requirement that police establish probable cause before interrogation could improve investigation accuracy.[37] It appears that criminal justice in China is more reliant on confessions than in the United States and more prone to tunnel vision (a collection of cognitive biases that predispose criminal justice actors to a belief in guilt without examining all the evidence). However, it would be a mistake to think that such pressures are not present in American criminal justice.

3. The Continued Use of Torture to Extract Confessions

Closely related to reliance on confessions is the reality that a large proportion of confessions admitted into Chinese courts are based on torture. Criminal justice officials (judges, prosecutors, lawyers, police officers) in five regions surveyed by Professor He and his graduate

students in 2007 answered a forced-choice question about the origin of false testimony by the accused and 55 percent blamed "extortion of a confession by torture" (BFTD, pp. 9, 45–48). Indeed, all the cases described in BFTD included some level of forced confessions (BFTD, pp. 43–45). A survey of empirical research, including research by He and He,[38] which I completed with a colleague, suggests that torture is applied in half of all criminal cases that end in conviction. We concluded that the central government is serious about ending forced confessions but that its application of legal exclusionary rules is unable to overcome the powerful work incentives that motivate police at the local level to satisfy the great pressure on them to solve crimes.[39] BFTD (pp. 48–51) supplies research-based explanations for the continuation of excessive force including a one-sided emphasis on crime control, organizational inertia that socializes recruits to use brutal tactics, undeveloped investigative capacity, and ineffective legal rules to deter torture.

As Professor He notes, "[e]xtracting confessions through the use of torture is part of the universal history of law enforcement" (BFTD, p. 43). What is helpful in contemplating effective reforms is that the structure and context of an entire legal system appears to shape the methods used to solve serious crimes. English common law trials of ordinary crimes, from medieval and early modern times, found torture unnecessary as the state was content to allow local juries to sort out guilt or innocence and could tolerate acquittals. This did not preclude judicial pressure when powerful interests were involved and did not rule out torture in inquisitorial courts operating in England.[40] Inquisition into serious crime by a magistrate who is duty bound to bring perpetrators to justice and to restore public safety leads logically to the use of torture when other methods fail. Torture was lawful in Ancient Greece and Rome and in medieval Europe, interrupted only by the superstitious application of the ordeal in the era when Europe descended into its "dark ages."[41] Legitimized judicial torture was also a component of criminal justice in Imperial China, driven by "the obsession of finding truth and seeking substantive justice."[42] As for Europe, the best explanation for the 18th-century decline of judicial torture was the change in continental jurisprudence away from absolute proof, a lesson worth considering by Chinese jurists.[43]

There is little evidence of forced confessions in American courts before its industrial revolution in the late 19th century. But from the 1890s through the 1930s and 1940s the use of torture to extract

confessions, euphemistically labeled "third degree methods," was common and widespread. It was an open secret; US Senate hearings were held in 1910 to explore the issue, and a reference to the practice crept into a famous Supreme Court decision.[44] The routine use of torture to extract confessions in America declined after the 1940s and was replaced by the heavy psychological pressure of the so-called Inbau-Reid method.[45] The decline of torture in American criminal justice should not be emulated as the best (i.e., most humane and most effective) approach to interrogation. Countries around the world apply three methods during the interrogation of criminal suspects: physical torture, psychologically coercive techniques (e.g., the Inbau-Reid method, which is allowed by US constitutional doctrines), and investigative interviewing techniques grounded in cognitive interview principles. The latter approach not only is more humane, but empirical research finds it to be effective in obtaining incriminating information. It "would appear that a paradigm shift is underway across the globe, from the traditional interrogation model, with an emphasis of persuading suspects to confess, to the investigation interviewing model, emphasizing a search for the truth and the collection of accurate and reliable information from interviewees." [46] Again, this is worth considering by Chinese and American jurists and policy makers.

