

CONCEPTS OF LAW IN THE CHINESE ANTI-CRIME CAMPAIGN

What is the source of the statutes in the books? Whatever previous rulers thought appropriate, they had written down as laws. Whatever subsequent rulers thought to be right, they added as ordinances. Whatever suits the moment is correct; what do the laws of the past matter?

— Du Zhou, Commandant of Justice (c. 100 B.C.).¹

[W]hat is to the advantage of the revolution, that is the law. Whenever it is to the advantage of the revolution the legal procedure can at any time be adapted. One ought not to hinder the interests of the revolution because of legal procedure.

— Liang Botai, Red China, 1934.²

[L]aw has to serve politics. What should be included in a constitution depends on whether or not it is advantageous to the present political objectives.

— Zhang Youyu, Beijing Review, 1980.³

The chief problem for students of modern Chinese law has often been one of finding it.⁴ There have been enactments that might be called statutes,⁵ but their effect on official behavior has never been clear.⁶ There have been institutions called courts staffed by officials called judges, but these judges do not appear to have played a very important or independent role in determining the outcomes of disputes before them.⁷ It is not even obvious why it is worth studying the set

¹ SIMA QIAN, SHIJI (HISTORICAL RECORDS), ch. 122, *quoted in* 1 K. HSIAO, A HISTORY OF CHINESE POLITICAL THOUGHT 452 (F. Mote trans. 1979). Du Zhou served at the court of Emperor Wu of Han.

² Liang Botai, *[The Main Direction of the Work of Organs of Adjudication: Suppress Counterrevolution]*, Hongse Zhonghua (Red China), Mar. 1, 1934, at 3. *Red China* was the organ of the Chinese Communist Party at that time.

³ Zhang Youyu, *Why "Sida" Has Been Abolished*, BEIJING REV., Oct. 6, 1980, at 27. Zhang is vice-president of the Chinese Academy of Social Sciences and a prominent jurist.

⁴ See generally Hazard, Book Review, 84 HARV. L. REV. 1569 (1971) (reviewing CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES (J.A. Cohen ed. 1970) and discussing problems of obtaining and interpreting material).

⁵ See, e.g., ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN [FGHB] (COMPENDIUM OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA) (several volumes published in the 1950s and early 1960s); GONGAN FAGUI HUIBIAN (1950-1979) (COMPENDIUM OF PUBLIC SECURITY LAWS AND REGULATIONS) (1980).

⁶ Chinese news media frequently report cases in which the government appears to be in violation of its own statutes. See, e.g., Leng, *Criminal Justice in Post-Mao China: Some Preliminary Observations*, 73 J. CRIM. L. & CRIMINOLOGY 204, 234 (1982) (reports of executions without required approval of Supreme Court); Luo Bing, *[Deng Xiaoping's Encounter with Bandits and the Big Crackdown]*, ZHENG MING (CONTENTING), No. 72, Oct. 1983, at 6, 7, *translated in* FOREIGN BROADCAST INFORMATION SERVICE, PEOPLE'S REPUBLIC OF CHINA DAILY REPORT [F.B.I.S.], Oct. 5, 1983, at W2, W3 ("prompt" handling and execution of criminals violated Criminal Law and Criminal Procedure Law until they were amended to validate such procedures in September 1983).

⁷ In 1959, a judge held up as a model to be followed wrote:

when cases I have handled required arresting and sentencing, had a relatively strong policy nature, or involved village or cooperative cadres, I asked instructions from the

of institutions and practices called legal, when they do not seem to have been very important to the Chinese themselves in ordering their society. Yet the search for Chinese law continues and is increasing in importance as Chinese contacts with the West grow and as the Chinese government promotes the "legalization" (*fazhikua*) of Chinese society as a means of solving the problems of political instability and economic development.⁸

One of the most widely publicized recent developments in Chinese law is the anti-crime campaign that began in the summer of 1983.⁹ Since then, a large body of literature explaining and justifying the campaign has appeared in Chinese newspapers and legal periodicals. This Note examines this literature closely and considers its implications for Chinese legal thought and practice. Part I discusses methodological problems in the study of Chinese law and explains the methodology used in this Note. Part II describes the background and history of the anti-crime campaign. Part III examines the theoretical literature that accompanied the campaign and draws conclusions about the structure of thought in Chinese criminal law. Finally, Part IV explains why the workings of Chinese criminal law have important consequences for the workings of Chinese law in other fields.

I. METHODOLOGICAL DILEMMAS

The main task for any methodology in the study of Chinese law¹⁰ is to distinguish the relevant from the irrelevant so as to produce an

Party committee both before and during the process of handling the cases, and afterward I reported to the Party committee. . . . Whenever the Party committee gave me instructions, I conscientiously studied and thoroughly implemented them.

Liu Zejun, [*Realizations from My Adjudication Work*], ZHENGFA YANJIU (POLITICAL-LEGAL RESEARCH), No. 1, 1959, at 48, 48, *quoted in* J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA: 1949-1963*, at 501 (1968). The practice described above, far from being irregular, has in fact been given a name: "shuji pi'an" (approval of cases by the [local Party] secretary). *See generally* Chiu, *Structural Changes in the Organization and Operation of China's Criminal Justice System*, 7 REV. SOCIALIST L. 53, 59-61 (1981) (discussing the persistence of the system whereby local Party secretaries approve the disposition of cases).

⁸ In 1979, an article in the authoritative *Beijing Review* declared:

Development of the productive forces in China will necessitate major changes in the relations of production as well as in the superstructure, of which laws, decrees and rules and regulations form an important component. To this end, various laws and regulations on economic work, including those for people's communes and factories [and] fulfillment of contracts . . . will be drafted and gradually perfected. Judicial organs will be established to arbitrate disputes and lawsuits between enterprises.

China's Socialist Legal System, BEIJING REV., Jan. 12, 1979, at 25, 30.

⁹ *See, e.g.*, Campbell, *China Suddenly Taking a Tougher Line on Crime*, N.Y. Times, Sept. 13, 1983, at A2, col. 3; Campbell, *To Shame Its Felons, China Puts Them on Parade*, N.Y. Times, Sept. 16, 1983, at A2, col. 3; Wren, *Crime and Capital Punishment in China*, N.Y. Times, Nov. 20, 1983, at E9, col. 1; Sommer, *Chinese Execute 5000 Since Start of Crime Crackdown*, Boston Globe, Nov. 24, 1983, at A42, col. 1; Bonavia, *Repent or Die*, FAR E. ECON. REV., Feb. 16, 1984, at 12.

¹⁰ It is perhaps misleading to speak of Western and Chinese "law," because this way of

analysis that is both accurate in its depiction of Chinese reality and of interest and significance to the student of law. We do not yet have a reliable set of categories, or theoretical pigeonholes, in which to place existing data about Chinese law. For example, although a writer on American law would not have to justify the proposition that statutes and judicial opinions are relevant to his subject, this premise cannot be taken for granted in Chinese law.¹¹ Methodological issues are of crucial importance because, in contrast to scholars of previous years, scholars today are overwhelmed by a mass of data coming from China that is relevant, at least on its face, to the study of Chinese law. The problem in analyzing this data lies in determining what is significant and in what way it is significant.

