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Mental Illness in China: A Stakeholder Perspective Analysis

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Forensic Psychiatric Assessment for Capital Crime Offenders with Mental Illness in China: A Stakeholder Perspective Analysis

Lilou Jiang*

Abstract

This paper investigates the accessibility and reliability of forensic psychiatric assessment for capital crime offenders who raise the defense of insanity in the Chinese criminal justice system. At present, only the judicial authority agencies can order a psychiatric assessment in criminal cases, whereas suspects/defendants' requests for mental evaluation are subject to the approval of the former, who, in practice, tend to accept requests from suspects bearing misdemeanor charges, but are inclined to deny an assessment when dealing with felony offenses.

This paper begins with an introduction to the legislation related to psychiatric assessment in China, and is followed by an investigation of the factors militating against China's judicial authority ordering a psychiatric assessment for capital crime offenders raising the defense of insanity. It then examines the public stigma in Chinese society and the traditional philosophical thoughts behind the historical legal treatment of mentally ill offenders. It concludes that the historical punitive attitude toward mental illness will continue influencing stakeholders' choices in the context of psychiatric assessment as long as China's judicial system emphasizes the superiority of social stability over individual human rights. Some practicable reforms are proposed at the end.

Keywords: Mental illness, Psychiatric assessment, the Death penalty, China

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I . Introduction

Li Haiwei (李海伟), a 29-year-old farmer in an impoverished village in northeast China, was sentenced to life imprisonment in November 2015.¹ Li was arrested in 2014 for assaulting a man whom he suspected was having an affair with his ex-wife.² During the investigation, his father filed an application to the local police for a psychiatric assessment for him. There was a family history of mental illness on Li's mother's side, and Li had become paranoid and aggressive since 2009 (prone to meaningless ramblings, unprovoked assault of his father and ex-wife). These behaviors led to his divorce.³ The entire village was aware of Li and his mother's conditions; over twenty villagers signed as witnesses to support Li's father's application.⁴ Li's father was informed by the local police that approximately \$400 was needed for ordering a psychiatric assessment, which he could not afford. Li was then deemed sane and held in a detention center awaiting trial.⁵ There he participated in a jailbreak.

On an early morning of September 2014, Li followed two other inmates, escaping from the detention center after subduing a guard, who later died of suffocation.⁶ He was swiftly captured due to running directly towards his home. When asked why he had chosen the most predictable route, he explained that he had missed his son so much that he just wanted to go back home to see him.⁷ Once again, Li's father requested for a psychiatric assessment for his son.⁸ Both the police and

¹ Huiying Zhou, "Two Inmates Sentenced to Death for Escape, Killing Guard", *China Daily* (13 November 2015) online: <http://www.chinadaily.com.cn/china/2015-11/13/content_22449492.htm>.

² Ming Zeng, "延寿县越狱案的三张面孔" "A Sketch of The Three Fugitives in The Jailbreak in Yanshou County", *Beijing News* (8 September 2014) online: <http://epaper.bjnews.com.cn/html/2014-09/08/content_534015.htm?div=-1>.

³ *Ibid.*

⁴ "高玉伦逃跑中曾给儿和侄打电话" "Gao Yulun Called His Son and Nephew While He Was on the Run", *LiaoShen Evening News* (6 September 2014) online: <http://news.lnd.com.cn/hm/2014-09/06/content_4101869_2.htm>. This is worth thinking because, in China, most people keep a distance with any judicial disputes and are very reluctant to stand out to be witnesses.

⁵ M Zeng, "A Sketch of The Three Fugitives," *supra* note 2.

⁶ "3 Chinese Inmates Kill Guard, Break Out of Jail", *China Daily* (2 September 2014) online: <http://www.chinadaily.com.cn/china/2014-09/02/content_18530660.htm>.

⁷ M Zeng, "A Sketch of The Three Fugitives," *supra* note 2.

⁸ Knowing Li was re-arrested, his father said to the reporter that his son probably could not avoid an

the procuratorate rejected his request; this time stating that a mentally ill person would not have the capacity to break out of jail.⁹

Li was charged with breaking out of jail using violence and intentional homicide, and faced the death penalty.¹⁰ He went on trial on the 28th of April 2015.¹¹ In court, Li insisted that he did not plan to break out of the jail or kill the guard, but only wanted to go home to see his son, which was confirmed by the other two jail breakers.¹² According to the other offenders, they allowed Li to participate because they needed an extra person to subdue the guard and they knew Li would accept because he did not think clearly.¹³ They both described Li as a “psychotic” (精神病) who clamored to see his son all the time in the detention centre.¹⁴ They did not disclose their original plan to Li, instead they told him to be prepared to leave the centre and go home.¹⁵ Li also mentioned that the police officers at the detention centre had forced him to take some psychotropic medicine every day.¹⁶ The judges, however, stated that was not relevant to this case.¹⁷ Legal experts stated on various occasions that it is very likely that he would be sentenced to death.¹⁸ Fortunately, Li

execution. He regretted that he had not borrowed money to pay for an assessment the first time when Li was arrested. See “哈尔滨越狱犯纪实” “Documenting The Three Jailbreakers in Harbin”, *China Review* (10 October 2014) online:

<<http://hk.cmtt.com/crn-webapp/mag/docDetail.jsp?coluid=29&docid=103419729>>.

⁹ *Ibid.*

¹⁰ “哈尔滨延寿县杀警越狱案开审 公诉人宣读起诉书” “Harbin Yanshou County Guard killing and Jailbreak Case on Trial: The Public Prosecutors Read the Indictment”, *Harbin Intermediate Court* (28 April 2015) online: <<http://news.qq.com/a/20150428/022381.htm>>. Both breaking out of jail using violence and intentional homicide are capital crimes according to Arts 232 and 317 of Chinese criminal law.

¹¹ Huiying Zhou, “Jailbreak Trio on Trial for Killing Guard in NE China”, *China Daily* (28 April 2015) online: <http://www.chinadaily.com.cn/china/2015-04/28/content_20567980.htm>.

¹² *Ibid.*

¹³ Yi Guo & Chong Zhang, “哈尔滨越狱案细节” “Details of the Jailbreak Case in Haerbin”, *Legal Daily* (29 April 2015) online: <<http://news.sina.com.cn/c/2015-04-29/110531775701.shtml>>; “哈尔滨9.2杀警越狱案公开审理” “Haerbin 9.2 Jailbreak Trio on Trial for Killing Guard”, *Middle-aged Times* (6 May 2015) online: <http://epaper.jwb.com.cn/lnsb/html/2015-05/06/content_1248232.htm>.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ “黑龙江杀警越狱案细节” “Details of the Guard killing and Jailbreak Case in Heilongjiang”, *Beijing Morning Post* (28 April 2015) online:

<<http://www.chinanews.com/fz/2015/04-29/7241324.shtml>>.

¹⁷ *Ibid.*

¹⁸ See e.g., Shuang Mei & Hong Wang, “暴动越狱三逃犯或难逃死刑”, “Jailbreak Trio Can hardly Avoid the Death Penalty”, *Legal Evening News* (4 September 2014) online:

<<http://www.fawan.com/Article/fzfk/2014/09/04/112314258747.html>>; Qian Zhang, “专家谈哈尔滨

passed the death penalty eventually as he was deemed accomplice. However, his mental state was not considered by the judges when making their final decision.

Li's story raises significant questions regarding the legal treatment of criminal offenders with mental illness in China, specifically, the role and accessibility of psychiatric assessment (精神鉴定) in the Chinese criminal justice system.¹⁹ In China, certain populations are excluded from the application of the death penalty because of their peculiar physical and/or mental conditions.²⁰ Amongst them, mentally ill offenders are extremely vulnerable in that they generally do not have the knowledge, the capabilities or even the will to assert their rights,²¹ whereas the judicial activities of defense lawyers can be highly restricted in practice.²² In a capital punishment retentionist country, psychiatric assessment can be used as an effective tool to protect this specific group from the death penalty. Presently in China, only judicial authority agencies (司法机关) can initiate a forensic psychiatric assessment in criminal cases whereas suspects/defendants' requests for a mental evaluation is subject to the former's approval. Deficiencies and gaps exist in law for a transparent psychiatric assessment process and reliable cross-examination of psychiatrist experts.²³ Guidance on how to implement involuntary medical treatment for offenders who are deemed not criminally

越狱案:未决犯没有与外界见面通话权利” “Experts Commenting on Haerbin Jailbreak Case: Unsensitized Criminals Have No Right to Meet or Speak with People Outside”, *Beijing Youth Daily* (24 May 2015) online: <<http://society.workercn.cn/12/201505/24/150524093649101.shtml>>.

¹⁹ Psychiatric assessment in this paper is limited to a process to determine whether a criminal offender has a mental disability to exempt or diminish his/her criminal responsibility. "Mental evaluation", "psychiatric evaluation", or "mental (health) examination" is also used to refer to the same practice.

²⁰ These populations include persons who were not yet been 18 years old or were 75 or over 75 years older while committing the crime, women who were pregnant at the time of trial, deaf-mute or blind wrongdoers, and offenders suffering from mental illness at the time of the offense. See 2011 年中华人民共和国刑法第 17,18,19 和 49 条 Criminal Law of the People's Republic of China, 2011, arts 17, 18, 19, 49 [Criminal Law].

²¹ For example, they are more likely to make false confessions under psychological pressures during police interrogation; the mental issues of some offenders might not be very obvious. See Liliana Lyra Jubilut, "Death Penalty and Mental Illness: The Challenge of Reconciling Human Rights, Criminal Law, and Psychiatric Standards" (2007) 6 Seattle J. for SOC. Just. 353 at 353.

²² Jerome A. Cohen, "Struggling for Justice: China's Courts and the Challenge of Reform", *World Politics Review* (14 January 2014) online: <<http://www.worldpoliticsreview.com/articles/13495/struggling-for-justice-chinas-courts-and-the-challenge-of-reform>>.

²³ The first Chinese mental health law was enforced in 2012, however, it does not provide any criminal procedure-related measures that decrease wrongful convictions of offenders with mental illness.

responsible is still non-existent.

This paper intends to identify and map the web of primary stakeholders involved in decision making and operations in the forensic psychiatric assessment regime in China, indicate how conflicts arise amongst the actors when dealing with capital crime offenders who might have mental illness, compare their responses and explain the background considerations leading to their choices. Scholars who are concerned with the death penalty and/or human rights protection status of people with mental health problems in China may find a basic understanding of a facet of the legal treatment of mentally ill offenders and of the role of culture in the decision making process.

This paper will begin with an introduction to the legislations related to psychiatric assessment in China, and will be followed by an investigation of the factors militating against China's judicial authority ordering a psychiatric assessment for capital crime offenders raising the defense of insanity. It will then examine the public stigma in Chinese society and the traditional philosophical thoughts behind the historical legal treatment of mentally ill offenders. To conclude, some practicable recommendations will be presented.

II. Legislation Regarding Forensic Psychiatric Assessment in China

It was stated in China's first modern criminal law enforced in 1935 that "an act committed by a person who is insane is not punishable".²⁴ But no specific provisions could be found in contemporary criminal procedure law regarding how to determine whether an offender was, in fact, insane. In practice, when necessary, judges or public prosecutors would designate one or more expert witnesses to provide their opinions on offenders' mental state.²⁵ Unfortunately, after years of continuous warfare, no more than 60 qualified psychiatrists were available in China by 1949 serving a population of over 500 million.²⁶

²⁴ 1935 年中华民国刑法第 19 条 Criminal Code of the Republic of China, 1935, art 19.