4. The Misinterpretation of Scientific Evidence

He Jiahong rightly extols the use of scientific evidence to solve crimes but wisely notes that "not all scientific evidence is reliable, and errors still occur" (BFTD, p. 31). Two logical errors made by police investigators that lead to false confessions are mistaking class identification for individualization and mistaking probability for certainty. A few cases used to explore this theme included an error in blood typing, taking a knife that could have been the murder weapon (class evidence) to be the actual murder weapon; improper use of lie detection (polygraph); and faulty footprint and footwear analysis (BFTD, pp. 31–42). In the example of Teng Xingshan's false conviction (and ultimate execution) Professor He describes an award-winning computer cranial superimposition technique invented in China that led to a conclusion that the skull of an unknown woman largely matched the appearance of the missing "victim" from her photograph. From this analysis a plaster model of the supposed victim's

head was constructed and the missing woman's sisters saw a resemblance. Along with other class evidence and conjecture, such flawed evidence sealed Teng's fate (BFTD, pp. 28–30).

Forensic science errors contribute to a large proportion of false convictions in America and are indeed deemed a "leading cause" of DNA exonerations.[47] In 2009 the National Research Council of the National Academies of Science published a major blue ribbon report that found many deficiencies in a whole range of forensic comparison techniques that relied on pattern evidence. These included fingerprint, firearm, tool mark, bite mark, impression (tires, footwear), bloodstain pattern, handwriting, and comparative hair analysis. The report also critically examined forensic analysis based on scientific and analytic evidence, including DNA, coatings (e.g., paint), chemicals (including drugs), materials (including fibers), fluids, serology, and fire and explosive analysis. Most of the methodologies were found wanting and many of them not based on science or on standardized testing. The report further explored the administrative structure and budgeting support for crime laboratories, the need for education and training, and deficiencies in medical examiner/coroner systems.[48] A result of this critical report was the creation in 2013 of the National Commission on Forensic Science (NCFS) by the Department of Justice in partnership with the National Institute of Standards and Technology to establish forensic science national standards.[49] Among its commissioners are innocence scholars and leaders of innocence organizations. While the NCFS is a positive development, a recent talk by innocence organization members of NCFS standards-setting panels (Quality Infrastructure Committees) expressed concern that older "industry" standards are being grandfathered in rather than new standards based on scientific evidence being established.[50]

In short, Professor He's insights, if anything, are too modest. On the one hand, the expanding use of forensic science techniques hold enormous promise for improving the accuracy of the criminal justice systems of all countries. On the other hand, complacency and blind reliance on investigative conclusions said to be based on forensic science are never proper. A recent study, in fact, uncovers the many ways in which DNA testing, the "gold standard" of forensic science, goes wrong in practice.[51] Continuous and rigorous oversight of all aspects of investigation, including forensic science, is essential to promoting investigative accuracy. And while many view a robust criminal defense as a force to

weaken crime control, effective defense-lawyer challenges to proffered scientific evidence can help strengthen the overall accuracy of forensic science by weeding out shoddy and even dishonest forensic science work.

5. Tunnel Vision

Chapter 5 of BFTD is titled "The One-Sided and Prejudicial Collection of Evidence." In one way Teng Xingshan was more fortunate than most convicted defendants, and not only in China but in the United States as well, although his case turned out bad. His relatives contacted his uncle, a lawyer named Teng Ye, who carefully and doggedly collected exonerating evidence. Teng Ye personally investigated the case, examined the crime scene, and interviewed witnesses, putting many holes in the state's evidence. Yet, on appeal, the court could not get past the (forced) confession and supposed scientific evidence of guilt. Professor He is certainly correct in identifying the one-sided collection of evidence by police as a source of false convictions. This is a long-standing problem in the United States, and while some police departments train investigators to search for exculpatory evidence, there are practical incentives to avoid exculpatory evidence, and there is no law that requires police to do so.[52]

Indeed, "one-sided prejudice" should not be limited only to the gathering of evidence. American wrongful conviction scholarship views cognitive biases as endemic throughout the criminal justice system; they affect every decision made by police, investigators, forensic scientists, prosecutors, defense lawyers, judges, and jurors.[53] Although cognitive biases are structured and patterned ways of thinking that can lead to error, they are based on mental heuristics that are essential psychological tools that enable humans to function normally. These heuristics often produce correct decisions and are efficient.[54] So-called tunnel vision is, then, not a "failing" that can be eliminated from human psychology, but an integral part of our being. Nevertheless, in specific realms that require critical judgment, like police investigation or medical diagnosis, heuristics can produce erroneous decisions. A concern for accuracy could lead to reforms that allow second guessing or "Team B" approaches to review first impressions that might be wrong (a method used in national security analysis). Allowing such oppositional thinking is antithetical to the way that many organizations work, but it can be valuable. However, even if such approaches are imposed from the top of organizations, accepting

them will likely require organizational culture change, no easy task.