The approach of this Note is to study the structure of Chinese thinking about law (*fa*) through an examination of the language and justificatory arguments used by commentators writing roughly contemporaneously with the anti-crime campaign.¹² It is an effort to understand and make use of categories explicitly employed in Chinese legal

speaking assumes that there is an underlying reality that simply manifests itself in different cultures in different ways. But however we choose to label the system of ideas subsumed under the word *fa* ("law") and its cognates, that system is worth studying because it is the one now being promoted in China as applicable not only to deviant behavior, but also to the regulation of other conflicts in Chinese society, *see supra* note 8.

¹¹ For the debate between William Jones and Frank Münzel over the significance to be attached to statutory material, see Jones, *An Approach to Chinese Law*, 4 REV. SOCIALIST L. 3 (1978) [hereinafter cited as *Chinese Law*]; Münzel, *Approaches to Chinese Law: A Comment on Professor W. Jones' Article*, 4 REV. SOCIALIST L. 323 (1978); and Jones, *Approaches to Chinese Law: A Reply to Comments by Dr. F. Münzel*, 4 REV. SOCIALIST L. 329 (1978) [hereinafter cited as *A Reply*]. See also Foster, *Codification in Post-Mao China*, 30 AM. J. COMP. L. 395, 410 (1982) (arguing that the main functions of codes are to facilitate foreign economic relations and to provide evidence of national legality for foreign and domestic audiences).

¹² Other methodologies are possible. One approach might be called exegetical. The scholar analyzes written statutes and speculates as to how they might be interpreted. See, e.g., Leng, *supra* note 6, at 235; Münzel, *supra* note 11. But see Jones, *A Reply*, *supra* note 11 (criticizing Münzel's approach). The problem with this approach is that its usefulness depends on the assumption that officials exist who have the authority, training, and inclination to apply the statutes as worded to cases that come before them. See generally Cohen, *Will China Have a Formal Legal System?*, 64 A.B.A. J. 1510, 1511 (1978) (noting lack of legal education and power of Party officials over court decisions); *supra* note 7 (discussing system of "approval of cases by the secretary").

A functional approach identifies functions of our own law, such as dispute resolution, and then examines how the same function is performed by Chinese institutions and procedures, whether or not they are labeled "legal." Studies of this kind have stressed the importance of guild and clan in settling disputes in China during the Qing dynasty and earlier, see, e.g., N. NIIDA, *CHŪGOKU HŌSEI SHI KENKYŪ: DOREI NŌDO HŌ, KAZOKU SONRAKU HŌ* (STUDIES OF CHINESE LEGAL HISTORY: LAW OF SLAVES AND SERFS, LAW OF CLAN AND VILLAGE) (1962) (family and clan); N. NIIDA, *CHŪGOKU HŌSEI SHI KENKYŪ: HŌ TO KANSHŪ, HŌ TO DŌTOKU* (STUDIES OF CHINESE LEGAL HISTORY: LAW AND CUSTOM, LAW AND MORALITY) 694-747 (1964) (guilds); S. VAN DER SPENKEL, *LEGAL INSTITUTIONS IN MANCHU CHINA* 80-97 (1966) (looking at clan and guild tribunals as "subsidiaries of the official courts"), and of mediation in the People's Republic, see, e.g., Cohen, *Chinese Mediation on the Eve of Modernization*, 54

theory, rather than to impose categories upon the material from outside. For example, suppose we hear of a homicide. We might find facts that allow us to judge for ourselves whether or not there was malice aforethought. Less parochially, we might step back and try to derive the Chinese rules relating to murder and voluntary manslaughter. These approaches, however, unjustifiably assume that concepts such as malice aforethought and voluntary manslaughter are meaningful in Chinese law. To understand the treatment of a particular set of facts under Chinese law, we must not merely fit them into categories; we must also ensure that those categories are in fact the ones understood and accepted by the Chinese.¹³ This Note attempts to elucidate some important conceptual categories used within the paradigm of thought called "legal" in China and to determine into which categories social facts must be fitted for "legal" thinking to be applicable at all.

This Note concentrates on the roles of Communist Party officials and the courts in interpreting criminal law and on the legal practices that developed during the anti-crime campaign. In examining these institutions and practices, one must remember that ideas about "law" are vague in China. Although there have been codes, magistrates, and courts, there is not much of a jurisprudential tradition: Chinese intellectuals did not study and teach law the way they did philosophy and literature.¹⁴ There is little consensus in the popular mind about what constitutes "law" and what is the legal way of looking at the world.¹⁵ As a result, the developing institutions and practices that

CALIF. L. REV. 1201 (1966); Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284 (1967).

A third approach has been to examine a particular area of social life that, whether or not regulated by "legal" institutions, is still of intrinsic interest to the Western legal scholar. Valuable studies of this kind have appeared on subjects ranging from criminal procedure, *see* J. COHEN, *supra* note 7, to family relations, *see* M. MEIJER, *MARRIAGE LAW AND POLICY IN THE CHINESE PEOPLE'S REPUBLIC* (1971).

¹³ *Cf.* Jones, *Theft in the Qing Code*, 30 AM. J. COMP. L. 499 (1982) (examining the formal ordering of certain prohibitions in the Qing Code and concluding that kidnapping is best understood as a species of theft).

¹⁴ *See* Jones, *A Reply*, *supra* note 11, at 330; S. VAN DER SPRENGEL, *supra* note 12, at 69 (contending that the restriction of professional activity to official advisers or clandestine lawyers was a barrier to the technical development of law). Traditionally, there was no formally recognized private legal profession, and helping litigants to prepare documents, whether for a fee or not, could result in three years of penal servitude. *See* D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA* 413 (1967). *See generally* J. WATT, *THE DISTRICT MAGISTRATE IN LATE IMPERIAL CHINA* 210-24 (1972) (discussing magistrates' dislike of litigation).

¹⁵ A 1982 issue of *Minzhu yu fazhi (Democracy and the Legal System)*, for example, carried a debate over whether the behavior of a young man who romanced four women and had sexual intercourse with two of them (one of whom later hanged herself) constituted the crime of "hooliganism" (*liumang zui*). Only one writer took the view that the defendant could not be punished in a court of law because his behavior, although immoral, was not illegal. Another objected to this view:

If we merely turn him over to the "moral court" (*daode fating*) of society, then let me

are called legal will help to shape what "legality" in China comes to connote. Legality in China is still an open-ended idea: it is ready to receive a more specific content, and that content will depend on the ideas, institutions, and practices that come to be associated with it.

At present, the most widely publicized function of law in China is to combat crime. Given the lack of consensus over what "law" is, the methods used to deal with crime will in all likelihood come to be seen as characteristically "legal" methods. The anti-crime campaign was a period of intense practical and theoretical activity among judicial officials and writers and is thus an appropriate starting point for an examination of some of the larger issues in Chinese law.

II. THE ANTI-CRIME CAMPAIGN

China's emphasis on "law" as a means of solving social problems such as crime is closely connected with political developments. The death of Mao Zedong in 1976 and the purge of the "Gang of Four" shortly thereafter led to the return of Deng Xiaoping and his allies to positions of influence. Determined to put a halt to the turbulent politics of the past, they instituted a set of reforms designed to bring "stability and unity" to China.¹⁶ "Strengthening the socialist legal system"¹⁷ was central to these reforms and was intended to restore the confidence of Chinese citizens in the legitimacy of the government and to counteract the cynicism and alienation engendered by the Cultural Revolution.¹⁸ In addition, the Chinese leadership has con-

ask: where is "the law must be strictly upheld" (*zhi fa bi yan*)? Where is "lawbreakers must be prosecuted" (*wei fa bi jiu*)? Where is the socialist legal system?