²⁵ 1935 年中华民国刑事诉讼法第 185 条 The Code of Criminal Procedure of the Republic of China, 1935, art 185.

²⁶ Robin Munro, "Judicial Psychiatry in China and Its Political Abuses" (2000) 14 Colum. J. Asian L. 1 at 18. General physicians were greatly insufficient too at that time, about 670 working for every one million inhabitants.

The Communist Party took over power at the end of 1949 (“new China”) and repealed the previous legislation system entirely. No criminal law existed from then until the end of the Proletarian Cultural Revolution in 1979, because the whole country was jammed into social and political turmoil for decades.²⁷ Psychiatry barely obtained any support from the authorities; mentally ill people were deemed “political lunatics” and were imprisoned or even executed.²⁸

The first criminal law of the new Chinese regime was enacted in 1979 and established a principle that mental illness (精神(疾)病) can be used as a defense to exempt criminal offenders from punishment.²⁹ A person is not deemed responsible for his/her misconduct if at the time of such offense, s/he is not able to recognize or control his/her conduct as a result of mental disease.³⁰ The amendment of the criminal law in 1996 further stressed that mentally ill offenders are free of criminal responsibility fully or in part depending on the offenders’ mental conditions while committing the offense, and added that the offenders’ mental status should be assessed (鉴定) for exemption or mitigation.³¹ This principle has been kept in the subsequent amendments.

However, one cannot find a specific definition for “mental illness” in Chinese criminal law or in any other related regulations.³² A widely accepted theory in

²⁷ There were scattered bylaws and regulations with an emphasis on national and public security-related matters. Bingzhi Zhao, “Evolution of Chinese Criminal Law in the Last Hundred Years: For the Centennial of Xinhai Revolution” (2012) 30 *Tribune of Political Science and Law* 117 at 122.

²⁸ R Munro, “Judicial Psychiatry in China,” *supra* note 27 at 19, 33.

²⁹ The Chinese Criminal Law enacted in 1979 is recognized to be the first modern criminal law of China.

³⁰ 1980 年中华人民共和国刑法第 15 条 Criminal Law, 1980, art 15.

³¹ “A mentally ill person who causes dangerous consequences at a time when he is unable to recognize or unable to control his own conduct is not to bear criminal responsibility after being established through accreditation of legal procedures. ... A mentally ill person who commits a crime at a time when he has not yet completely lost his ability to recognize or control his own conduct shall bear criminal responsibility but he may be given a lesser or a mitigated punishment.” See 1997 年中华人民共和国刑法第 18 条 Criminal Law, 1997, art 18. And it was the first time that psychiatric assessment was introduced in the Chinese criminal procedure law.

³² The concept “mental disorder” (精神障碍) was adopted when the Chinese Mental Health Law was enacted in 2012. Mental disorder refers to “disturbances or abnormalities of perception, emotion, thinking or other mental processes that lead to significant psychological distress or to significant impairments in social adaptation or in other types of functioning”. See 中华人民共和国精神卫生法第 83 条 Mental Health Law of the People's Republic of China, 2013, art 83 [Mental Health Law]. Although the Chinese criminal law and criminal procedure law were amended around the same time,

Chinese criminology is that mental illness falls into three categories, namely, offenders who have been professionally diagnosed with psychosis, those who suffer from moderate or severe intellectual deficiency, or those who show psychotic equivalents.³³ Non-psychotic disorders were suggested to be added to the mental illness stipulation in the revision of the criminal law, but the commonly accepted theory prevailed.³⁴ Therefore, mental illness is narrowly defined in practice, and mentally ill offenders are usually referred to as being psychotic or retarded individuals in China, which matches traditional Chinese beliefs concerning mental illness as discussed below.

Forensic psychiatry started obtaining official attention in 1984-1985.³⁵ A set of provisional regulations for psychiatric evaluation (精神鉴定) was further enacted in 1989 to provide general guidelines on setting up psychiatric evaluation committees, qualification requirements for assessors, and what should be included in a psychiatric assessment report.³⁶ Corresponding to the addition of assessment of offenders' mental state to the Chinese criminal law in 1996, the term "mental (illness) evaluation" (精神病鉴定) appeared for the first time in Chinese criminal procedure law in the same year. Mental evaluation was acknowledged to be a time-consuming process, requiring the gathering information and data and making a diagnosis, therefore the criminal procedure law stipulates that the time needed for conducting an appraisal should not be counted in the time for handling the case.³⁷

Nonetheless, there were no specific provisions describing standard procedures of a psychiatric evaluation. It is classified as "forensic identification and evaluation" and subject to the general official-dominated model procedures in

the term "mental illness" (精神(疾)病) has been kept in their new versions. In practice, the "mental disorder" has become commonly used and the two terms are interchangeable.

³³ Zeqing Hu, "精神病人的刑事责任能力(续)" "Criminal Responsibility of Psychotic Offenders (Cont.);" (1998) 4 J of Law & Medicine 181 at 181.

³⁴ *Ibid*, 182.

³⁵ Veronica Pearson, "Law, Rights, and Psychiatry in the People's Republic of China" (1992) 15 Int'l J.L.& Psychiatry 409 at 410.

³⁶ 精神疾病司法鉴定暂行规定 Provisional Regulations on the Psychiatric Evaluation of Mental Illness, 1989.

³⁷ 1997年中华人民共和国刑法第122条 Criminal Law, 1997, art 122.

Provisions on the Procedures for Judicial Authentication (司法鉴定程序通则) promulgated by the Ministry of Justice in 2007.³⁸ Presently in China, only judicial authority agencies (司法机关) can initiate a forensic psychiatric assessment in the criminal legal process.³⁹ These agencies primarily include public security organs (公安机关) also known colloquially as the police (警察), the people's procuratorates (人民检察院), and the people's courts (人民法院).⁴⁰

On the other hand, offenders cannot initiate a psychiatric evaluation by themselves. Although they can request the judicial authority agency in charge at various stages in the legal process for an assessment, it is up to the authority agency's approval. If an assessment is ordered upon the offenders' request, the expenses shall be borne by the offenders.⁴¹ If their request is rejected, there is no channel for them to appeal the official refusal. If an assessment is conducted but the offenders are not satisfied with the assessment result, they can, only during a court session, request to supplement new evidence or apply for a re-assessment, which still has to be approved by the judges and the judges' decision is final.⁴²

All forensic psychiatric assessments are required to be entrusted to an assessment agency, not to individual psychiatrists. The 1997 version of the criminal procedure law narrowed the scope of the agencies to hospitals designated by a provincial government,⁴³ but this limit was removed in the new procedure law in 2013. Internal forensic units of the public security organs or the procuratorates are eligible for conducting appraisals and they have their own ministerial guidelines to

³⁸ Zhiyuan Guo, "Who Should Be Entitled to Initiate a Mental Examination Process? An Empirical Perspective" in Mike McConville & Eva Pils, eds, *Comparative Perspectives on Criminal Justice in China* (Cheltenham, U.K.: Edward Elgar, 2013) 279 at 287. Provisions on the Procedures for Judicial Authentication (司法鉴定程序通则) is the primary legal source governing judicial authentications, but it has no practice guidelines for psychiatric evaluations.

³⁹ 精神疾病司法鉴定暂行规定第 17 条 Provisional Regulations on the Psychiatric Evaluation of Mental Illness, 1989, art 17.

⁴⁰ The entitlement of the police and the court to initiate a psychiatric evaluation is prescribed in Articles 144 and 191 of the Criminal Procedure Law, and the entitlement of the procuratorates is confirmed in Article 173 of the People's Procuratorate Criminal Procedure Regulation (Trial Version) (人民检察院刑事诉讼规则(试行)).

⁴¹ 人民检察院刑事诉讼规则(试行)第 367 条 The People's Procuratorate Criminal Procedure Regulation (Trial Version), 2013, art. 367.

⁴² 中华人民共和国刑事诉讼法第 192 条 Criminal Procedure Law, 2013, art 192.

⁴³ 1997 年中华人民共和国刑事诉讼法第 120 条 Criminal Procedure Law, 1997, art 120.

follow.⁴⁴ External experts are encouraged to become involved to improve the impartiality and transparency of psychiatric assessment. An attending doctor who has more than five years of psychiatry clinical experience or a forensic physician who has forensic psychiatry knowledge, expertise and work experience is deemed to have the statutory qualification to be considered a forensic psychiatric assessor.⁴⁵

Once a psychiatric assessment is ordered, the agency entrusted generally assigns two assessors for the case.⁴⁶ The conclusions of an assessment should be provided in writing and signed by the assessors. The two assessors make one joint assessment report; if they disagree, they should put a note on the report and a consultation shall be held.⁴⁷ An assessment report is required to present the assessors' diagnosis of the offender's mental illness, identify the offender's possible psychiatric conditions when committing the offense, explain the connection of the mental illness with his/her misdeeds, and determine the level of the offender's criminal responsibility.⁴⁸ Since 2013, a noteworthy revision to the criminal procedure law was adopted; assessment conclusions are no longer deemed to be a verdict (结论), rather, the more neutral term "opinions" (意见) is used.⁴⁹

When an offender is found not to bear criminal liability on account of his/her mental illness, s/he is turned over to his/her family or guardian (relatives or friends) for supervision and control, and the latter are supposed to make appropriate medical treatment arrangement for the offender.⁵⁰ When there is no family or guardian, the offender's work unit, the neighborhood or village committee in the place of the offender's residence, or the local civil affairs department shall act as the offender's

⁴⁴ 公安部刑事技术鉴定规则 Public Security Ministry's Regulations on Technical Authentication for Criminal Cases, 1980; 人民检察院鉴定规则(试行) Rules for Forensic Evaluations of the People's Procuratorate (Trial Version), 2007.

⁴⁵ 精神疾病司法鉴定暂行规定第 1989 条 Provisional Regulations on the Psychiatric Evaluation of Mental Illness, 1989, art 13.

⁴⁶ 司法鉴定程序通则第 19 条 General Rules on the Procedures for Judicial Authentication, 2007, art 19.

⁴⁷ 司法鉴定程序通则第 19, 35 条 General Rules on the Procedures for Judicial Authentication, 2007, arts. 19, 35.

⁴⁸ 精神疾病司法鉴定暂行规定第 5 条 Provisional Regulations on the Psychiatric Evaluation of Mental Illness, 1989, art 5.

⁴⁹ 中华人民共和国刑事诉讼法第 145 条 Criminal Procedure Law, 2013, art 145.

⁵⁰ 2011 年中华人民共和国刑法第 18 条 Criminal Law, 2011, art 18.

guardian.⁵¹ If the offender is found to have severely harmed people in violence and is believed to continue to pose a potential threat to the public, the court may order or approve the request of the police or the procuratorates for compulsory hospitalization.⁵² However, there are no detailed guidelines on how to proceed with the mandatory treatment, and in which situations the patients can be released.