The next five causes of false convictions examined in Part II of BFTD are told through the story of She Xianglin. They explore why erroneous investigations are not caught at the trial stage.

6. Public Pressure: "Bowing to Public Opinion in Contradiction to Legal Principles"

BFTD describes an apparently common procedure that is antithetical to American law: families of the victim collecting petitions of local people in support of the prosecution that are delivered to the courts to create pressure. As the investigation in the well-known wrongful conviction case of She Xianglin dragged on, the family of the alleged victim "called for a representative to draw up a petition signed by over two hundred local citizens and demanding that the government harshly punish the alleged perpetrator, She Xianglin, according to the law. This move put enormous pressure on local government" (BFTD, p. 92).

Directly petitioning an American court in this way is clearly inappropriate and not done. This does not mean that indirect public pressure that seems inimical to the rule of law does not exist. A flagrant example is the Alabama death penalty override, which allows a judge to reverse a jury's life sentence and impose the death sentence. An anti–death penalty organization writes, "Alabama's trial and appellate court judges are elected. Because judicial candidates frequently campaign on their support and enthusiasm for capital punishment, political pressure injects unfairness and arbitrariness into override decisions."[55] This is shown by the fact that "judges in Alabama have overridden recommendations of life 101 times and of death just 10 times."[56] Sometimes, the pressure from the public is more direct. In the summer of 2016 a nationwide controversy erupted when a California state judge sentenced a Stanford University student to only six months in jail and probation (excluding any prison time) for the rape of an intoxicated woman. The victim's court statement "went viral" on social media, leading to a move to recall the elected judge. A debate by four legal scholars about the propriety of recalling a judge under public pressure offered mixed views, but they agreed that the pressure was likely to lead to harsher sentences among other judges and that a system of elected judges lent itself to such occasional pressures. These examples concern sentencing and not verdicts, but there is reason to be concerned

that public pressure and pro-prosecution biases in the courts can tilt some toward erroneous guilty verdicts. At the very least, there are examples in the United States of family pressure derailing the exoneration of clearly innocent prisoners. [57]

7. Unlawfully Extended Custody with Tunnel Vision

In China, 80 percent of suspects are detained, 80 percent of detainees are arrested, and most arrests end in convictions. Detentions can be extended under existing statutes, and in addition, many terms of detention are extended illegally. "Unlawfully extended custody and the use of torture to extort confessions are two great blots on the Chinese criminal justice system" (BFTD, p. 96). In America's third degree era police often violated the law by not bringing arrested suspects promptly before magistrates—keeping their whereabouts secret while beating confessions out of them. The problem was widespread and declared unconstitutional by the US Supreme Court.[58] Today, the problem is the excessive detention of indigent suspects in misdemeanor cases. The previously understudied problem of misdemeanor (in)justice is coming to light. Included among the procedural errors and harsh consequences of misdemeanor convictions is the obvious truth that the pressure of jail conditions has forced some proportion of the millions convicted of misdemeanors each year to plead guilty even while knowing they are innocent. This system is "radically underdocumented," and rough estimates place the annual number of non-traffic misdemeanor convictions at about 10.5 million.[59] Although misdemeanor-level convictions like drunk driving are most likely accurate, "bulk-urban policing crimes such as loitering, trespassing, disorderly conduct, and resisting arrest create the highest risk of wrongful conviction" because they require no physical evidence and are based on an officer's word.[60] Thus, even if American criminal justice no longer links illegal detention with coerced confessions, a large and serious problem of false convictions exists for less serious crimes. The problem is far from trivial as misdemeanor conviction records diminish the life chances of the convicted, and unjustly burden the innocent among them.