[*What Court Should Judge Him?*], MINZHU YU FAZHI (DEMOCRACY AND THE LEGAL SYSTEM), No. 1, 1982, at 20, 20. *Minzhu yu fazhi* is a widely circulated popular magazine about law with numerous human interest stories. See Edwards, *An Overview of Chinese Law and Legal Education*, 476 ANNALS 48, 57 (1984).

The sixteen-character slogan "*you fa ke yi, you fa bi yi, zhi fa bi yan, wei fa bi jiu*" ("there must be laws to follow, where there is a law it must be followed, the law must be strictly upheld, lawbreakers must be prosecuted") has been described as "the guiding principle (*zong fangzhen*) in the establishment of our country's socialist legal system." Cui Min, [*Learn How To Use and Use Well the Weapon of Law*], FAXUE ZAZHI (JURISPRUDENCE MAGAZINE), No. 5, Oct. 1983, at 13, 13.

¹⁶ At the Third Plenum of the Eleventh Central Committee of the Chinese Communist Party in 1978, the focus of Party and state work was officially shifted from class struggle to modernization. See *Communique of the Third Plenary Session of the 11th Central Committee of the Communist Party of China*, PEKING REV., Dec. 29, 1978, at 6, 10-11. "Stability and unity" were viewed as necessary for modernization. See DENG XIAOPING, *Uphold the Four Cardinal Principles*, in SELECTED WORKS OF DENG XIAOPING 166, 167 (1984) ("In the two and a half years since the overthrow of the Gang [of Four], we have . . . secured a political situation marked by stability and unity; this situation is both a prerequisite and a guarantee for our socialist modernization.") (1979 speech).

¹⁷ This common slogan has been in currency since August 1977. See Foster, *supra* note 11, at 398.

¹⁸ It is a commonplace in China that many, especially the young, lost their moral compass

sidered the growth of the legal system to be a prerequisite to the attainment of the "four modernizations": the modernization of agriculture, industry, national defense, and science and technology.¹⁹

Following the adoption of a new Constitution by the Fifth National People's Congress on March 5, 1978,²⁰ the government set out to provide a statutory foundation for its reforms.²¹ Central to the legislative program were the Criminal Law and the Law of Criminal Procedure, both of which came into effect on January 1, 1980.²² These laws were extensively publicized, and in newspapers, the most

during the turbulence of the Cultural Revolution. The popular writer Gao Xiaosheng probably spoke for many when he wrote, "All people can distinguish between right and wrong in their hearts' — this [saying] sounds very grand. In fact, it never went through the Cultural Revolution — it's too naive." Gao Xiaosheng, [*Li Shunda Builds a House*], in 1979 NIAN QUANGUO YOUXIU DUANPIAN XIAOSHUO PINGXUAN HUOJIANG ZUOPIN JI (COLLECTED NATIONAL AWARD-WINNING SHORT STORIES OF 1979) 134 (Shanghai 1980).

¹⁹ See, e.g., Hu Qiaomu, [*Act in Accordance with Economic Laws, More Rapidly Achieve the Four Modernizations*], Renmin ribao (People's Daily), Oct. 6, 1978, at 1, 3 (calling for legislation to govern contracts); Lubman, *Emerging Functions of Formal Legal Institutions in China's Modernization*, 2 CHINA L. REP. 195, 204 (1983). The "four modernizations" are defined, with textual citations, in Y. LAU, W. HO & S. YEUNG, GLOSSARY OF CHINESE POLITICAL PHRASES 400-01 (1977) [hereinafter cited as GLOSSARY]. A further goal of recent legislation has been to encourage foreign investment. See Foster, *supra* note 11, at 408; Leng, *supra* note 6, at 206.

²⁰ A translation of the 1978 Constitution, the third in the history of the People's Republic, appears in 4 REV. SOCIALIST L. 247 (1978). That Constitution was superseded by a fourth, adopted in December 1982, which appears in translation in 9 REV. SOCIALIST L. 183 (1983). The new Constitution is analyzed in Saich, *The Fourth Constitution of the People's Republic of China*, 9 REV. SOCIALIST L. 113 (1983).

²¹ In July 1979, the National People's Congress adopted seven major laws: the Criminal Law, the Law of Criminal Procedure, the Organic Law of Local People's Congresses and Local People's Governments, the Electoral Law for the National People's Congress and the Local People's Congresses at All Levels, the Organic Law of People's Courts, the Organic Law of People's Procuratorates, and the Law on Joint Ventures with Chinese and Foreign Investment. (These laws are translated in F.B.I.S., July 27, 1979 (Supp. 019), and *id.*, July 30, 1979 (Supp. 020)). The Chinese government then embarked on an extensive campaign to publicize the laws and the new legal system. A number of laws covering an extensive variety of subjects have been enacted in subsequent years. See Leng, *supra* note 6, at 207-08 (discussing developments in legislation, legal training, and publicity about the system since 1979). For an overview of recent Chinese codification policy, see Foster, *supra* note 11, 397-413.

²² See ZHONGHUA RENMIN GONGHEGUO XING FA (CRIMINAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA), reprinted in Renmin ribao, July 7, 1979, at 1, translated in 73 J. CRIM. L. & CRIMINOLOGY 138 (1982) [hereinafter cited as CRIMINAL LAW]; ZHONGHUA RENMIN GONGHEGUO XINGSHI SUSONG FA (CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA), reprinted in Guangming ribao (Enlightenment Daily), July 8, 1979, at 1, translated in 73 J. CRIM. L. & CRIMINOLOGY 171 (1982) [hereinafter cited as CRIMINAL PROCEDURE LAW]. The Foreign Languages Press in Beijing has published in book form the above translations together with the Chinese text. See THE CRIMINAL LAW AND THE CRIMINAL PROCEDURE LAW OF CHINA (1984). These two laws were the keystone of the government's legislative program at the time they were passed. See Foster, *supra* note 11, at 403 & n.51. One Chinese article, discussing China's recent success in filling its legislative vacuum, mentioned specifically only the Criminal Law, the Law of Criminal Procedure, and the Constitution. See Cui Min, *supra* note 15, at 13.

commonly reported activity of legal organs has been the handling of criminal cases.²³

Almost from the moment of their promulgation, however, the new laws appeared inadequate to deal with the problem of crime. The social order proved more unstable than the government had anticipated.²⁴ Purely institutional constraints, such as the lack of courts and trained officials, made it difficult for those charged with the task of fighting crime to do so according to the law.²⁵ And pressure on local officials to handle crime quickly and efficiently²⁶ made it less likely that public security organs would strictly observe the new regulations. Consequently, the laws were amended in an effort to harmonize the emphasis on legality with the fight against crime. On June 10, 1981, the Standing Committee of the National People's Congress passed a resolution²⁷ modifying provisions of the Criminal Procedure Law so that from 1981 to 1983, death sentences in certain cases²⁸ did not have to be approved by the Supreme People's Court. In addition, it promulgated harsher regulations governing persons undergoing reform through labor and rehabilitation through labor.²⁹

Periodic campaigns against crime followed, with varying emphases. Sometimes the campaigns stressed the need to punish "economic" crimes, such as bribetaking and other forms of corruption;³⁰

²³ See Lubman, *supra* note 19, at 208.