Studies show that most suspects' requests for mental evaluation have been approved by the police and the procuratorates during the investigation and prosecution process.⁵³ Although suspects are not entitled to initiate a mental assessment in law, raising a request is executing their defense rights,⁵⁴ which in practice are being acknowledged and respected.⁵⁵ What deserves attention is that the police and the procuratorates tend to accept requests from suspects bearing misdemeanor charges, but are inclined to deny a psychiatric assessment when dealing with felony offenses.⁵⁶ If no mental evaluation was conducted during investigation and prosecution, the chances that a psychiatric assessment is ordered in the first trial would be very low, as exemplified in Li's story above.⁵⁷ This pattern has been observed in some controversial serious criminal cases in recent years, in which, regardless of some psychiatrists' questioning about the mental status of the offenders, the offenders were executed because of the seriousness of their crimes, as discussed below.

III. Stakeholders' Role and Participation in Mental Evaluation Process

Part of the forensic psychiatric assessment regime in China can be further glimpsed through the following case stories.

Case 1: Zheng Minsheng (郑民生), a 42 year old laid-off community doctor,

⁵¹ 1987年中华人民共和国民法通则第17条 General Principles of the Civil Law of the People's Republic of China, 1987, art 17 [Civil Law].

⁵² 中华人民共和国刑事诉讼法第284, 285条 Criminal Procedure Law, 2013, arts 284 - 285; 公安机关办理刑事案件程序规定 Procedure Regulations on the Handling of Criminal Cases by Public Security Organs, 2013, arts. 331- 332. (China); 人民检察院刑事诉讼规则(试行)第539条 The People's Procuratorate Criminal Procedure Regulation (trial version), 2013, art. 539.

⁵³ See, e.g. Weidong Chen & Lei Cheng, “司法精神病鉴定基本问题研究” “Forensic Examination on Mental Disorder in Criminal Process” (2012) 1 Chinese J of Law 163 at 166.

⁵⁴ 中华人民共和国刑事诉讼法第14条 Criminal Procedure Law, 2013, art 14.

⁵⁵ W Chen, “Forensic Examination,” *supra* note 54 at 166.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

was sentenced and executed in 37 days after he stabbed eight elementary school students to death and injured five other students on 23 March 2010 in Nanping, a city of the Fujian province in northwestern China. Without performing any psychiatric examinations, the local police announced that Zheng had no mental issues in a press briefing three days after the massacre. Although his family believed that he might be suffering from paranoid schizophrenia because he kept telling them that his past colleagues were framing him for a murder, neither they, nor Zheng's defense lawyer requested for an evaluation of his psychiatric conditions. His relatives told the media: "Even if he is insane, he has to be executed. He killed eight kids. Heaven forbids!"⁵⁸

Case 2: On 16 July 2006, Qiu Xinghua (邱兴华), a villager of the Shaanxi province in northwest China, murdered ten innocent people in a Taoist temple near his home including the abbot of the temple, because he suspected that the abbot had had an affair with his wife. After the brutal killing, he fried the abbot's internal organs and fed them to dogs. During his escape, he killed one person and injured two others badly for robbery. He was captured 35 days after the temple slaughter, when he sneaked back home.⁵⁹ Quite a few psychiatrists and legal scholars called for an assessment for Qiu, noticing his disturbing behavior. Upon the suggestion of a psychiatrist, Qiu's wife filed a request for a mental evaluation, claiming Qiu's family had a history of psychiatric illness.⁶⁰ Both the first and second instance courts, however, turned down the request, stating that Qiu was considered to have full criminal responsibility. He had done very careful preparations before the murder, set fires to destroy evidence of his crime, and was able to escape from the police

⁵⁸ Huiqun Cai, "南平杀童案: 死刑后, 大家都解脱了" "Nanping School Children Killing: Everybody Was Relieved After the Execution", *Southern Weekly* (1 May 2010) online: <<http://www.infzm.com/content/44473>>.

⁵⁹ Shaanxi Province Ankang Intermediate People's Court, Ankang, 19 October 2006, Shaanxi Province Ankang People's Procuratorate v Qiu Xinghua (2006) (China); Tao Zhang, "邱兴华案二审维持死刑原判并立即执行" "Qiu Xinghua's Death Sentence was Hold in Second Trial and He Was Executed Immediately", *Westnet* (28 December 2006) online: <<http://news.sina.com.cn/c/1/2006-12-28/091811905087.shtml>>.

⁶⁰ Yu Xiao & Lin Zhang, "法学教授称应为邱兴华做司法精神病鉴定" "Law Professors Call For a Forensic Psychiatric Assessment for Qiu Xinghua", *Chongqing Morning Post* (24 December 2006) online: <<http://news.sina.com.cn/c/1/2006-12-24/030011870129.shtml>>; Huiqun Cai, "我不是为邱兴华一人奔走" "I am not Appealing for Qiu Xinghua Solely", *Southern Weekly* (30 November 2006) online: <<http://www.southcn.com/weekend/top/200611300010.htm>>.

chase.⁶¹ Qiu was executed on 28 December 2006, immediately after the second sentence was announced in court.⁶²

Case 3: Liu Baohe (刘宝和) was called a "lucky madman" by the media, because he was the first defendant, in decades, declared by the Guangdong Province Chaozhou Intermediate People's Court not criminally responsible on the grounds of mental illness. Liu was charged for murder in February 2010 after killing a neighbor and her daughter. The presiding judge of the first trial noticed Liu's abnormal behavior and inconsistent confessions, ordered a psychiatric assessment for him, and later on he was considered insane and exempted from criminal punishment⁶³ When his family were informed that Liu would be acquitted, however, they refused to take him back claiming that they were not able to provide him any care or strict supervision at home, nor could they afford the expenses for any medical treatment he needed. Instead, they suggested that the court sentence him to death and execute him to show their apology to the whole village.⁶⁴

Case 4: On 1 July 2008, a 28 years old man Yang Jia (杨佳) entered a local police station in Shanghai, killed six police officers and injured five other staff. His lawyer provided some evidence showing that both Yang and his mother had a mental illness history. Shanghai police entrusted a forensic science institute to conduct a psychiatric assessment for Yang. After a meeting with him at the detention centre, without his lawyer and family present, the assessors had a discussion and then presented a report on the same day declaring that Yang was mentally healthy and therefore had full criminal responsibility.⁶⁵ Regardless of the ambiguity surrounding

⁶¹ H Cai, "I am not Appealing," *supra* note 61.

⁶² T Zhang, "Qiu Xinghua's Death Sentence", *supra* note 60. Four days after Qiu's execution, the Supreme court restored its power to review all death sentences handed down by lower courts.

⁶³ Huiqun Cai, "疯汉杀人的艰难免刑" "A Tough Process of A Madman Killer's Acquittal", *Southern Weekly* (10 September 2010) online: <<http://www.infzm.com/content/49877>>.

⁶⁴ *Ibid.*

⁶⁵ Zhiyuan Guo, "Approaching Visible Justice: Procedural Safeguards for Mental Examinations in China's Capital Cases" (2010) 33 *Hastings Int'l & Comp. L. Rev.*, 21 at 28; Xiaoyuan Liu, "杨佳的精神病鉴定, 程序严重违法" "Yang Jia's Psychiatric Assessment Procedures Violated the Law Seriously", *BOXUN News* (1 August 2008) online: <<http://news.boxun.com/news/gb/pubvp/2008/08/200808012235.shtml>>.

the qualification of the evaluation agency and the validity of the assessment result,⁶⁶ the appeal court rejected Yang's parents' request for a re-assessment based on Yang's statement that he was not insane.⁶⁷ Yang Jia was executed in November of the same year.

In practice, most forensic psychiatric assessments are carried out during the police investigation period. Studies found that over 90% of the assessments were ordered by local police.⁶⁸ Compared with prosecutors and judges, local police have more advantages in detecting the mental abnormalities of offenders. China's police system has a unique strategy known as mass-line policing, which includes two types of surveillance organizations, namely neighborhood committees and internal security units.⁶⁹ A neighborhood committee consists of volunteers who are familiar with the conditions of a residential area and most inhabitants in that area, and functions as a security safeguard, public health inspector and conflict resolver for the area.⁷⁰ An internal security unit is located within the workplace. All work units are required to set up an internal division to supervise the security measures in the workplace, and to provide information regarding their employees to the police, in order to assist official investigations. Both neighborhood committees and internal security units are directly connected to individual police officers and are accredited to being their eyes and ears within the community.⁷¹ Depending on the close cooperation and assistance of the neighborhood committees and internal security units, the local police can have an

⁶⁶ The appraisal agency was not a hospital, but belonged to the Ministry of Justice, which was criticized not eligible to conduct mental examinations for criminal suspects/defendants. Moreover, the assessors were retained by the Shanghai police department, therefore the neutrality of their examination opinions was disputed. See Z Guo, "Approaching Visible Justice," *supra* note 66 at 25-26.

⁶⁷ Z Guo, "Who Should Be Entitled," *supra* note 39 at 299.

⁶⁸ See, e.g.: Yonghua Qi & Ming Kang, "司法精神医学鉴定无精神病 74 例案例分析及随访" "Analysis and Follow-up Investigation of 74 Cases Found without Psychosis in Forensic Psychiatric Assessment" (2006) 22 J of Forensic Medicine 135 at 136; Xingsheng Zhong & Yaqin Shi, "司法精神医学鉴定 210 例的初步分析" "A Preliminary Analysis of 210 Cases Who Received Forensic Psychiatric Appraisal" (1987) 20 Chinese J of Neurology & Psychiatry 139 at 140. Their findings were supported by the statistics of the Ministry of Justice, see W Chen, "Forensic Examination," *supra* note 54 at 165.

⁶⁹ The mass-line policing is very much similar to the community policing strategy adopted in most western countries. Yue Ma, "The Police System in China" in Liqun Cao, Ivan Y. Sun & Bill Heberton, eds, *The Routledge Handbook of Chinese Criminology* (New York: Routledge, 2014) 67.

⁷⁰ Victor N. Shaw, *Social Control in China: A Study of Chinese Work Units* (Westport, CT: Praeger Publishers, 1996) 70.

⁷¹ Y Ma, "The Police System in China," *supra* note 70 at 67.

effective surveillance over the residents in its jurisdictional area without frequent patrol or home visits.⁷² Research shows that around 40% of the offenders sent for mental examination are community residents who had a mental illness history that the local police was aware of.⁷³

Nevertheless, it is hard to initiate a psychiatric assessment for the investigation of capital crime cases. The cost for assessment is one important factor that the police have to consider when initiating a psychiatric evaluation for suspects who cannot afford it. Criminological experts indicate that severe mental illness is often associated with low socioeconomic status, dangerous neighborhoods, and problematic social relationships.⁷⁴ It is not uncommon in China that serious crime offenders who may have mental health issues come from a low-income family. Before committing the crimes, they very probably had shown abnormal symptoms for an extended period, but were not able to get diagnosed, not to mention being unable to receive timely medical treatment, and appropriate care and supervision from their families or the community. If the local police have reasonable doubt as to the mental status of a low-income offender and order a psychiatric assessment, they have to bear the costs for the assessment. This responsibility imposes extra financial burden on local police departments and ends up differently affecting different regions in China, because of the uneven development of the regional economies.⁷⁵ The budget for regional public legal services varies greatly, because the gap between the local government's fiscal income in wealthy areas and underdeveloped areas is huge. The expenses for forensic psychiatric assessments and potential costs in the following proceedings can become a burden which is hardly bearable in some less developed regions.