As noted above, it is far too limiting to attach tunnel vision only to the problem of unlawfully extended custody as tunnel vision is pervasive. But it does help explain why officials tolerate the unlawful extension of detention.

8. "The Merely Nominal Checks among the Police, the Procuratorate, and the Court."

Chapters 8 and 9 (the eighth and ninth ascribed false conviction causes) take aim at China's weak rule of law tradition. Chapter 8 (BFTD, pp. 110–116) avers that guilt or innocence decisions are made at the police investigation stage; prosecutors and courts simply ratify those decisions, offering no checks and balances. Two structural features of China's criminal justice system account for this: (1) China's deeply inquisitorial system and (2) the role played by CCP "Political-Legal Work Committees" at every level. Courts are viewed more as administrative adjuncts of the party-state than as autonomous branches of government. This is reinforced by Ni He: "the Chinese Supreme People's Court is blunt with its own goals: courts are to enforce the laws according to the strategic visions of the Party-Central in order to 'protect economic growth, people's quality of life and social stability.'"[61] While accepting this facet of China's constitutional structure, He Jiahong is concerned that "local political leaders place too much emphasis on the importance of 'coordinating efforts.'" As a result, instead of a proper judicial process to assess case facts, closed-door committees engage in bureaucratic compromises, generating some miscarriages of justice (BFTD, p. 112). CCP coordination combined with heavily documented police dossiers makes the police version the basis of decision, even in doubtful cases. In conclusion, "the criminal trial in China has lost its function" (BFTD, p. 116).

This analysis echoes a deep concern of American criminal procedure: it has become a system of pleas rather than a system of trials, a feature acknowledged by the US Supreme Court.[62] As a formal matter guilty pleas in American courts are not dictated by the state in a one-sided bureaucratic system. Lawyers are constitutionally required in felony cases. In many instances a properly formulated plea and sentencing recommendation is based on careful fact analysis, a sober assessment of the defendant's likelihood of success at trial, a truthful acknowledgment of guilt, and a reasonable sentence agreement. But the system does not always (or perhaps even often) work as it should, because plea bargaining "short-circuits" pretrial and trial adversarial protections.[63] Its dysfunctions include overworked and underfunded defense attorneys relying too heavily on police investigation and unable to adequately assess or challenge the accuracy of the state's case, which have led to injustices including false convictions.[64]

9. Nominal Position of Courtroom Trials

Given the nature of China's party-state, courts as adjunct of the executive, political-legal committees at every level, and the inquisitorial/dossier system of criminal justice (BFTD, pp. 127–130), it is no surprise that courts play a nominal role in deciding case outcomes. The ninth reason for wrongful convictions continues the eighth theme of "nominal checks." The ability of courts in China to be sites of truth production is further diminished by a practice that weakens judicial independence: difficult, complex, or major cases are transferred from judicial panels to the "trial committee" of judges who have not participated in the trial.[65] The committees are "more authoritative" and thus better able to withstand criticism for erroneous decisions, and render the collegial panel of judges "obsolete" even though some of their decisions imprisoned innocent defendants (BFTD, pp. 117–118, 125–127).

More powerful factors undermining court effectiveness to get to the truth are the reliance on police and prosecution dossiers and the meager use of live witnesses and cross-examination in trials. Empirical research on 337 audited or broadcast criminal trials conducted by Professor He and his students disclosed that most evidence is introduced by the prosecutor, and most of it is documentary rather than testimonial. Defendants introduced a tiny number of witnesses (BFTD, pp. 119–120). A head-scratching rule is that "prosecutors may produce evidence before and *after* the trial by transferring the case files to the courts" (BFTD, p. 120, emphasis added). Cross-examination is allowed but is rare (BFTD, pp. 122–123). What is more (or less), in only a fifth of the cases do judges assess the evidence, and their assessment is usually "insubstantial" (BFTD, p. 124). He Jiahong concludes that the trial process is administrative and bureaucratic, emphasizing coordination and control, rather than adjudicative, emphasizing accurate fact finding. This is a gloomy indictment of China's judicial process. In slight counterpoise, in many of the wrongful conviction narratives presented in BFTD, higher appellate courts sent decisions back to trial courts for reconsideration where the evidence was not solid, staving off executions and preserving the innocent long enough to be exonerated.