²⁴ Large numbers of youth who had been "sent down" (*xiafang*) to the countryside in previous years as part of the government's program to reduce the urban population began drifting back to the cities illegally, without ration coupons or job prospects. Unable to find legitimate means of providing for themselves, some appear to have turned to crime. See Wren, *supra* note 9, at col. 1 (stating that returnees are forced "to live illegally without jobs or money").

²⁵ See Cohen, *Chinese Criminal Code Symposium: Foreword — China's Criminal Codes*, 73 J. CRIM. L. & CRIMINOLOGY 135, 136 (1982) (noting some obstacles to the implementation of the codes). Well before the end of 1980, for example, both Jilin and Shanghai had decided to extend, for reasons of practicability, some of the time limits set out in the Law of Criminal Procedure, such as those for detention, investigation, prosecution, and appeal. See Lubman, *supra* note 19, at 206.

²⁶ According to the Central News Agency of Taipei, Communist Party leader Hu Yaobang, on a visit to Shanghai in August 1983, expressed his disappointment that only 19,000 criminals had been arrested. Another 49,000 suspects were immediately rounded up. See *CNA: 'Criminal Offenders' Arrested in Shanghai*, F.B.I.S., Nov. 4, 1983, at V1. This report comes from a source hostile to the Chinese government and cannot be verified.

²⁷ [Decision on the Question of Approval of Death Sentences], *reprinted in Renmin ribao*, June 11, 1981, at 1, *translated in F.B.I.S.*, June 11, 1981, at K4. The Decision amended articles 144 and 145 of the Criminal Procedure Law.

²⁸ The decision applied to cases of murder, rape, robbery, bombing, arson, poisoning, breaching of dikes, and sabotage of communications and power facilities.

²⁹ [Decision on Handling Escapees and Recidivists Who Are Under Reform Through Labor or Rehabilitation Through Labor], *reprinted in Renmin ribao*, June 11, 1981, at 1, *translated in FBIS*, *supra* note 6, June 11, 1981, at K4. Generally speaking, reform through labor is a criminal punishment, whereas rehabilitation through labor is an administrative measure that is in theory therapeutic rather than punitive.

³⁰ See Lubman, *supra* note 19, at 243-44 (noting the drive on economic crimes and corruption in spring of 1982).

at other times they focused on the need to punish violent crimes.³¹ The most recent and perhaps the most sustained anti-crime campaign began suddenly with mass arrests on August 6, 1983.³² This campaign, directed largely but not exclusively against crimes of violence, was carried out on three fronts. First, the police and militia worked at ferreting out crimes and apprehending suspects (usually described as "criminals"). Second, the government introduced legislative reforms designed to streamline the process from arrest to conviction, and often to execution.³³ Third, a sustained propaganda drive began: newspapers and radio carried reports of arrests and executions,³⁴ and more general articles stressed the need for sternness in the fight against criminals and enemies of society.³⁵ A number of articles of a more theoretical nature appeared in specialized legal journals.³⁶ The next Part will examine the language of those articles and identify certain recurring formulations that illuminate the structure of thought within Chinese criminal law.

³¹ See, e.g., Editorial, [*Use the Weapon of Law To Crack Down on Criminal Activities*], Renmin ribao, June 22, 1981, at 1, translated in F.B.I.S., June 23, 1981, at K2; Zhou Daoluan, Sun Changli & Zhang Sihan, [*Deal Heavy and Quick Blows to Serious Criminal Offenders According to Law*], Renmin ribao, June 25, 1981, at 5.

³² Over 3,000 were arrested in Beijing alone, according to one Hong Kong magazine. See Luo Bing, *supra* note 6, at 6, translated in F.B.I.S., Oct. 5, 1983, at W3.

³³ On September 2, the Standing Committee approved the Decision on Severely Punishing Criminals Who Gravely Endanger Public Security (*Guanyu yancheng yanzhong weihai shehui zhian de fazui fenzi de jue ding*), 1983 ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO [GWYGB] (BULLETIN OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA) 851, translated in F.B.I.S., Sept. 6, 1983, at K2 [hereinafter cited as Decision on Punishing], and the Decision on the Procedure for Swiftly Trying Criminals Who Gravely Endanger Public Security (*Guanyu xunsu shenpan yanzhong weihai shehui zhian de fazui fenzi de chengxu de jue ding*), 1983 GWYGB 853, translated in F.B.I.S., Sept. 6, 1983, at K4 [hereinafter cited as Decision on Procedure]. Both of these decisions substantially changed the substantive and procedural criminal law. The death penalty was extended to apply to numerous offenses, and the appeal time was reduced to three days. The Standing Committee declared: "Criminals involved in homicide, rape, robbery, explosion and other activities that seriously threaten public safety who warrant the death penalty should be tried swiftly if the major facts of the crime are clear, the evidence is conclusive, and they have incurred great popular indignation." Decision on Procedure, *supra*, 1983 GWYGB at 853.

³⁴ See, e.g., Commentator, [*Deal Blows to Criminal Offenders with an Iron Hand*], Heilongjiang ribao (Heilongjiang Daily), Sept. 13, 1983, at 1, translated in F.B.I.S., Oct. 6, 1983, at S1 (praising execution of criminals in Harbin); Commentator, [*Deal Severe Blows to Criminal Gangs*], Tianjin ribao (Tianjin Daily), Sept. 25, 1983, at 1, translated in part in F.B.I.S., Oct. 19, 1983, at R5 (fourteen "archcriminals of hooligan gangs" sentenced to death).

³⁵ See, e.g., [*Strike Resolute Blows at and Thoroughly Exterminate an Evil*], Sichuan ribao (Sichuan Daily), Aug. 27, 1983, translated in F.B.I.S., Aug. 30, 1983, at Q1; Jing Wencan & Shi Taiyou, [*Give Full Play to the Role of Political and Judicial Organs as a "Knife"*], Guangming ribao, Sept. 10, 1983, at 3, translated in F.B.I.S., Sept. 22, 1983, at K11.

³⁶ Articles in these journals (discussed below) are written for the most part by scholars, and occasionally by students, at Chinese institutes of law.

III. THE ANTI-CRIME CAMPAIGN AND CHINESE CRIMINAL LAW

A close reading of the literature of the anti-crime campaign allows us to clarify the content of the idea of law in China by examining other concepts from which it is distinguished. By understanding what law is not, we can understand more clearly what it is. In Chinese discussions of criminality and social conflict, the two most important dichotomies are between the concepts of law and policy and between the concepts of law and discipline or administration. This Part will examine these dichotomies and show how they are reinforced by the broader Chinese notions of dictatorship and democracy.

A. The Dichotomy Between "Law" and "Discipline" or "Administration"

The theoretical articles that accompanied the anti-crime campaign indicate clearly that "law" is distinct from "discipline" or "administration." To understand the scope of the concept of law, therefore, it is necessary to map out the realm of discipline and administration³⁷ and to demarcate the border between these areas and law.