Research reveals that significant regional differences exist in China in terms of psychiatric assessment ratios.⁷⁶ In economically developed areas where fiscal

⁷² *Ibid.*

⁷³ X Zhong, "A Preliminary Analysis," *supra* note 69 at 141.

⁷⁴ See e.g., Russil Durrant, *An Introduction to Criminal Psychology* (Oxon: Routledge, 2013) 90.

⁷⁵ Shubham Chaudhuri & Martin Ravallion, "Partially Awakened Giants: Uneven Growth In China And India" November 2006 online <<http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-4069>>.

⁷⁶ W Chen, "Forensic Examination," *supra* note 54 at 168.

funds are sufficient and the awareness of human rights protection are widely spread, the police, compared to their peers in less developed areas, are more likely to start a mental evaluation.⁷⁷ For example, the police initiated assessments for 700-800 criminal cases on average every year in China's capital city Beijing at an annual rate of 0.8%, whereas the rate is lower than 0.1% in a city of Shanxi, a province where the GDP per capita is below the national average.⁷⁸ An unwritten rule followed by the police in less developed region regarding mental evaluation is that "when it is acceptable either to initiate or not, it is preferable not to initiate" (可鉴定不可鉴定的, 不鉴定) and the rule is quite the opposite in the developed regions.⁷⁹ The regional differences can sometimes influence an offender's fate greatly, as demonstrated below.

A man named Li Wei (李伟), who shared a similar background to Li Haiwei, had a different experience in China's largest city, Shanghai (上海). Li Wei came from the same province as Li Haiwei did. His father had psychiatric problems and died when he was very young. According to his family, he was a very aggressive person, who often ran away from home for no reason and easily had conflicts with people. An employer felt sympathetic for Li Wei's condition, and gave him a job as a driver for his company in Shanghai in the beginning of 2006. On May 24 2006, Li Wei was caught after he hit 9 people, while driving, including 4 traffic police officers and fled the scene. Li Wei claimed that a killer sent by his girlfriend was chasing him. Shanghai police noticed some mental abnormalities in Li Wei during interrogations. They pulled out the police Emergency phone record on that day and found three calls from Li Wei calling for immediate police assistance before the accident and during his evasion. The Shanghai police then ordered a forensic psychiatric assessment. Understanding that this case had caused wide concern, the entrusted assessment centre assigned two psychiatrists who both had around 20 years experience to carry out the evaluation. As compared to a regular assessment report which generally

⁷⁷ The economically developed areas include the capital economy region, Yangtze River Delta region, and Pearl River Delta region. W Chen, "Forensic Examination," *supra* note 54 at 168.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

consists of 3 pages and approximately 1000 words, their report had 6 pages and 5000 words. Li Wei was diagnosed to have been suffering from delusional paroxysm (妄想阵发) during the accident. He was then escorted to a psychiatric hospital for compulsory treatment without taking criminal responsibility. When his symptoms had been improved, upon his family's request, Li Wei was transferred to a hospital in his hometown where his family could visit him regularly.⁸⁰

Pressure from the government in serious criminal cases can prevent the local police from initiating a psychiatric assessment even when there is reasonable doubt about the offender's mental state. Take Case 1 above as an example, informed of the accident, the provincial governor and the secretary of the provincial Party Committee instructed the local police in Nanping to control the suspect immediately, pacify the victims' families, and maintain social stability.⁸¹ On the day following the tragedy, some provincial officials came to Nanping and passed on the instructions from higher level leaders "to close this case in the shortest amount of time with the highest quality in accordance with the law."⁸² Nanping's municipal government then set up an "investigate fast, try fast, and sentence hard" principle for this case.⁸³ Accordingly, the local police arrested Zheng on the same day (24 March 2010), and completed all investigation and interrogation by the early morning of March 25th.⁸⁴ Although the media reported that Zheng might be insane based on their interviews with Zheng's relatives and neighbors, no mental evaluation was arranged by the police for him.⁸⁵ The local police and the municipal government explained to the

⁸⁰ Ling Zhang, Wenjian Gu & Jia Cheng, "奥迪上海闹市连撞9人续: 揭开肇事司机七个疑团" "Hit 9 People and Run in Shanghai: More Details of the Driver", *Oriental Morning Post* (30 August 2006) online: <<http://news.sina.com.cn/c/2006-08-30/03539883626s.shtml>>; Jie yang, et als, "上海司法鉴定部门称奥迪司机精神鉴定并无私情" "Forensic Authentication Agency States No fraud in Their Assessment", *Oriental Morning Post* (18 August 2006) online: <http://news.xinhuanet.com/legal/2006-08/18/content_4976451.htm>.

⁸¹ Ying Jiang, ed, "南平 323 惨案回放" "The Playback of Nanping Massacre on March 23" *Beijing Evening News* (24 March 2010) online < <http://edu.people.com.cn/GB/11209972.html>>.

⁸² H Cai, "Nanping School Children Killing," *supra* note 59.

⁸³ Haiyong Li, "福建南平血案疑犯供认原计划杀死 30 个孩子" "The Suspect of the Murder in Nanping Confessed He Had Planned to Kill 30 Children", *Yangtse Evening Post* (26 March 2010) online: <<http://news.sohu.com/20100326/n271104757.shtml>>.

⁸⁴ *Ibid.*

⁸⁵ "南平凶案案犯未确证精神病 熟人揭案犯个性" "The Suspect of Nanping Killing Cannot be Confirmed Insane His acquaintances Reveals His Personalities", *China News* (24 March 2010) online:

media during the press briefing on the 26th of March that Zheng had no psychiatric history and therefore was deemed mentally well.⁸⁶ This opinion became the final conclusion on Zheng's mental state. A psychiatric assessment was never mentioned during the following prosecution and court hearings.

Victim families' grief, and the fear and anger of the public can also form a kind of invisible but intense pressure on local police. In Case 1, the slaughter happened in the morning when students were lining up in front of the school gate. Everything happened very quickly; some parents even witnessed the death of their children, but by the time they had realized what was happening, it was already too late.⁸⁷ Due to China's One Child policy, these parents shall probably never have another child.⁸⁸ As for the surviving students, the violent scene and the death of their schoolmates have created a deep psychological trauma on them. Reviewing the media reports, one can find that at the beginning there were discussions about whether the suspect was insane. Later on, the disclosure of the details of Zheng's atrocity and cruelty in the murder and his original plan of killing 30 children fueled the public's rage; Zheng's relatives and acquaintances became silent.⁸⁹ After Zheng's identity was disclosed, his family left their home and hid in a secret place fearing that they might face revenge. Zheng's brothers were fired, because their employers could not bear the pressure from the local community.⁹⁰ If Zheng was assessed as being insane during the investigation period, he would not have had to go through the subsequent legal proceedings, rather, the police would have sent him back home under his family's supervision or to a psychiatric facility for involuntary medical treatment. However, such a decision might have caused mass protest which is deemed detrimental to social stability. Undoubtedly, Nanping police had little will to initiate a mental examination for Zheng while under the pressure from both the

<<http://news.sohu.com/20100324/n271055310.shtml>>.

⁸⁶ H Cai, "Nanping School Children Killing," *supra* note 59.

⁸⁷ Y Jiang, "The Playback of Nanping Massacre," *supra* note 82.

⁸⁸ It is very common in China that one of the parents has surgical sterilization after their first child was born.

⁸⁹ See, e.g. H Cai, "Nanping School Children Killing," *supra* note 59.

⁹⁰ *Ibid.*

government authorities and the public.

Nanping police's response in this case is not uncommon. When an extremely heinous crime is committed, the local police will be immediately exposed to greater scrutiny and become the center of public attention. Political intervention usually occurs at this stage stressing that social order reigns supreme among priorities (重中之重). Ordering a mental examination for a capital crime offender, especially an offender caught red-handed, will be viewed by the public as the police being lenient and offering a chance to walk away to the offender. In Case 3, for example, upon hearing of the initial psychiatric assessment result, the victim's family insisted that Liu's family had bribed the judges and the assessment agency, and requested for a re-assessment from another agency.⁹¹ The local police deem it a safer choice to presume the suspect sane and transfer the case to the procuratorate as soon as they have collected the criminal facts. After all, both the prosecutors and the judges can order a psychiatric assessment if they have reasonable doubt about the suspect's mental conditions. Unfortunately, neither of the two actors have immunity against external pressures when dealing with high-profile cases.

According to statistics, less than 5% of psychiatric assessments were initiated by the people's procuratorates.⁹² There are three main reasons why the procuratorates appeared less proactive when compared to the police. Firstly, prosecutors build their cases based on the evidence and information provided by the police. Unlike the local police, the prosecutors do not have a close connection with local residents, therefore they usually depend on the police's opinions of the suspects' mental status. Secondly, even if they have observed some signs implying that a mental examination is needed, the usual practice is that the procuratorates shall return the case back to the local police for dismissal or supplementary investigations.⁹³ Thirdly, the procuratorates confront the political pressure in an identical manner as the local police. Initiating a psychiatric assessment for a suspect

⁹¹ H Cai, "A Tough Process", *supra* note 64.

⁹² See, e.g. Y Qi, "Analysis and Follow-up Investigation," *supra* note 69 at 136; X Zhong, "A Preliminary Analysis," *supra* note 69 at 140; W Chen, "Forensic Examination," *supra* note 54 at 165.

⁹³ W Chen, "Forensic Examination," *supra* note 54 at 165.

whom the police have deemed sane may lead the procuratorates to bear the external pressure solely, which they tend to avoid.⁹⁴

Nonetheless, the people's procuratorates have not been criticized harshly for their inactive attitude in starting mental examinations. In fact, some scholars have questioned whether initiating psychiatric assessment by the police or the procuratorates would undermine their primary duties. In contemporary the Chinese criminal system, the police are to reveal crimes and catch wrongdoers, while the procuratorates are to make charges against the suspects and prove them guilty. Considering wrongdoers may walk free without receiving any punishment after a psychiatric assessment, critics argue that initiating mental evaluations by the police or the procuratorates is against their bounden duties.⁹⁵

So far, most criticisms toward China's official-dominated model in forensic psychiatric assessment have focused on the judges' inappropriate application of their discretionary power.⁹⁶ In a civil law system, the judges' decisions are crucial to the defendants' fate. Statistics show that only 5% of psychiatric assessments were ordered by the courts, and the judges were even more hesitant to approve a mental evaluation for defendants whose crime may qualify for the death penalty.⁹⁷ Most discussions in academia revolve around whether the judges have misjudged the necessity of a mental examination or held bias against capital crime defendants.⁹⁸

First instance courts usually have to bear more pressure than local police and the procuratorates. Criminal investigations are confidential to the public whereas criminal litigation proceedings are comparatively transparent in today's China. Once a public prosecution is raised in the court, the judges are put front and centre. The fact that first instance courts are financed by the local governments makes the judges inclined to comply with the local authorities' direction.⁹⁹ Research has found that

⁹⁴ *Ibid.*

⁹⁵ See, e.g. Liqin Huang, "Forensic Psychiatric Assessment in Criminal Process" (2010) 5 *Law Review* 109 at 111.