American criminal trials have been critically analyzed for not screening out innocent defendants,[66] and a number of scholars have proposed ways to modify the American adversary trial to produce more accurate results.[67] Of course, many American trials operate as they

should; they produce acquittals that protect erroneously prosecuted innocent defendants, and they uphold the rule of law by allowing the defendants to stand up to state power.[68] Nevertheless, in view of the expense and length of American trials, the concern that their hyper-adversarialness may not assess the truth,[69] and countervailing experimentation with adversarial trial elements (like juries) in inquisitorial countries, there is a need in China to explore a wider range of trial process alternatives than American trial procedure. Superimposing an adversarial ideal on a system that is profoundly inquisitorial may simply be a prescription for continuing disappointment. I have no solution except to agree with Professors He Jiahong and Ni He that Chinese jurists should be encouraged to continue to seek more authentic adjudicative modalities to assess the truth.

10. The Reduction of Punishment in Case of Doubt

A final reason proffered for courts failing to uncover erroneous cases is the practice in China of "splitting the difference" in doubtful cases and reducing a sentence (often from death to life imprisonment) rather than releasing the defendant. As Professor He correctly notes, this goes counter to the presumption of innocence. My observation is that it is well known in the United States that juries will at times acquit a defendant and when asked, will say that they thought that the defendant was in fact guilty but that the prosecutor did not prove the state's case beyond a reasonable doubt. It is also believed that examples of citizen juries performing their constitutional obligation of holding the state to its proof tend to apply in less serious crimes. In violent crimes juries tend to be swayed by death or injury to overlook prosecution weaknesses, although the notorious acquittals of O. J. Simpson in 1996 and Casey Anthony in 2011 show that a skillful defense can expose prosecution weaknesses in even horrific cases.[70]

Upon completing his diagnosis of China's criminal justice system's ills, in Part III of BFTD, Professor He proposes reforms that exemplify innocence consciousness. Chapter-length analyses of exclusionary rules against illegally seized evidence, reforming the criminal justice system to make it more "trial centered" than "investigation centered," breathing life into a people's jury system, and changing the criminal retrial system and standard of proof for exoneration are proffered. These kinds of administrative changes are being considered in many countries with innocence

movements. They are not simple fixes but require complex legal, administrative, and practice changes to improve justice. They will surely be subject to debate, but BFTD importantly provides policy makers with a blueprint of what needs to be addressed in order to reduce false convictions.

BFTD is a challenging book, especially for a casual reader, although the tales of Teng Xingshan, She Xianglin, Zhao Zuohai, and others add poignancy to the legal and scholarly analysis. It does not address every critical issue, omitting, for example, the problem of eyewitness misidentification, perhaps because misidentification did not arise in the cases. But eyewitness misidentification might become a more pressing concern if other sources of false conviction, like coerced confessions, are reduced. The empirical research reported in BFTD was not conducted with the same level of social scientific precision as the work of McConville et al. of Ni He, but does highlight the problems with sufficient clarity.

There are signs that the research conducted by Professor He and others and their findings are beginning to take root. BFTD reports an unprecedented hearing ordered by the Supreme People's Court in late 2014 to review a potential false conviction (BFTD, p. 192). And in 2016, apparently for the first time in China, a conviction was overturned based not on the return of a "corpse" but on shaky evidence. The release of Chen Man in February 2016 "is one of a growing number of overturned cases."[71] These signs highlight the greatest challenge confronting innocence reformers: "change in the mentalities of judicial and law enforcement officers" (BFTD, p. 193). Reform-minded jurists in China experienced a major disappointment when the 1996 Criminal Procedure Code legislative reform failed to usher in a new way of doing things. He Jiahong understands that structural change without a change in the culture of police, prosecutors, and judges will not deliver justice. He describes the needed changes in thinking to achieve a more accurate judicial system: less reliance on crime control; merging defendants' rights into Chinese culture; understanding procedural justice; and greater reliance on physical proof. A postscript alludes to the highly significant Fourth Plenary Session of the 18th Chinese People's Congress in 2014 that announced the goal of building a "socialist rule of law with Chinese characteristics" (BFTD, pp. 206–209). *How* the desired changes are to be achieved is not so clear. What is clear is that BFTD is a signal achievement. It is a milestone of China's innocence movement. The book, with its clear assessment of everyday justice-system practices, grounded in a