Disciplinary and administrative sanctions are, like legal sanctions, imposed for transgressions against rules of conduct. The two differ theoretically in that the term "administrative sanctions" usually means sanctions imposed by the state as state,³⁸ whereas disciplinary sanctions are imposed by one's work unit, such as a factory, or some other organization of which one is a member, such as the Party or a labor union.³⁹ When, however, as is frequent in China, the employer is the state or the organization is the Party, there tends to be little practical distinction between the two.⁴⁰ What is important about disciplinary and administrative sanctions is that although they are explicitly differentiated in theory and practice from "legal" sanctions, they can, like legal sanctions, be imposed with the authority of the state.

Disciplinary sanctions are to be imposed when one breaks the regulations of an organization. A worker who is careless, for example, can have his pay docked. A Party member who does not do what is expected of him can be given a warning or a demerit, which will hurt his chances for promotion to a more powerful position in the Party. Because of the close ties between all social organizations and the state, it is not surprising to find that disciplinary sanctions are often used as a substitute for legal sanctions.

³⁷ Because the two labels are often used interchangeably, *see* FAXUE CIDIAN (LAW DICTIONARY) 296 (Shanghai 1980), this Note will use both to refer to a single type of sanction.

³⁸ *See id.* at 274.

³⁹ *See id.* at 296.

⁴⁰ *See id.* at 296-97.

The substitution of discipline for law⁴¹ occurs primarily in two situations. First, discipline may produce a lesser punishment than law. Party members who commit acts in clear violation of the law, such as embezzlement, assault, or manslaughter, may avoid legal punishment entirely and be dealt with according to internal Party procedures. Although Chinese writers on law unanimously condemn this practice,⁴² it is widespread, and examples of it commonly appear in the major newspapers and magazines.⁴³ Second, discipline may produce a greater punishment than law when an act is unlikely to be punished under law. A factory manager has broad authority to dock wages, but he is not allowed to incarcerate people. Hence he may impose disciplinary sanctions on an offending worker under his authority because they are more readily available and more certain than legal sanctions.

A similar pattern can be found in the distinction between legal sanctions and administrative sanctions (*xingzheng chufen*). The latter category was created to deal with minor infractions of the social order.⁴⁴ Administrative sanctions are typically punishments imposed by the police without the participation of other legal organs such as the procuracy and the courts. The most important types of these sanctions are rehabilitation through labor (*laodong jiaoyang*)⁴⁵ and

⁴¹ The words "discipline" and "law" are used here instead of "disciplinary sanctions" and "legal sanctions" to denote the substitution not just of one type of penalty for another, but also of one way of thinking about sanctions for another way.

⁴² For example, the following comments were made in 1981:

When dealing with state workers who have committed crimes on the job, some comrades frequently use Party discipline or administrative discipline as a substitute for legal discipline. It seems that when cadres commit crimes, one can use Party disciplinary sanctions or dismissal from administrative posts as a substitute for legal discipline. This is incorrect.

Qiu Xueyao, [*The Distinction Between Party Discipline, Administrative Discipline, and Legal Discipline*], *Guangming ribao*, Dec. 8, 1981, at 3.

⁴³ In one case, a group of cadres conspired to frame an innocent man; they beat him so severely that the victim hanged himself in despair. After an internal Party investigation, the public security officer responsible for the worst excesses was removed from his job and expelled from the Party, while the cadre who had "arrested" the man in the first place was removed from his job but allowed to remain in the Party on probation. State judicial organs appear to have been wholly uninvolved. See Lu Zhenqiu & Mou Chunlin, [*Report of an Investigation Into a Case of Utter Disregard for Human Life*], *MINZHU YU FAZHI*, No. 3, 1982, at 37.

More recently, the English-language *China Daily* reported in December 1984 that in the previous 13 months, 279 Party officials in Tianjin had been subjected to disciplinary measures, with 85 of them stripped of their Party membership, for "crimes ranging from corruption to embezzlement." *Party Officials Sacked for Crimes*, *China Daily* (Beijing), Dec. 7, 1984, at 3, col. 1. See generally Kou Mengliang & Bai Mu, [*Morality and Discipline Cannot Replace Law*], *FAXUE JIKAN* (JURISPRUDENCE QUARTERLY), No. 4, 1983, at 62, 62 (citing other examples).

⁴⁴ See J. COHEN, *supra* note 7, at 200.

⁴⁵ See [Decision of the State Council Relating to Problems of Rehabilitation Through Labor], 6 FGHB 243, 244 (July-Dec. 1957) [hereinafter cited as Decision on Rehabilitation Through Labor]. See generally J. COHEN, *supra* note 7, at 238-74 (discussing rehabilitation through labor in the 1950s and early 1960s).

punishments imposed under the Security Administration Punishment Act,⁴⁶ although punishments called administrative may be coercively imposed from time to time by bodies other than the police.

The substitution of disciplinary or administrative sanctions for legal sanctions is possible because the person with the power to impose disciplinary or administrative sanctions often also has the power to decide whether legal sanctions should be imposed. If a village official, for example, is powerful within the local Party organization, he can choose to impose a fine to “discipline” a peasant who assaults another. He might also instruct the police to incarcerate him for a few days as an “administrative” punishment under the Security Administration Punishment Act.⁴⁷ Finally, he might turn the miscreant over to the procuracy and the courts, with instructions that he be dealt with “according to law.”

The differentiation of disciplinary and administrative sanctions from legal sanctions highlights several important features of law. First, law tends to be viewed as formal rather than informal. This tendency is strengthened by the edifying role “legal” institutions and practices are supposed to play. Chinese legal theory justifies public trials, for example, in large part for their value in educating the public.⁴⁸ As long as this function of law remains important, the urge to identify law with formality will be strong. The much used phrases “punished according to law” (*yi fa chengban*) and “dealt with according to law” (*yi fa chuli*) should thus be understood as meaning not “punished according to proper procedures,” but “given a formal, legal punishment, and not just a disciplinary or administrative one.”

The above formulation also reflects the identification of legal punishments with heavy punishments.⁴⁹ This identification follows from the general conception of disciplinary and administrative punishments as appropriate for minor violations of social order. The two types of sanctions — disciplinary/administrative and legal — tend to form a continuum from lesser to greater severity, at the same time that they constitute two different and independent systems of punishment.

⁴⁶ [Security Administration Punishment Act of the People's Republic of China], 6 FGHB 245 (July–Dec. 1957). The Act is discussed in detail in J. COHEN, *supra* note 7, at 200–37. Both the Decision on Rehabilitation Through Labor and the Security Administration Punishment Act are still in effect. See F.B.I.S., Nov. 30, 1979, at L3, L4 (translating National People's Congress Standing Committee's Resolution on the Validity of Laws and Decrees Enacted Since the Founding of the People's Republic of China).

⁴⁷ [Security Administration Punishment Act of the People's Republic of China], 6 FGHB 245 (July–Dec. 1957).

⁴⁸ See, e.g., FAXUE CIDIAN 125 (Shanghai 1980).