⁹⁶ Z Guo, "Who Should Be Entitled," *supra* note 39 at 299.

⁹⁷ W Chen, "Forensic Examination," *supra* note 54 at 166-167.

⁹⁸ See, e.g. Z Guo, "Approaching Visible Justice," *supra* note 66 at 30; Y Xiao, "Law Professors Call for," *supra* note 60.

⁹⁹ J Cohen, "Struggling for Justice," *supra* note 23.

first instance courts rarely initiate psychiatric assessments in capital crime cases. Rather, most assessments were ordered by the second instance courts or even by the Supreme People's Court during its review of death sentences, which, as commentators point out, is because the two superior courts generally are beyond the boundary of the local influential forces, and can take a comparatively neutral standpoint accordingly.¹⁰⁰

But when dealing with some extremely serious criminal cases, the courts at higher levels no longer have much resistance against external pressures. Theoretically, the courts should exercise their judicial powers independently without any interference.¹⁰¹ In practice, however, the Party apparatus in China holds an overlying influence on how trials should be run and concluded. In the Nanping school massacre case, following the “try fast and sentence hard” order set by the municipal party leaders, the local court designated a collegial panel and intervened in advance,¹⁰² meaning the panel had a pre-trial review of the case materials supplied by the procuratorate. This “decision first, trial later” (先定后审) pattern used to be a popular practice in China which made most criminal trials become a mere formality.¹⁰³ The suspect Zheng was prosecuted for intentional homicide on March 27th 2010, tried on April 8th and sentenced to death in court.¹⁰⁴ His appeal was rejected by the second-instance court in less than two weeks on April 20th. The Supreme people's court approved the death sentence in one week and Zheng was executed on April 28th.¹⁰⁵ Neither the two higher level courts considered ordering a mental examination in their review.

Although mental illness is a legitimate mitigating factor, it can turn into an aggravating factor for consideration in the sentencing process when social order and

¹⁰⁰ W Chen, “Forensic Examination,” *supra* note 54 at 167.

¹⁰¹ 中华人民共和国刑事诉讼法第 14 条 Criminal Procedure Law, 2013, art 14.

¹⁰² H Cai, “Nanping School Children Killing,” *supra* note 59.

¹⁰³ It is stressed that the pre-trial reviews should be limited in the criminal procedure law. Margaret K. Lewis, “Legal Systems in China” in Liqun Cao, Ivan Y. Sun & Bill Heberton, eds, *The Routledge Handbook of Chinese Criminology* (New York: Routledge, 2014) 55.

¹⁰⁴ H Cai, “Nanping School Children Killing,” *supra* note 59.

¹⁰⁵ Zhaoli Meng & Zheng Liang, “福建南平“3·23”重大凶杀案罪犯郑民生被执行死刑” “The Criminal Zheng Minsheng of Nanping Homicide on March 23 Was Executed”, *Xinhua Net* (28 April 2010) online: <http://news.xinhuanet.com/2010-04/28/c_1260878.htm>.

public safety are the paramount concern of the courts. The theory of harmonious society has been integrated into the guidelines for the Chinese judicial system since the beginning of this century. It is stressed that the fundamental duties of the people's courts are to solve social conflicts and maintain social stability, and the courts should shift their work focus to dedicating themselves to social harmony.¹⁰⁶ When hearing and sentencing serious criminal cases, the judges are expected to take the objective of protecting public safety and preventing mass protests into account. Researchers have observed that psychiatric assessment is rarely ordered in cases when victims are non-relatives or military or police, or which have caused people's great indignation.¹⁰⁷

Preventing "continuing dangerousness" is also a factor that the judges have to consider before they initiate a psychiatric assessment for capital crime offenders. In current practice, most of the mentally ill offenders who have been found not criminally responsible would be released to society. As discussed earlier, it is very common that psychotic offenders cannot afford the medical treatment they need, yet there are no sufficient and appropriate care and support services provided by the government and the community. At present, only the psychiatric hospitals run by the Public Security Bureau, which are known collectively as "AnKang hospital" (安康医院), would take the offenders who are ordered by the courts for compulsory hospitalization. Unfortunately, there are only 25 AnKang hospitals in China having 10,000 beds in total whereas the annual increase of mentally ill offenders is about the same number.¹⁰⁸

Once assessed as bearing no criminal responsibilities, most of the offenders with mental illness shall return home. Without access to affordable medical treatment and care, it is very probable that their symptoms deteriorate and these people become

¹⁰⁶ 最高人民法院关于为构建社会主义和谐社会提供司法保障的若干意见 Some Opinions of the Supreme People's Court about Providing Judicial Protection for the Construction of Socialist Harmonious Society, 2007.

¹⁰⁷ Zhiyuan Guo, "Procedural Safeguards for Mental Examinations in China's Capital Cases" (2012) 9 Political Science & L 35 at 37.

¹⁰⁸ W Chen, "Forensic Examination," *supra* note 54 at 164; Jianhong Feng, "解密安康医院" "Unveiling Ankang Hospitals", *Justice Net* (23 April 2014) online: <http://news.jcrb.com/jxsw/201404/t20140423_1379538.html>.

a potential threat to the public, which no doubt constitutes a destabilizing factor to society.¹⁰⁹ If, by any chance, they cause any severe harm and/or damage again, the agencies which set them free might be identified and held accountable. A senior psychiatrist once criticized China's current flawed forensic psychiatric assessment system by saying: "when dealing with offenders who might be mentally ill but with low social standing, sentencing and even killing them is convenient."¹¹⁰ This assessment may sound too cynical, but it seems likely that there are not many good alternatives for this special population.

The tragic story shown below exemplifies that in today's China, public safety and societal harmony are superior to mentally ill offenders' individual human rights:¹¹¹

On an evening of September 2011, three young children (3, 6 and 7 years old respectively) were found dead in a house in a small village of the Jiangsu province. The police soon found out that the children were murdered by the home owner, Liu. The three kids were playing with Liu's daughter that afternoon. Later on when Liu's daughter wanted to play outside with them, Liu stopped her, fearing that she might be trafficked. While his daughter was arguing with him, Liu strangled her very hard and made her pass out. Liu thought his daughter was dead and became furious. He blamed the other three kids for her death, and hit all of them to death using sticks. The court ordered a psychiatric assessment for him and he was diagnosed as suffering from schizophrenia when he committed the crime, and deemed partially responsible. However, he was still sentenced to death.¹¹²

¹⁰⁹ Statistics show that, around two thirds of serious crime offenders, who were assessed to be mentally ill and set free, have received very limited medical treatment (less than three months) or none at all. See e.g. Xiaolong Fang et al, "90 例无责任能力精神病违法者鉴定后处理的随访研究" "Follow-up of Disposal of 90 Psychiatric Cases with Irresponsibility after Forensic Assessment" (2006) 18:5 Shanghai Archives of Psychiatry 273 at 275.

¹¹⁰ H Cai, "I am not Appealing," *supra* note 61.

¹¹¹ This peculiar view has been widely noticed and discussed by western scholars in various areas including psychiatrists and legal researchers. See, e.g. V Pearson, "Law, Rights, and Psychiatry," *supra* note 36 at 418-419; Lewis M. Bloomingdale, "Chinese Psychiatry after Mao-Zedong" (1980) 10 Psychiatric Annals 217 at 223; Hannah Achtenberg, "Mental Health Care in China" (1983) 5 J Psychiatric Treatment & Evaluation 371 at 373; Eli Breger, "A Child Psychiatrist's Observations on Care of the Mentally ill in the People's Republic of China" (1984) 15 Psychiatric Hospital 127 at 130.

¹¹² Xiaoye Pan, Yuan Ren & Xiaobing Zhou, "精神病杀人犯被判死刑" "A Psychiatric Murderer was Sentenced to Death" *Huaian News Net* (19 October 2012) online:

As explained earlier, any crimes hurting children in China would ignite mass public outrage. According to the Chinese judicial system, the crime Liu committed merited the death penalty, as “only the death penalty can appease civilians’ anger” (不杀不足以平民愤). According to the judges in this case, the first factor they considered in sentencing was the nature and the seriousness of the offence, and their second concern was the dangerousness of the defendant.¹¹³ From the judges’ perspective, Liu’s killing of three innocent young children was extremely heinous, and he himself was also very dangerous to the public, therefore Liu’s mental condition could not diminish the punishment inflicted on him.¹¹⁴

The judges also have to worry about the costs of ordering mental evaluations for low-income defendants and the subsequent compulsory hospitalization and medical treatment as well. In Liu Baohe’s case, when the court determined to order a psychiatric assessment, they faced a practical problem: how would it be paid for. Neither the court, the procuratorate nor the local police had the funds to pay for the assessment, because of their budgetary shortfalls. So Liu’s village committee settled the payment.¹¹⁵ Upon hearing that Liu might be set free, the whole village was thrown into great panic. Therefore, the judges had to commit Liu to compulsory hospitalization. However, the county where Liu lived is impoverished; no individuals or agencies would voluntarily bear the admission costs for Liu. Eventually the president of the court reached the county Party committee secretary; the secretary instructed the government of the town where Liu lived to pay the hospital admission fees first and then to apply for a grant at the county’s civil affairs bureau.¹¹⁶ Meanwhile, to avoid protest from the victims’ family, the county leaders and the president of the court paid visits to the family and offered to cover the four-year university tuitions for their surviving child.¹¹⁷

<<http://jsnews.jschina.com.cn/system/2012/10/19/014949210.shtml#>>. The author was not able to find the name of the offender.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ H Cai, “A Tough Process,” *supra* note 64.

¹¹⁶ *Ibid.*

¹¹⁷ In rural areas in China, families are allowed to have two children without penalties imposed. H Cai, “A Tough Process,” *supra* note 64.

Obviously, Liu's case cannot be considered a model experience that can be recommended and duplicated in China. Moreover, we cannot be certain that Liu's is favorable. There was no further report on who would bear the medical fees for Liu's treatment at the hospital. Medical fees in arrears is a very common problem in most of the AnKang hospitals in China.¹¹⁸ Without guidance or instructions from superior authorities, the hospitals cannot determine from whom they should collect the unpaid balance. Meanwhile, they cannot release the patients due to their dangerousness. A general practice amongst regular hospitals in China is that all medication and treatment would be suspended if a patient fails to pay his/her medical fees on time. It is not certain whether this is the same rule applied within AnKang hospitals, but one should not be very optimistic considering only three AnKang hospitals across the country receive financial funding regularly from local governments.¹¹⁹ It is very possible that some mentally ill offenders end up being psychiatrically detained on an indefinite or even permanent basis.

Nevertheless, in most cases the judges turn down a defendant's request for mental evaluation at their discretion. Empirical studies indicate that, although they may be subject to political pressure in some high-profile criminal cases, the judges make their refusal decisions mostly because they do not see the necessity.¹²⁰ However, psychiatric experts often question whether judges have sufficient knowledge to do the 'pre-screening'.¹²¹ In Qiu Xinghua's case, the judges did not believe a man who was able to carefully plan and scout for his murder, and successfully escape from the police chase could be mentally ill. A psychiatrist challenged the judges' opinion, citing the Reagan assassination attempt and argued that a mentally ill person can be very good at planning, stalking, and circumventing security measures.¹²² Researchers have observed some common features between the cases in which the court's rejection of a psychiatric assessment request sparked

¹¹⁸ J Feng, "Unveiling Ankang Hospitals," *supra* note 109.