broad understanding of the cultural foundations of China's justice system, both ancient and modern, and its exhaustive analysis of that system's problems, provides an invaluable tool for those in China's innocence movement to move forward to reduce false convictions.

Notes

1 See C. Ronald Huff and Martin Killias, eds., *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (Philadelphia: Temple University Press, 2008); C. Ronald Huff and Martin Killias, eds., *Wrongful Convictions & Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems* (New York: Routledge, 2013); Luca Lupária, ed., *Understanding Wrongful Conviction: The Protection of the Innocent across Europe and America* (Milan: Wolters Kluwer, 2015).

2 See Brian Forst, *Errors of Justice: Nature, Sources, and Remedies* (Cambridge: Cambridge University Press, 2004). Some prosecutors fail to protect the public by virtually ignoring entire categories of crime like domestic violence, see Amy Bach, *Ordinary Injustice: How America Holds Court* (New York: Metropolitan Books/Henry Holt, 2009), pp. 130–190.

3 Marvin Zalman, "An Integrated Justice Model of Wrongful Convictions," *Albany Law Review*, Vol. 73, No. 3 (2011), pp. 1465–1524, 1468.

4 For the United States the innocence movement has been defined as "a related set of activities by lawyers, cognitive and social psychologists, other social scientists, legal scholars, government personnel, journalists, documentarians, freelance writers, and citizen-activists who, since the mid-1990s, have worked to free innocent prisoners and rectify perceived causes of miscarriages of justice." Zalman, "Integrated Justice Model," p. 1468.

5 See Marvin Zalman, "Wrongful Convictions: Comparative Perspectives," in *Cambridge Handbook of Social Problems*, edited by Javier Trevino (Cambridge: Cambridge University Press, forthcoming). That many innocence movements arose at about the same time is a fact that calls for sociocultural scholarship beyond the scope of this article.

6 Marvin Zalman and Julia Carrano, "Sustainability of Innocence Reform," *Albany Law Review*, Vol. 77 (2014), pp. 955–1003.

7 Michael Naughton, ed., *The Criminal Cases Review Commission: Hope for the Innocent?* (Basingstoke: Palgrave Macmillan, 2010).

8 Zhu Suli, "The Party and the Courts," in *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, edited by Randall Peerenboom (Cambridge: Cambridge University Press, 2010), pp. 52–68. As He Jiahong noted in *Back from the Dead* (hereafter BFTD), "China has a 'dual administrative system,' in which leadership is shared between Communist Party

officials and government leaders. In any particular village, the party secretary will determine the basic policy direction, while the government leader (village head, mayor, or similar position) will be responsible for implementing the policy" (p. 221, n. 14).

9 See Zalman, "Wrongful Convictions."

10 For the expansion of China's legal profession, see Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002), pp. 343–393.

11 Throughout this article, I include parenthetical page references to *Back from the Dead: Wrongful Convictions and Criminal Justice in China* (BFTD) rather than a profusion of notes. While in Illinois, He met Professor Fred Inbau, a legal scholar who was an important figure in the transition of American interrogations from the third-degree (i.e., torture) model to one based on psychological pressure.

12 In *Hanging Devils*, the protagonist, an American-trained Chinese defense lawyer, gains an exoneration not through a proceeding in the courts, but through the political-legal committee consisting of the chiefs of the police, prosecutorial, and court agencies. He Jiahong, *Hanging Devils: Hong Jun Investigates* (New York: Penguin, 2010).