⁴⁹ See, e.g., DENG XIAOPING, [*The Present Situation and Tasks*], in DENG XIAOPING XUANJI (SELECTED WORKS OF DENG XIAOPING) 217 (1983), quoted in [*Use the Weapon of Law Well To Strike Severe Blows at Criminal Activities!*], FAXUE ZAZHI (JURISPRUDENCE MAGAZINE), No. 4, Aug. 1983, at 2, 4 (“We must resolutely take legal measures against all types of criminals; we cannot be soft.”).

The existence of the two types of sanctions illustrates the limited nature of the concept of law in China. In the West, law is the sole legitimator of the state's exercise of coercive power over its citizens. Only one type of argument — "legal" argument — is permissible in deciding whether any level of coercion may be applied. In China, however, many acts that the law does not prohibit are nevertheless punishable by the state through disciplinary or administrative measures. Law does not so much define what acts are punishable as it prescribes what the sanctions will be when relatively severe punishment is deemed in order. Everything that is said about law, therefore, should be understood as concerning only one end of a spectrum of authoritative sanctions, because "legal sanctions" mean, for the most part, sanctions under the criminal law.⁵⁰ Because "legal" punishments occupy only part of this spectrum, it is possible to speak, as did one jurist, of "administrative measure[s] . . . directed at those who break the law and commit minor *crimes* . . . but [whose crimes] do not warrant criminal punishment."⁵¹ The substantive rules of law, therefore, do not define what is and what is not subject to sanctions. They specify what ought to happen after a decision has been made that *legal* sanctions are appropriate in a particular case.

The dichotomies so far noted — between law and discipline or administration, between formal and informal proceedings, between heavy and light punishments — are all implicit in a more comprehensive distinction drawn in Chinese legal theory and legislative texts: the distinction between the "serious" and the "minor." This distinction pervades the Criminal Law, which sets out very few absolute prohibitions but which frequently makes criminality and punishment depend on the "circumstances"⁵² of a particular act. Article 10 of the Criminal Law, for example, provides that where "the circumstances [of an

⁵⁰ This sense of the phrase "legal sanctions" is not new. In 1957, the State Council instructed that "persons undergoing rehabilitation through labor . . . who violate discipline should be subject to administrative measures; those who violate the law and commit crimes should be dealt with according to law." Decision on Rehabilitation Through Labor, *supra* note 45, at 244.

⁵¹ Qiu Shi, [A Tentative Discussion of the Distinction Between Reform-Through-Labor and Rehabilitation-Through-Labor Work], FAXUE JIKAN, No. 4, 1983, at 46, 46 (emphasis added). Because administrative sanctions are conceived as being light, they remain free from court interference and supervision, even though they can be much more severe than a mere fine. Deprivation of freedom for up to four years is possible under this rubric. See [Supplementary Regulations on Rehabilitation Through Labor Promulgated by the State Council], Renmin ribao, Nov. 30, 1979, at 1, translated in F.B.I.S., Nov. 30, 1979, at L3. A "mere" administrative violation, by definition not serious enough to warrant "criminal" punishment, can lead even to permanent exile for a person previously convicted of a crime. See Qiu Shi, *supra*, at 51.

⁵² "Circumstances" has a very broad meaning. In general, it refers to all the aspects of a specified act that are thought relevant but are not expressly provided for in the written law governing that act. More specifically, it could refer to the subjective blameworthiness of a particular actor or to purely external social and political effects of a crime.

Some writers have attempted to analyze the concept of "circumstances" jurisprudentially. See Fang Huicheng, [Do Not Punish Multiple Crimes As a Single Crime Committed Under

act which would otherwise be deemed a crime] are clearly minor and the harm is not great, the act shall not be deemed a crime.”⁵³ A large number of the acts listed as crimes in the Criminal Law are in fact punishable under that law only where “the circumstances are serious.”⁵⁴ This qualification does not, however, mean that where the circumstances are not serious, the act is not subject to sanctions. It can still be punished by administrative sanctions.⁵⁵ “Legal” sanctions are thus reserved for a special and relatively narrow class of offenses.

The distinctions analyzed above suggest that “law,” in the area of crime control, may be understood in at least two senses. The first is a broad, rhetorical sense: law, the public is repeatedly told, is that which the government is using to fight crime. The second is a more specific, practical sense: law is one framework within which to deal with wrongdoers; administration or discipline is another. The next Section analyzes how the choice of framework is made.

B. “Law” versus “Policy”

Chinese ideas of law do not govern the treatment of all behavior punishable under state authority. Neither does one turn to “law” in determining whether undesirable behavior is punishable under the rubric of law or that of administration or discipline. Although the government could in principle have used statutory law itself to make this determination, that function came to be served in the anti-crime campaign by “policy” explicitly labeled as such. It was policy that decreed that certain kinds of anti-social behavior were now “serious” enough to warrant legal sanctions. Thus, policy shaped the application of law.

“Serious Circumstances”), FAXUE (JURISPRUDENCE), No. 3, Mar. 1984, at 24; Wen Jing, [*My Humble Opinion on the Circumstances of a Crime*], FAXUE JIKAN, No. 1, 1984, at 44.

⁵³ Conversely, “serious” circumstances can be sufficient to transform an act from an administrative violation into a criminal violation. Prostitution as such is not prohibited by the Criminal Law, but one writer held that it was a crime of hooliganism (*liumang zui*) under article 160 if the circumstances were “serious.” As an example of such circumstances, the writer suggested prostitution committed with foreigners and Hong Kong and Macao Chinese, because the “political influence was very bad.” See Gong Wenqing, [*An Inquiry Into the Problem of Determining the Crime of Women Who Engage in Prostitution*], FAXUE, No. 1, Jan. 1984, at 28, 29.

⁵⁴ See, e.g., CRIMINAL LAW, *supra* note 22, arts. 116 (smuggling), 121 (tax evasion), 158 (disruption of social order), 182 (abuse of family members). Note that “seriousness” is a prerequisite to the application of the law itself, not merely a circumstance to be considered in sentencing. Where seriousness is merely a circumstance to be considered in sentencing, the Criminal Law states, in general form, “X shall be punished by not more than Y; when the circumstances are serious, the punishment shall be not less than Y and not more than Z.” See, e.g., *id.* arts. 133 (negligent homicide), 139 (rape), 150 (robbery).

⁵⁵ See, e.g., *id.* art. 192 (“Where state personnel commit a crime specified in this Chapter, if the circumstances are minor, the competent department may apply administrative sanctions in accordance with the circumstances.”).

"Policy" usually means the policies of the Party,⁵⁶ and it is distinguished from "law" defined as written statutes backed by state authority. Although statutory laws are enacted by the National People's Congress under the direction of the Party, they are more concrete, formal, and specific than Party policy pronouncements. Because they are subject to more formal requirements, statutes are also more difficult to adapt to changed circumstances than is Party policy. For reasons of institutional competence, the Party has less direct control over the interpretation of "law" than it does over the interpretation of "policy." Local Party secretaries are clearly the most authoritative interpreters of policy, but it is easier to dispute their interpretation of a written statute, in that another bureaucracy (the judicial bureaucracy) has been explicitly charged with the task of interpreting and applying statutes.