¹¹⁹ *Ibid.* The three public-funded AnKang hospitals are located in Beijing (the capital city), Shanghai (the biggest and most developed city in China) and Heilongjiang province.

¹²⁰ Z Guo, "Who Should Be Entitled," *supra* note 39 at 291.

¹²¹ *Ibid.*

¹²² H Cai, "I am not Appealing," *supra* note 61.

wide discussions among psychiatry professionals: the defendants' motive and criminal methods were extremely abnormal, which raises reasonable doubt about the defendant's mental state; the judges, on the other hand, stressed that there was no ground to initiate a mental examination, because the defendant committed the crime in an organized way, and appeared in good spirits during the investigation and during trial.¹²³ It is not uncommon that, in practice, most judges are prone to pre-assessing the defendants based on their stereotyped understanding of mental illness.

Commentators point out that there is a common misunderstanding among the populace and the judicial authority agencies that forensic psychiatric assessment conclusions have a legal binding effect on court decisions.¹²⁴ I argue that this misunderstanding was created by the law and strengthened in judicial practice. Besides giving a medical diagnosis of the assessed offender's psychiatric conditions, psychiatrists are required to determine whether the offender has full, partial or nil criminal responsibility, and psychiatric assessment conclusions had been regarded as verdict in law until 2013. In China's criminal justice system, psychiatrist assessors are supposed to supplement the professional knowledge and expertise that the judges lack, therefore, conducting psychiatric assessments is deemed exercising a state power, and the assessors are performing quasi-judicial functions during assessment.¹²⁵

While psychiatric assessors are assigned a quasi-judicial power, there are too few guidelines regarding standard procedures required for a transparent and reliable evaluation process. Researchers have noticed that standards of psychiatric assessment vary greatly depending on the availability of resources and the courts determine whether a practice is acceptable at their discretion.¹²⁶ Although all evaluation results are required to be presented in writing, sometimes an assessment is

¹²³ W Chen, "Forensic Examination," *supra* note 54 at 166.

¹²⁴ Daming Sun, "对邱兴华杀人案的司法鉴定学反思" "Discuss Qiu Xinghua Murder Case from the Perspective of Forensic Science" (2008) 5 Chinese Criminology Rev 51 at 56.

¹²⁵ Jie Yuan, "我国司法精神鉴定主体制度的法律思考" "Legal Thoughts on the Subject Institution in Forensic Psychiatric Assessment" (2003) 4 Chinese J of Forensic Sciences 46 at 46.

¹²⁶ V Pearson, "Law, Rights, and Psychiatry," *supra* note 36 at 412.

carried out in court orally.¹²⁷ While an assessment generally includes a four hour interview with the patient and a series of physical examinations including EEG, the Weschler Intelligence Test, the Eysenck Personality Inventory, and the MMPI,¹²⁸ the psychiatrists' conclusions on Yang Jia's mental status based on a meeting with him at the detention centre were accepted by the court. Cross-examination is often skipped because neither the judges nor the assessors see the necessity as most offenders and their defense attorneys can hardly have a same-level professional dialogue with the assessors, or hire a psychiatrist as their witness to challenge the assessment conclusions. In practice, less than 5% of assessed offenders were able to question their assessors in court.¹²⁹

The technically unbeatable status of forensic psychiatric assessment conclusions makes the courts very cautious when initiating an assessment. If a judge is not able to challenge an assessors' medical diagnosis, s/he has to accept their medical conclusions, and furthermore has to admit the assessors' legal opinions on the offender's criminal responsibility, because the assessors' legal opinions are an integrated part of the evaluation result.¹³⁰ In other words, if a judge, who rarely has any medical background, cannot deny the medical contents in a psychiatric assessment report, s/he has to passively accept the legal contents in that report. The probative value of psychiatric assessment has been soundly strengthened because, in practice, over 90% of the assessment results are adopted by the courts.¹³¹ Statistics indicate that at least 60% of evaluation conclusions are positive, meaning that over a half of the suspects/defendants assessed have been exempt or partially exempt from criminal responsibility.¹³² As discussed earlier, offenders who claim insanity in China do not have to confront a dilemma: either go to jail or stay in a psychiatric

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ Aiyang Zhang, "精神鉴定意见的司法判定" "Judicial Determination of the Psychiatric Expert Opinions" (2011) 26: 4 Legal Forum 142 at 143. Financial burden is a main reason. On the other hand, most psychiatrists would be very cautious to present as defendant's expert witness in capital cases.

¹³⁰ *Ibid* at 146.

¹³¹ W Chen, "Forensic Examination," *supra* note 54 at 167.

¹³² *Ibid*, at 166-167.

hospital.¹³³ Rather, their chances to be set free are very high. Naturally, some offenders tend to take advantage of psychiatric assessment to be released. Without appropriate supervision, the superior status of psychiatric assessment is likely to cause malpractice and corruption.¹³⁴ Presently, most local courts in China have established an internal policy to limit the right to initiate psychiatric assessment to the judicial committee.¹³⁵ That is to say, neither the judges nor the president of the court have to bear the pressure and the risks for approving a mental evaluation for a defendant who is deemed sane by both the police and the procuratorates.¹³⁶

One may question whether the defense lawyers had performed their duties to the fullest in the above-mentioned cases, and moreover, what their role and influence is in the criminal justice system in China. Actually, defense lawyers in today's China are also subject to the political and public pressures. Prior to the privatization of law firms in the early 1990s, there were no real defense lawyers in China because the legal profession had worked as "state legal workers" and their salaries were paid by the government.¹³⁷ Instead of providing legal expertise assistance to the public in court proceedings, Chinese lawyers by then had collaborated with the judicial authority and served the interest of the government. Although the legal profession as a whole has acquired due respect in contemporary Chinese society, criminal defense lawyers sometimes still confront public hostility and resistance from other actors in the judicial system.¹³⁸

The amendment of the Chinese criminal procedure law in 2012 allowed a defense lawyer to meet his/her client after the first interrogation or the first day of

¹³³ Z Guo, "Who Should Be Entitled," *supra* note 39 at 292.

¹³⁴ A notorious case in 2009 disclosed that at least six psychiatrists at the AnKang Hospital in Inner Mongolia province had provided false assessment reports for bribery for years to help serious crime offenders evade justice. See Heyan Wang, "操纵司法鉴定: 内蒙古窝案" "Manipulating Forensic Assessment: A Group Crime in Inner Mongolia" (2010) 2 *New Century Weekly* 86 at 87-91.

¹³⁵ A judicial committee is set up in people's courts at all levels to discuss important or difficult cases and other issues relating to the judicial work. Members of the judicial committees of local people's courts are appointed by the standing committees of the people's congresses in the region.

¹³⁶ W Chen, "Forensic Examination," *supra* note 54 at 166-167.

¹³⁷ J Cohen, "Struggling for Justice," *supra* note 23.

¹³⁸ Yi Sheng, "A Promise Unfulfilled: The Impact of China's 1996 Criminal-Procedure Reform on China's Criminal Defense Lawyers' Role at the Pretrial Stage (Part 2)", *Perspectives* (31 March 2004) online: <www.law.yale.edu/documents/pdf/Part_2.pdf>.

detention for the first time.¹³⁹ Prior to 2013, defense lawyers were not permitted to obtain access to any judicial documents or their clients until the procuratorates had taken over the cases.¹⁴⁰ Defense lawyers used to be given approximately one week to prepare for the trial, and their job mainly focused on finding mitigation factors to plead for lighter sentence in court.¹⁴¹ In Yang Jia's case, the legal aid lawyer designated by Shanghai police met Yang Jia soon after he had been arrested, because the local procuratorate had intervened in advance. But later on, when two defense lawyers entrusted by Yang Jia's father wanted to see him, they were refused because the local procuratorate disapproved their meeting.¹⁴²

Having financial hardship or claiming being mentally ill does not necessarily make a suspect/defendant eligible for legal aid. According to the 1996 version of the criminal procedure law, only offenders who did not have a defender but might be sentenced to death could be assigned a legal aid lawyer during court trial.¹⁴³ The 2012 revision stipulates that, if a criminal suspect or defendant does not have a defender but is facing life imprisonment or the death penalty, the judicial authority agencies shall notify a legal aid agency to appoint a defense lawyer for him/her.¹⁴⁴

In practice, most of the legal aid lawyers do not have proper psychiatric knowledge and/or have not received special trainings for effectively raising insanity defense on behalf of their clients. They often failed to provide sufficient evidence to convince the judicial authority agencies to initiate a psychiatric assessment.¹⁴⁵ In addition, some lawyers' personal stereotyped perception of mental illness may encourage their responsiveness to the judicial authority's opinions. In an interview prior to the first trial, Yang Jia's legal aid lawyer told the media that he thought Yang Jia was mentally well, and predicted that very possibly Yang Jia would be sentenced

¹³⁹ 中华人民共和国刑事诉讼法第 33 条 Criminal Procedure Law, 2013, art 33.

¹⁴⁰ 1997 年中华人民共和国刑事诉讼法第 36 条 Criminal Procedure Law, 1997, art 36.

¹⁴¹ Y Sheng, "A Promise Unfulfilled," *supra* note 139.

¹⁴² Liming Zhang, "'杨佳袭警案'的程序公正问题透视" "Analyzing Procedural Fairness Issues in the Case of Yang Jia Assaulting Police Officers" (2009) 1 Legal Science 19 at 22.

¹⁴³ 1997 年中华人民共和国刑事诉讼法第 34 条 Criminal Procedure Law, 1997, art 34.

¹⁴⁴ 中华人民共和国刑事诉讼法第 34 条 Criminal Procedure Law, 2013, art 34.

¹⁴⁵ Z Guo, "Procedural Safeguards," *supra* note 108 at 37.

to death.¹⁴⁶

Defense lawyers have to compromise when confronting political and public pressures. A psychiatrist disclosed in his blog that, upon hearing of the Nanping school massacre, most people around him doubted if any lawyer would dare defend the killer Zheng because the lawyer might be threatened by victims' families.¹⁴⁷ Certainly Zheng was assigned a defense lawyer by the local judicial authority, however, the lawyer's performance in trial implied that he was too constrained to fully defend Zheng. The lawyer did not request a mental examination for Zheng; instead of searching for further evidence to save Zheng's life or to lessen his culpability, he declared in court on behalf of Zheng that he had no objection to the criminal evidence provided by the prosecutor and the accusation of intentional homicide.¹⁴⁸ The only defense he prepared for Zheng was to remind the court that Zheng had made a complete confession of his crime and requested that the judges take Zheng's cooperative attitude into consideration when sentencing.¹⁴⁹

Reviewing articles and media reports about capital crime cases in which the mental state of the offenders was controversial, one can easily find that most criticisms against the current psychiatric assessment practice are from the academics. The public, on the contrary, have few objections to the application of punishment in most cases to the serious crime offenders regardless of their mental health problems. In the Nanping killing case, the silence of the local community including the offender's family to the offender's mental state is a good example. Even for those who were found not able to bear criminal responsibility, it is not uncommon that

¹⁴⁶ “杨佳辩护律师：即使曾被打伤杨佳也难逃死刑” “Yang Jia's Defense Lawyer: Yang Jia Can Hardly Avoid the Death Penalty Even If He Once was Wounded by the Police”, *Guangzhou Daily* (8 July 2008) online: <http://news.dayoo.com/society/200807/08/53921_3463322.htm>.