13 BFTD, p. 217, n. 7 (participation in China-EU Human Rights dialogue, 2001; forum on death penalty at French Embassy, 2013); p. 224, n. 4 (expert advisory meeting to Supreme People's Court, 2013); p. 224, n. 1 (International Symposium on Jury System, 2011).

14 He Jiahong, "Case Study on the Causes of Wrongful Conviction in Chinese Criminal Proceedings," *Frontiers of Law in China*, Vol. 10, No. 4 (2015), pp. 670–689; He Jiahong, "Miscarriage of Justice and Malpractice in Criminal Investigations in China," *The China Review*, Vol. 16, No. 1 (2016), pp. 65–93.

15 M. McConville, S. Choongh, P.C. D. Wan, E. C. W. Hong, I. Dobinson, and C. Jones, *Criminal Justice in China: An Empirical Inquiry* (Cheltenham: Edward Elgar, 2011), pp. 1–25.

16 Ni He, *Chinese Criminal Trials: A Comprehensive Empirical Inquiry* (New York: Springer, 2014).

17 Ibid., pp. 139–141; John Bryan Starr, *Understanding China: A Guide to China's Economy, History, and Political Culture*, 3rd ed. (New York: Hill & Wang, 2010), pp. 57–96. The CCP has transitioned from a majority of workers and peasants to a more inclusive membership including professionals and businesspersons.

18 Ni He, *Chinese Criminal Trials*, pp. 137–142. It is worth noting that American state judges are elected, an almost unheard of practice in other nations, and their selection is politicized, creating problems like the subtle pressures generated by practicing lawyers who contribute to the modest

campaign funds of local judges, to highly partisan, big-money state supreme court races in which political parties or, more recently, plutocratic organizations attempting to control American politics seek to gain party control. See Justice at Stake, http://www.justiceatstake.org/; Scott Greytak, Alicia Bannon, Allyse Falce, and Linda Casey, "Bankrolling the Bench: The New Politics of Judicial elections, 2013–2014," http://newpoliticsreport.org/.

19 Ni He, *Chinese Criminal Trials*, p. 128.

20 Zhu Suli, "The Party and the Courts," pp. 52–68; Starr, *Understanding China*, p. 59, describes the CPP as functioning "somewhat like the board of directors for the country," making all critical decisions that the government must carry out.

21 Ni He, Chinese Criminal Trials, pp. 47–48. See Susan Trevaskes, Elisa Nesossi, Flora Sapio, and Sarah Biddulph, eds., *The Politics of Law and Stability in China* (Cheltenham: Edward Elgar, 2014) (the Chinese state's concern for stability permeates all areas of law).

22 Ni He, *Chinese Criminal Trials*, pp. 3–36; Starr, *Understanding China*, pp. 41–56; Peter D. Hershock and Roger T. Ames, eds., *Confucian Cultures of Authority* (Albany: State University of New York Press, 2006); Peerenboom, *China's Long March*, pp. 27–54. See BFTD, pp. 206–207.

23 See Peerenboom, *China's Long March*; Randall Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?* (Oxford: Oxford University Press, 2007); Peerenboom, *Judicial Independence in China*.

24 Ni He, *Chinese Criminal Trials*, pp. 15–17, 17–21, 154–155.

25 Ni He forthrightly asserts that the sensitive cases reported in Western media "are seen (rightly so) as an affront to the prevailing western model of due process and an embodiment of gross injustice." Ibid., pp. vii–viii. Ni He goes on to describe the Chinese government's defense of its actions and the miscommunication between the different views. For his analysis of the rule of law, see pp. 39–46.

26 Ibid., p. 159. On the historical roots of China's self-concept and larger relations between China and the West, see Thomas J. Christensen, *The China Challenge: Shaping the Choices of a Rising Power* (New York: Norton, 2015); Noah Feldman, *Cool War: The Future of Global Competition* (New York: Random House, 2013); Orville Schell and John Delury, *Wealth and Power: China's Long March to the Twenty-First Century* (New York: Random House, 2013).

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42 Ni He, *Chinese Criminal Trials*, p. 34.

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61 Ni He, *Chinese Criminal Trials*, p. 164.
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