Until the onset of the anti-crime campaign, it had seemed fairly clear that law was to be considered separate from and superior to policy as a guide for legal adjudicators.⁵⁷ As late as June 1983, a report on a national conference on police work stressed the need to "understand correctly the relationship between carrying out the Party's policies and doing things according to law, to put the whole work of the public security departments upon the track of the law. [They must] do things strictly according to the Constitution and the law" ⁵⁸ But these niceties could not survive the imperatives of the fight against crime. The policy was clear: restore order in the nation's cities. Because this policy lay behind the criminal laws, insisting on adherence to their letter would contravene their spirit.⁵⁹

The apparent revival of policy as a guide for legal adjudicators may also be due to the continued structural weakness of legal institutions and the lack of personnel trained in the administration of law. There are simply not enough courts and judges to go around.⁶⁰ The

⁵⁶ "Policy" may also sometimes mean the policies of the government, but in a one-party system, the practical distinction between party and government is not always clear. The significance of the theoretical distinction made in China between the two is not important to the discussion here. What matters is the existence of a distinction between policy, no matter whose, and law.

⁵⁷ This Note uses term "legal adjudicator" instead of "judge" because of the uncertainty as to just who has, and ought to have, the power to make authoritative decisions about the outcome of criminal cases and civil disputes in China. See *supra* note 7 (discussing system of "deciding a case by the secretary").

⁵⁸ [*Reform Public Security Work; Implement Comprehensive Control*], FAXUE ZAZHI, No. 3, June 1983, at 2, 3.

⁵⁹ One writer criticized those who thought that when applying law, one could ignore politics and the needs of the "situation" (*xingshi*). This approach, he said, was "a fantasy of legal dogmatism"; it looked only at the letter of the law and failed to understand its spirit. See Sun Guohua, [*Use the Weapon of Law To Give Full Play to the Function of Dictatorship*], FAXUE ZAZHI, No. 6, Dec. 1983, at 10, 13, 14.

⁶⁰ A *People's Daily* article in early 1983, for example, noted that there was a need for more courts in rural areas, because the system of independent household production meant that many

real decisionmakers in many cases — Party officials — rely on their area of expertise and source of legitimate authority: the Party and its policies. In response to these realities, the Party seems to have abandoned to some extent its earlier ambition of promulgating a complete set of laws that would clearly delineate the bounds between the permissible and the impermissible. The urgent need for anti-crime measures, coupled with the prominent role played by the Party in the implementation of these measures, has led to the use of “policy” rather than “law” as a guide for determining when legal sanctions are to be applied.

C. “Dictatorship” versus “Democracy”

The dichotomy drawn in Chinese political theory between dictatorship and democracy is helpful in understanding the limited role played by law and legal institutions in China. The terms “dictatorship” and “democracy,” as used in China, express not so much the constitutional structure of a government as a particular *style* of governing. This understanding makes it possible to say, as did one contemporary commentator, that political-legal organs have two functions: “first, to exercise dictatorship toward enemies, and second, to exercise democracy toward the people.”⁶¹ Dictatorship over enemies implies the use of police, courts, and the “weapon of law” to combat serious offenses formally and to punish offenders with death, prison, or reform through labor. Democracy, on the other hand, implies informal, “administrative” punishments for less serious offenses —

disputes could no longer be resolved by commune and brigade cadres. See [*Hengshui Prefecture Makes It Easier for the People To Go to Court*], Renmin ribao, Feb. 7, 1983, at 3.

⁶¹ Song Tao, [*Striking at and Punishing Criminals Is an Important Measure of “Comprehensive Control”*], FAXUE ZAZHI, No. 5, Oct. 1983, at 10, 12; see also Zhao Changsheng, [*Is Law Only a Supplementary Method in Handling Contradictions Among the People?*], FAXUE JIKAN, No. 1, 1983, at 24, 24 (“Our basic method of handling contradictions among the people is the democratic method.”). The idea was expressed quite clearly by Mao Zedong in 1957:

two different methods, one dictatorial and the other democratic, should be used to resolve the two types of contradictions which differ in nature — those between ourselves and the enemy and those among the people. . . . [I]n order to settle problems within the ranks of the people ‘the method we employ is democratic, the method of persuasion, not of compulsion.’

MAO ZEDONG, *On the Correct Handling of Contradictions Among the People*, in 5 SELECTED WORKS OF MAO TSETUNG 391 (1977).

The definition of “people” and “enemy” has varied over time. See *id.* at 385. In 1957, Mao broadly defined “the people” as those who supported socialism and “enemies” as those who opposed it. See *id.* More specifically, “the people” usually refers to “the working class, the peasantry, the petty bourgeoisie, the national bourgeoisie, and certain patriotic democratic elements of the reactionary class who have repented their mistake.” See GLOSSARY, *supra* note 19, at 301. Domestic enemies over whom the government exercises dictatorship are usually defined as “landlords, rich peasants, counter-revolutionaries, bad elements and rightists.” See *id.* at 465–66.

punishments such as criticism, fines, brief detention at a police station, or rehabilitation through labor.⁶²

The existence and continued use of this distinction in Chinese political theory reinforces the distinction between law and discipline or administration and the tendency to categorize conflicts as suited for treatment within one paradigm or the other. The association of law with dictatorship inevitably colors the meaning of "law." The recurring theme of the "weapon of law"⁶³ in the articles accompanying the anti-crime campaign is closely tied to the notion of law as an instrument of dictatorship: subjects of dictatorship have no rights. Law is thus not regarded in China as a scale for balancing a need for social order against a need for personal security; it is more aptly symbolized by a sword.⁶⁴

D. The Meaning of Law in the Anti-Crime Campaign

The distinctions between law and policy and between law and discipline or administration are stated explicitly in Chinese legal literature. They suggest that the Chinese notion of "law" is much narrower than our own — "law" is only one rubric under which state authority may be brought to bear upon citizens. In Chinese thought, "law" may simply not apply when the "circumstances are minor." The grounds for determining whether the circumstances are minor, or whether criminal rather than disciplinary or administrative sanctions are appropriate, exist outside of "law," in the realm of "policy."

The role of "law" in the anti-crime campaign reflects this limited conception. Great stress was laid upon punishing criminals "according to law" not because the government wished to restrain police arbitrariness, but because it had been determined as a matter of "policy" that the problem of crime had become "serious." "Law," then, not administration or discipline, was the appropriate weapon, and it was used as a weapon, rather than as an abstract set of rules and procedures.

⁶² See, e.g., Cui Min, *supra* note 15, at 14 ("[T]he primary function of [law] . . . is to suppress enemies."); Song Tao, *supra* note 61, at 12 ("Political-legal organs . . . are organs of dictatorship. . . . If they deviated from striking blows and punishing, [they] would not be organs of dictatorship any more."); Sun Guohua, *supra* note 59, at 10 (strengthening the socialist legal system means using the weapon of law to exercise dictatorship over enemies). Although this vision of law as dictatorship is the majority view, it is not unanimously held. See, e.g., Yang Yize, [*A Principal Task of Socialist Law Should Be To Resolve Contradictions Among the People*], FAXUE JIKAN, No. 2, 1984, at 22, 22 (arguing that with the extinction of exploiting classes *qua* classes, law should now be considered an instrument of democracy); Zhao Changsheng, *supra* note 61, at 26 (criticizing emphasis on the dictatorial function as leading to disregard for law by those unambiguously part of "the people").