¹⁴⁷ Jian Wu, “有人去为郑民生辩护吗?” “Does Anyone Want to Defend Zheng Minsheng?”, (8 April 2010), *Psychological Space-Time* (blog), online: <http://blog.sina.com.cn/s/blog_49add9b80100i8y6.html>.

¹⁴⁸ “南平砍杀学生者扰乱法庭半小时愿承担三成责任” “Nanping Student Killer Harassed the Trial for Half an Hour and Was willing to Take 30 Per Cent of the Alleged Culpability”, *Beijing Times* (9 April 2010) online: <http://www.chinadaily.com.cn/dfpd/2010-04/09/content_9705858.htm>; Yinggui Tong, “谁将郑民生逼到绝望” “Who Pushed Zheng Minsheng to Despair”, (23 April 2010), *Crisis Game* (blog), online: <http://www.caogen.com/blog/infor_detail/20113.html>.

¹⁴⁹ “残杀 13 小学生郑民生当庭被判死刑” “Zheng Minsheng Was Sentenced to Death in Court for Slaughtering 13 Elementary Students”, *WangChao Net* (9 April 2010) online: <http://tc.wangchao.net.cn/muying/detail_14543.html>.

their families and/or guardians refused to take them back, similar to the response of Liu Baohe's family.¹⁵⁰ In practice, the judicial agencies had to either transfer the offenders to a psychiatric hospital or keep them in detention centres.¹⁵¹ No legislation has addressed how these people, who were abandoned by their families and society, should be managed.

Most Chinese people hold a complex attitude toward mentally ill lawbreakers and psychiatric assessment. On one hand, they are aware of related stimulations in the criminal law and acknowledge that offenders with mental illness should not be (fully) punished. In daily life, they tend to avoid having any conflict with the person who they think is abnormal, because "madman kills without consequence" (疯子杀人不偿命). On the other hand, psychiatric assessment, in their eyes, is a tool to help offenders be alleviated of their deserved punishment, and often they would question the fairness and accuracy of assessments confirming offenders' insanity. The populace still believes whoever breaks the law should take responsibilities, and mentally ill offenders' families are to be blamed for failing to prevent the offending, and accordingly, should take responsibilities for all the pain and damage the offenders have caused.

Chinese people's punitive attitude towards mentally ill lawbreakers, to some extent, has influenced the judicial agencies' choices in initiating forensic psychiatric assessment, and has further shaped the tone and tenor of the human rights protection policy for capital crime offenders with mental illness in China. I argue that the contemporary legal treatment of offenders with mental illness is considerably attributable to the stigma deeply embedded in the populace's mind.

¹⁵⁰ Even some mentally ill individuals who had not committed crimes were refused by their families after medical treatment and had been sent back to the mental health rehabilitation institution. See, e.g. Qiying Zheng, "精神病患者痊愈出院却回不了家 家属多不愿接回" "Mental Health Patients Cannot Return Home after Treatment _ Families Refused" *Fuzhou News Net* (20 March 2015) online: <<http://fj.qq.com/a/20150320/026820.htm>>.

¹⁵¹ See, e.g. Guangzheng Zhang et al, "刑事案件的司法精神病学鉴定 154 例案件随访" "Following up Investigation of Forensic Psychiatry Assessments in 154 Criminal Cases" (2005) 40 *J of Zhengzhou Uni (Medical Sciences)* 924 at 925; Guangzheng Zhang et al, "河南省刑事案件司法精神病学鉴定案例的随访研究" "Following up Investigation of Forensic Psychiatry Assessments in Criminal Cases in Henan Province" (2006) 22 *J of Forensic Medicine* 104 at 106.

IV. Stigma of Mental Illness in Chinese Society

Public stigma of mental illness is the general public's discriminatory perception of people with mental illness.¹⁵² The stigma can create negative impacts on mentally ill individuals, their family members and their social connections.

Studies indicate that traditional Chinese people had two-level explanations explaining a person's mental illness, in which the first level was articulated in traditional Chinese medical theories, whereas the second level attributed the illness to supernatural factors.¹⁵³

When someone started behaving abnormally, people around usually would say the person was sick and suggested him or her to see a doctor - a traditional Chinese medicine doctor. Traditional Chinese medicine has a long history and has accumulated a wealth of knowledge concerning mental illness. As early as in first century A.D, mental illness symptoms were already described in the oldest Chinese medical text, the Yellow Emperor's Manual of Corporeal Medicine (黄帝内经).¹⁵⁴ In the following thousands of years, elite doctors' understanding of the disease etiology and their cures were gradually added to this classical book.¹⁵⁵ Chinese people believed certain madness symptoms were caused by Yin-Yang imbalance (阴阳失调); a breakdown of the internal environment of the human body and/or a disharmony of a person's body and soul. It was believed that such an imbalance could be relieved using Chinese herbal medicine and/or acupuncture, especially at the incipient stage.¹⁵⁶

But if a patient's symptoms could not be mitigated by Chinese medicine, people would turn to the second level explanations. There were three widely-accepted causes for mental illness including retributions for wrongful conducts, being possessed by evil spirits, and the soul's separation from the human

¹⁵² Tahirah Abdullah & Tamara L. Brown, "Mental Illness Stigma and Ethnocultural Beliefs, Values, and Norms: An Integrative Review" (2011) 31 *Clinical Psychology Rev* 934 at 936.

¹⁵³ Vivien W. Ng, *Madness in Late Imperial China: From illness to Deviance* (Norman: University of Oklahoma Press, 1990) at 28.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid* at 28, 33.

¹⁵⁶ *Ibid* at 33-37,

body.¹⁵⁷ At this stage, patients and their families no longer expected much from the traditional Chinese medical treatment, rather, they placed their hope on folk-remedies, prayers, charity, sacrifices, restitutions, and rites of exorcism.¹⁵⁸

The public's attitude toward mental patients would become less empathetic and friendly along with the deterioration of the patients' symptoms. When the patients were at the first stage, people provided them with care and sympathy. Once the patients were cured, they would be accepted by society and were able to have a normal life. But when the patients entered the second stage, people would think that the patients themselves were to blame for the illness. The popular view or belief was that the patients (or their family members) must have done some sins in previous and present lives, or that they were possessed by some demonic spirits due to their inferior physical condition or inappropriate desire, or that they were not able to control their spirit because of personal weak characters.¹⁵⁹ This is how mental illness was stigmatized.

The terms “*dian*” (癡), “*kuang*” (狂), and “*feng*” (瘋) were traditionally used to describe mental illness, and later were adopted in official standard.¹⁶⁰ *Dian* means “insane without excitation or epileptic”, *kuang* means “raging, unpredictable wildness”, and *feng* is “mad or crazy”.¹⁶¹ It is noteworthy that some psychological illness, which appears passive or non-aggressive in the stage of attack, such as “depression”, generally is considered to be caused by weakness in the patients' spiritual strength instead of mental health issues.¹⁶² While growing up, kids were repeatedly reminded that mentally ill people were ridiculous, violent and dangerous,

¹⁵⁷ *Ibid* at 51.

¹⁵⁸ *Ibid*.

¹⁵⁹ T Abdullah, “Mental Illness Stigma,” *supra* note 153 at 941. It is argued that this belief has a connection with *Samsara* in Buddhism asserting that people's behavior in this life shall determine their reincarnation. See, Chow S. Lam et al, “Chinese Lay Theory and Mental Illness Stigma: Implications for Research and Practices” (2010) 76 *J of Rehabilitation* 35 at 36.

¹⁶⁰ The term *dian* (癡) appeared the first time in *Shi* (诗经, The book of Songs) and *kuang* in *Shangshu Weizi* (《尚书·微子》, The Book of Historical Documents). “*Dian*”, “*kuang*”, and “*feng*” (瘋) were taken as medical terms for mental illness in *Kang-Xi Dictionary*, an encyclopaedia compiled in A.D. 1716 pursuant to the order of Emperor Kang-Xi of the Qing dynasty. See, T'ien Ju-K'ang, “Traditional Chinese Beliefs and Attitudes toward Mental Illness” in Wen-Shing Tseng & David Y.H.I. Wu, eds, *Chinese Culture and Mental Health* (Orlando, FL: Academic Press, 1985) 68.

¹⁶¹ *Ibid*. Also see V Ng, “Madness in Late Imperial China,” *supra* note 154 at 37.

¹⁶² C Lam, “Chinese Lay Theory,” *supra* note 160 at 36.

and should be kept at a distance.¹⁶³ In this way, the public stigma was amplified.

People with mental illness used to be described as “a very helpless class”¹⁶⁴ and their families had to either hide the fact of the mental illness, or live with shamefulness in a hostile and discriminatory environment once the truth was exposed.¹⁶⁵ The historical family system in Chinese society has determined that families are the primary care providers for mentally ill people. Living in a continental country, ancient Chinese farmers had to stick to their land for survival, and so did their descendants, because the land could not be moved.¹⁶⁶ Besides these facts, the family had to live together for economic considerations, meaning one lived with his/her grandparents, parents, uncles and cousins.¹⁶⁷ With economic conditions as its basis, the ethical significance of this family system was further confirmed by Confucianism which has been the dominant philosophy in Chinese society since 2000 years ago.¹⁶⁸

A primary Confucian theory is that stable social relationships can build up and maintain an orderly and harmonious society.¹⁶⁹ The fundamental social relations defined in Confucianism are *Wulun* (五伦, five cardinal relations), namely, sovereign-subject (君臣), father-son (父子), husband-wife (夫妇), siblings (兄弟), and friends (朋友), three of which are family relationships,¹⁷⁰ and sovereign-subject was assimilate to father-son, friends to siblings.¹⁷¹ In Confucian doctrine, humans are identified as relational beings by their harmonious interdependence, most often

¹⁶³ T Abdullah, “Mental Illness Stigma,” *supra* note 153 at 939.

¹⁶⁴ Robert D. Lamson, *Social Pathology in China: A Source Book from the Study of Problems of Livelihood, Health, and the Family* (Shanghai: Commercial Press, 1935) 416-417.

¹⁶⁵ Veronica Pearson, “Families in China: An Undervalued Resource for Mental Health?” (1993) 15 *J of Family Therapy* 163 at 167.

¹⁶⁶ Fung Yu-Lan & Derk Bodde, eds, *A Short History of Chinese Philosophy* (New York: The Free Press, 1948) at 21.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid* at 30. The Confucianist school was founded by Confucius (孔子, 551 - 479 B.C.). The body of Confucian philosophy theories was developed and expanded by Confucius' followers Mencius (孟子) and Xun Zi (荀子), and Confucianism had become one of the main streams of Chinese thought by the third century B.C.

¹⁶⁹ C Lam, “Chinese Lay Theory,” *supra* note 160 at 36.

¹⁷⁰ 《孟子·滕文公上》 Mencius: Tengwengong Shang.

¹⁷¹ 《孟子·梁惠王上》 Mencius: Lianghuiwang Shang.

on family members.¹⁷² Thus, family became the core unit of the Chinese social universe, and the responsibilities for mentally ill members naturally fell upon their families.¹⁷³ Take the last imperial dynasty, Qing (清朝, 1644 -1911 A.D.), as an example, families were ordered to confine their mentally ill family members strictly and registered their names at the local government authorities.¹⁷⁴ Whenever a mentally ill person committed an offense, his/her family would be punished collectively.¹⁷⁵

Today Chinese people no longer live in extended-family relationships, but the essential concepts of the family system have been inherited. It is natural and obvious to most Chinese people that supervising mentally ill people or paying for medical treatment and professional care is their families' obligation. Mental health services, financial or moral support are rarely provided by the government and society.¹⁷⁶ Moreover, influenced by the stigma, most families were less respected and isolated in their communities.¹⁷⁷ Meanwhile, there is a lack of an understanding of the influence of mental illnesses on people's behavior in contemporary China, because public mental health education is still a poorly explored area.

Traditionally, mentally ill offenders were often punished for their misconduct because mental illness was deemed as deviance instead of an unhealthy condition of the body or mind. About 2000 years ago, Han Feizi (韩非子), the founder of the Legalism school (法家) stressed "a psychotic cannot escape from punishment according to the law" (狂则不免人间法令之祸).¹⁷⁸ Legalism was the official philosophy of the penal legislation in China's first imperial dynasty, Qin (秦朝, 221 - 207 B.C.);¹⁷⁹ Han Feizi's strong attitude set up a cornerstone for the legal tradition in dealing with offenders with mental illness. After the Han dynasty (汉朝, 202 B.C.

¹⁷² C Lam, "Chinese Lay Theory," *supra* note 160 at 36.

¹⁷³ V Ng, "Madness in Late Imperial China," *supra* note 154 at 16.

¹⁷⁴ *Ibid* at 103.

¹⁷⁵ R Munro, "Judicial Psychiatry in China," *supra* note 27 at 15.

¹⁷⁶ T Abdullah, "Mental Illness Stigma," *supra* note 153 at 935.

¹⁷⁷ *Ibid* at 937.

¹⁷⁸ Xiehe Liu, "Psychiatry in Traditional Chinese Medicine" (1981) 138 *British J of Psychiatry* 429 at 429.

¹⁷⁹ Hong Lu & Terance D. Miethe, *China's Death Penalty: History, Law, and Contemporary Practices* (New York: Routledge, 2007) at 30-31.

- 220 A.D.) had replaced Qin, Confucian ideas were adopted to be the guidelines for legal thinking and legal practices, continued through the rest of China's imperial history, and became the foundation of an integrated and orderly feudal society.¹⁸⁰

The Confucian perception of mental illness, however, did not suggest substantially different treatment to mentally ill offenders. According to Confucianism, a decent person (君子) should possess five fundamental ethic virtues, namely, *Ren* (仁, benevolence, human-heartedness),¹⁸¹ *Yi* (义, righteousness),¹⁸² *Li* (礼, propriety, rituals, rules of proper conduct),¹⁸³ *De* (德, moral integrity),¹⁸⁴ and *Xin* (信, good faith).¹⁸⁵ People's humanity is verified and signified by their social relations and responsibilities;¹⁸⁶ a decent person is supposed to manage all his/her social relationships appropriately based on his/her virtues which are rendered in his/her conduct in accordance with *Li* – the social and legal norms of contemporary society.¹⁸⁷ That is to say, people should show their humanity in their behaviors which are recognized to be appropriate and acceptable in their temporal social context.

From the Confucian perspective, people with mental illness did not possess the fundamental ethic virtues as human being, could not maintain positive social relationship, and further posed a threat to social order and harmony. Confucian concept of *Xing* (刑, punishment) was developed simultaneously with the formation of the above virtue values.¹⁸⁸ Confucian masters asserted that *Li* played a crucial role in sustaining a stable and harmonious society and *Xing* was to improve the

¹⁸⁰ The Chinese legal system completed its Confucianization in Tang dynasty: it was clearly stipulated in Tang Code (唐律) that “everything has to follow *De* and *Li*” (一准乎礼). See eg. Y Fung, “*A Short History of Chinese Philosophy*,” *supra* note 167 at 30; Jianhong Liu et al, “Chinese Legal Traditions: Punitiveness versus Mercy” (2012) 9:1 Asia Pac J Police & Crim Just 17 at 22; H Lu, “China’s Death Penalty,” *supra* note 180 at 30.

¹⁸¹ 《论语·颜渊》 Analects of Confucius: Yan Yuan.

¹⁸² 《论语·里仁》 Analects of Confucius: Li Ren.

¹⁸³ 《论语·泰伯》 Analects of Confucius: Tai Bo.

¹⁸⁴ 《论语·为政》 Analects of Confucius: Wei Zheng.

¹⁸⁵ 《孟子·滕文公上》 Mencius: Tengwengong Shang.

¹⁸⁶ Mee-Yin Mary Yuen, “Human Rights in China: Examining the Human Rights Values in Chinese Confucian Ethics and Roman Catholic Social Teachings” (2013) 8 Intercultural Hum Rts L Rev 281 at 292.

¹⁸⁷ *Ibid* at 293; J Liu, “Chinese Legal Traditions,” *supra* note 181 at 21.

¹⁸⁸ 《左传·昭公二十年》 Zuo Zhuan: Zhao Gong Year 20.

implementation of *Li* or make *Li* complete,¹⁸⁹ and stressed that everyone should be equal before the law.¹⁹⁰

The low tolerance of mental illness in Legalism and Confucianism determined the historical unfavorable legal treatment of mentally ill offenders because the two schools of philosophy jointly shaped the dominant view on public morality and law in imperial China.¹⁹¹ Comparing with physically disabled offenders, mentally ill offenders received less sympathy and leniency in criminal law.¹⁹² In the Han dynasty, mentally ill offenders would be executed publicly for killing their moms or brothers, which was a severe violation of a Confucian ethic - filial piety.¹⁹³ Offenders' mental state had not been considered in the imperial criminal law until the 17th century, whereas the added legal provisions mainly focused on isolation and punishment.¹⁹⁴ In the Qing dynasty, for instance, mentally ill offenders were subject to prison sentences for homicide and the death penalty if they had murdered their grandparent(s) or more than one non-relative.¹⁹⁵ As Confucian perspectives on ethics and values have permeated every facet of life of the Chinese people in the past and today as well,¹⁹⁶ Confucian's attitude towards mentally ill offenders have passed down to modern Chinese society, which also prioritizes social stability and collective interest in its legal system.

V. Conclusions and Suggestions

The popular punitive attitude in Chinese society towards mentally ill offenders stems from the stigma which was shaped by the dominant values and concepts of traditional Chinese philosophy. Mental illness was deemed a source of

¹⁸⁹ 《论语·堯曰》 Analects of Confucius: Rao Ri.

¹⁹⁰ Chung-Ying Cheng, "Critical Reflections on Rawlsian Justice versus Confucian Justice" (1997) 24 J of Chinese Philosophy 417 at 420.

¹⁹¹ See, e.g. Y Fung, "A Short History of Chinese Philosophy," *supra* note 167 at 38; Derk Bodde, "Dominant Ideas in the Formation of Chinese Culture" (1942) 62 JAOS 293 at 293; H Lu, "China's Death Penalty," *supra* note 180 at 29.

¹⁹² Tiechu Jiang, "中国古代精神病人犯罪法探析" "On the Law of Psychopath Crime of Ancient China" (2005) 190 The Northern Forum 151 at 154.

¹⁹³ C Lam, "Chinese Lay Theory," *supra* note 180 at 37.

¹⁹⁴ V Ng, "Madness in Late Imperial China," *supra* note 154 at 67.

¹⁹⁵ *Ibid* at 113.

¹⁹⁶ Sébastien Billioud, "Confucianism, "Cultural Tradition" and Official Discourses in China at the Start of the New Century" (2007) 3 China Perspectives 50 at 58-60.

shame interfering with social stability in imperial China, and the historical legal treatment of insane offenders was isolation and punishment. Unfortunately, the stigma and the harsh legal tradition can still be seen in today's criminal practice. An examination of the role and concern of the primary stakeholders in China's forensic psychiatric assessment regime reveals that psychiatric evaluation has not effectively exempted serious crime offenders with mental illness from the death penalty. However, as a researcher stresses, "traditions or values should not excuse the denial of due process."¹⁹⁷

Although the monopoly power rested upon the judicial authority agencies has been widely criticized,¹⁹⁸ empirical studies show that the official-dominated model of psychiatric assessment has had, and will have its solid ground in China.¹⁹⁹ The question arises, therefore, as to how to improve the accessibility and reliability of psychiatric assessment for capital crime offenders in China.

Standard procedures for initiating psychiatric assessment should be established, because currently laws affecting forensic psychiatric assessment are still scattered through a variety of statutes. With specific guidelines available, offenders shall know what evidence would suffice to initiate an assessment. On the other hand, clear criteria shall prohibit judicial authority agencies from abusing their power or rejecting a request just based on individual subjective judgement.

Remedy measures including an appeal mechanism need to be taken to ensure that judicial authority agencies' decisions are not final and offenders have full access to psychiatric assessment regardless of their socioeconomic status. A professional third party, for example, a review board consisting of mental health experts, can be instated to deal with all appeals against official decisions. The state-funded national legal aid system²⁰⁰ should extend to low income offenders who request for

¹⁹⁷ Z Guo, "Approaching Visible Justice," *supra* note 66 at 31.

¹⁹⁸ See, e.g. Z Guo, "Approaching Visible Justice," *supra* note 66 at 28; Jinhong Zhang & Qike Xu, "精神病鉴定程序的启动_以精神病事件的频发现象为背景" "The Initiation of the Evaluating Process of Psychosis - Based on the Background of Frequent Occurrence of Psychosis Incidents" (2011) 55 Forensic System 15 at 19.

¹⁹⁹ Z Guo, "Who Should Be Entitled," *supra* note 39 at 292-294.

²⁰⁰ The national legal aid centre in China was established in 1997. Currently there are 2,642 local legal aid centers across the country. See e.g. Chunyu Lu & Lijuan Zhang, "Legal Aid Mechanism in China",

psychiatric assessment, and meanwhile can provide sufficient evidence to support their insanity claims.

In addition, a section should be added to the current mental health law to identify under which circumstances involuntary admission, involuntary hospitalization and treatment for mentally ill criminal offenders are needed, how the legal processes should be coordinated and monitored, and when the expenses involved in the processes shall be paid from some specific state controlled funds.

Increasing public awareness of the importance of mental well-being for society as a whole should be set as an imperative goal for public health education in China. Only when the stigma and discrimination are reduced, will Chinese society be more accepting to those vulnerable populations. The government should then be more willing to assign more funds to mental health promotion, which shall prevent risk factors for (especially violent) offending, and eventually protect and sustain social order and public well-being. Investment and actions should be taken to promote mental health education, to improve rehabilitation facilities and services, and conduct research on stigmatization removal strategies.

Xinhua Net (21 August 2003) online:

<http://news.xinhuanet.com/ziliao/2003-08/21/content_1038391.htm>; Christopher Smith & Marco

Rubio, "Legal Aid" Congressional - Executive Commission on China online:

<<http://www.cecc.gov/legal-aid>>.