⁶³ See, e.g., sources cited *supra* note 61.

⁶⁴ See, e.g., Jing Wencan & Shi Taiyou, *supra* note 35 (article title likening judicial organs to a knife).

It is thus possible to reconcile the increased emphasis on "law" with the acknowledgement that the call for heavier punishments came from the Party, a nonlegislative body. While downgrading the importance of "legal" standards as opposed to policy pronouncements, the Party by those very pronouncements promoted the use of law as a system for meting out heavy punishments. Instead of responding to the perceived crisis in the social order by toughening the formal rules, the Party directed that those rules should be applicable to a broader range of behavior than before. Punishable acts that had formerly not been deemed serious were now so deemed. Thus, an act formerly punishable administratively now became punishable criminally, and an act that would formerly have drawn a relatively light penalty under the criminal law now drew a heavy one.

From the notion of law as a weapon it can be seen fairly clearly that law, in the context of crimefighting, is not to be conceived as a set of neutral rules or a source of rights. Certainly, the current leadership is concerned about the abuses of the past, when many innocent people were imprisoned or otherwise subjected to state-sanctioned abuse. But this concern itself relates to the notion of law as a weapon. Because "law" is now something to be used to punish severely enemies of the social order, it is helpful for it to function surgically so that the right people may be singled out.

The conception of criminal law that pervades the literature is that these legal rules should be followed because they are helpful. They are directives telling government officials what they *ought* to be doing, not what they *must* do.⁶⁵ "Laws" provide guidelines to officials within the legal bureaucracy when heavy punishments are deemed appropriate.

IV. IMPLICATIONS OF CHINESE CRIMINAL LAW FOR OTHER DEVELOPING LEGAL FIELDS

The content the Chinese give to the idea of "law" will depend on what people experience as "law" during such heavily publicized campaigns as the recent drive against crime. This campaign might have been carried out under the rubric of another set of ideas, such as politics and class struggle, but it was not. The most repeated phrase in the campaign literature was "according to law" — "arrested ac-

⁶⁵ Four months after the promulgation of the Criminal Law and the Law of Criminal Procedure, the president of the Supreme People's Court saw nothing odd in suggesting that the people's courts "gradually implement" those laws. See Jiang Hua, [*Earnestly Perform People's Court Work Well*], Renmin ribao, Apr. 9, 1980, at 3. The other side of the coin is described, with apparent approval, in *China's Socialist Legal System*, *supra* note 8, at 26 (stating that the draft penal law, while never "examined and adopted by the state legislative body[,] . . . was referred to by courts in deciding cases and meting out punishment" since 1963).

ording to law," "sentenced according to law," "punished according to law," "executed according to law." The significance of promoting "law" as the governing standard extends beyond the realm of crime control;⁶⁶ the concept of "law," powerfully shaped in the practice of fighting crime, is now to prevail in other areas of social life as well.⁶⁷

The ideas of law that have been developed in the course of past anti-crime campaigns have not so far been the governing ideas in these other areas. In the past, for example, relations between economic enterprises were not typically governed by a set of ideas that anyone called "legal." People looked instead to ideas about economics (what does the Plan call for?) or perhaps politics (is one party to the dispute a privately-owned enterprise, the other state-owned?).⁶⁸ Now, however, legal ideas are to govern economic relations.⁶⁹ These ideas cannot spring from nowhere. The concepts that have evolved in the "legal" battle against crime are therefore likely to be reproduced in the practice of regulating the new fields that are to come under "law."

This prediction does not suggest that economic relations will necessarily be regulated by imposing prison sentences on those who breach contracts or that public security organs will be important in settling peasant disputes over land. Instead, it is likely that the concepts that are relevant in criminal cases will also be seen as relevant in other areas of social life regulated by the set of ideas and institutions called legal. For example, suppose two enterprises agree to exchange goods for money in a regime in which economic relations are to be governed by law. What will happen if one party is dissatisfied with the performance of the other? The analysis undertaken above suggests that first it will be necessary to decide whether the "law" governing contracts should apply at all or whether the dispute should be settled by informal, "administrative" means. This decision will depend on policy. Policy may be the guide for determining whether the "circumstances" of the faulty performance are "serious." Moreover, the judgment as to whether the circumstances are serious will take into account not only the situation of the parties, but also the social effect of the faulty performance.⁷⁰ Finally, the defending enterprise may be expected to present itself as properly subject to a

⁶⁶ See *supra* pp. 1893-94.

⁶⁷ See *supra* note 8; pp. 1894-95 & note 19.

⁶⁸ One can see this way of looking at issues in an account of a contract dispute that took place in the early 1950s between the People's Livelihood Navigation Company, a state-private joint enterprise, and the Kiangnan (Jiangnan) Shipyards, a state-owned enterprise based in Shanghai. The Shipyard failed to deliver a boat as it had promised but was not required to pay compensation because, among other things, "it would not look right for [a state-owned enterprise] to pay compensation to [a state-private joint enterprise]." See Interview Describing 1950s Contract Case (on file at Harvard Law School Library).

⁶⁹ See *supra* note 8; pp. 1894-95 & note 19.

⁷⁰ This way of thinking existed even before the most recent anti-crime campaign. In a 1982

“democratic” standard of adjudication rather than a “dictatorial” one.⁷¹ Minor breachers might under this standard write a self-criticism — a mild nonlegal sanction — instead of paying damages.

V. CONCLUSION

This Note has argued that it is possible to make sense of Chinese law by taking language seriously — that is, by examining legal discourse for what it reveals about the meanings the Chinese attach to various legal concepts. Such an approach can identify the categories into which facts must be fitted and clarify the relationships between those categories. But these categories and the institutions that use them do not exist in only an abstract sense. A concrete social event like the anti-crime campaign invests these categories with meaning and shapes the institutions it presses into service.

Chinese law has so far seen little practical development outside the criminal field. But if economic decentralization continues, giving more autonomy to state enterprises and greater economic power to private entrepreneurs, more disputes involving greater sums of money will arise that cannot be resolved by intragovernmental directives. As the rhetoric of law becomes dominant, Chinese courts and commentators may handle commercial disputes according to the pattern visible in the recent anti-crime campaign. That is, no all-embracing framework of “law” will apply, but rather one or more of the frameworks of “law,” “administration,” and “discipline.” By being alert to the existence of multiple modes of adjudication, we may be able to understand better the substantive resolution of particular disputes.

discussion of liability for substandard products, one writer stated that lowering quality standards and raising the prices of goods,

generally speaking, when relatively minor and unintentional, are [acts] within the scope of the unethical and the irresponsible, and should receive the criticism of the masses and the reprimand of public opinion. *When they are relatively serious*, [these acts] are a violation of law and dereliction of duty within the scope of administrative regulations, and should receive the disciplinary punishment of the state. *When they are serious*, then they constitute a crime under the criminal law, and criminal liability should attach.

Yang Xueqi, [*As Commercial Enterprises Implement the Economic Responsibility System, It Is Necessary To Strengthen the Building of Economic Laws*], CAIJING WENTI YANJIU (STUDIES IN PROBLEMS OF ECONOMICS AND FINANCE), No. 1, 1982, at 33, 37 (emphasis added).

⁷¹ See *supra* pp. 1904–05.