

Authoritarian Legal (Ir)rationality: The Saga of ‘Picking Quarrels’ in China

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I. INTRODUCTION

Luo Daiqing, a 20-year-old University of Minnesota student, was detained by Chinese authorities in Wuhan on July 12, 2019, for satirical Tweets about Xi Jinping, posted when Luo was in the United States.¹ In one tweet, Chinese government slogans were overlaid onto images of Lawrence Limburger, a cartoon antagonist who bears a resemblance to Chinese President Xi Jinping.² Luo was sentenced to six months in prison for the offense of “Picking Quarrels and provoking trouble” (referred to as “Picking Quarrels”).³ Chinese authorities accused Luo of “spreading misinformation that defied the image of the People’s Republic of China (referred to as “PRC”).” According to the verdict, Luo “caused a disturbance and drew undue attention, resulting in a significant disruption

¹ Bethany Allen-Ebrahimian, *University of Minnesota Student Jailed in China Over Tweets*, AXIOS, (Jan. 22, 2020), <https://www.axios.com/2020/01/23/china-arrests-university-minnesota-twitter>.

² *Id.*

³ *Id.*

of public order.”⁴

Luo’s case exemplifies how Picking Quarrels works as a convenient tool for Chinese authorities, leading to the imprisonment of thousands of individuals for their online expressions.⁵ Expressions being targeted range from complaints about traffic police⁶ to criticisms of the ruling Chinese Communist Party (referred to as “CCP” or the “Party”) on social media platforms.⁷

However, speech-related offenses are just the surface of the catchall category. In the past decade, China has witnessed a troubling trend in politically motivated cases where the charge of Picking Quarrels has become alarmingly common. This catchall offence has been wielded by authorities as a pervasive tool to silence dissent and suppress the activities of numerous civil groups, including feminists and human rights lawyers.⁸

Nevertheless, the portrayal of Picking Quarrels remains incomplete, as this same charge and arbitrary discretion have been applied in cases with less or minimal political relevance.⁹ Chinese authorities utilize the charge of Picking Quarrels to enforce state-sanctioned moral standards. Individuals whose actions or speech on social media platforms are deemed morally contentious by officials are also at risk of criminalization under this pretext. In one case, a Chinese TikTok¹⁰ creator received a sentence of over one year

⁴ Donald Clarke, *Chinese Student at University of Minnesota Jailed for Tweets Made while in the US: a Legal Analysis*, THE CHINA COLLECTION (Jan. 23, 2020), <https://thechinacollection.org/chinese-student-university-minnesota-jailed-tweets-made-us/>.

⁵ While the official number is extremely difficult to obtain, independent researchers are tracking down and counting individual Picking Quarrel cases using available resources. *See, e.g.*, @SpeechFreedomCN on Twitter provides updates on this matter (https://twitter.com/SpeechFreedomCN?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor), along with associated statistics: https://docs.google.com/spreadsheets/d/1CQBeBpP2-A45lw-zr6mneDuPtSBNWg_8KqgXpWMLcbo/edit#gid=0 (last visited Feb. 4, 2024).

⁶ *See Nanzi Beitie fadan Hou Fapengyouquan Majiaojing, Zhengzhou Jingfang yi Xunxinzhishi Duiqi Xingju* (男子被贴罚单后发朋友圈骂交警，郑州警方以寻衅滋事对其进行拘) [Zhengzhou Police Detained a Man for Picking Quarrels for uploading a post to Criticize the Traffic Police], Pengpai Xinwen (澎湃新闻) [The Paper] (Aug. 16, 2018), https://www.thepaper.cn/newsDetail_forward_2353231.

⁷ AFP, *Chinese Rights Lawyer Xie Yang detained for ‘inciting state subversion’*, HONG KONG FREE PRESS (Jan. 19, 2022, 8:51), <https://hongkongfp.com/2022/01/19/chinese-rights-lawyer-xie-yang-detained-for-inciting-state-subversion/> [hereinafter AFP].

⁸ *See infra* Part IV.

⁹ *Id.*

¹⁰ TikTok is a social media platform that allows users to create, share, and discover short-form videos. In China, TikTok operates under the name Douyin (抖音), which is a

in jail for this charge because he uploaded a clip in which he pretended to engage in a fictional fight against imaginary opponents.¹¹

Legally, “Picking Quarrels” is defined in Article 293 of the current 1997 Chinese Criminal Code. In theory, this offense encompasses the following actions:

- 1) Arbitrarily attacking people with particularly grave circumstances;
- 2) Chasing, intercepting, or berating others with particularly grave circumstances;
- 3) Forcibly taking, destroying, or occupying public or private property with serious circumstances;
- 4) Creating a disturbance and causing serious disorder in a public place.¹²

Article 293 then specifies the penalties for this offense, which range from supervised release and short-term detention to a maximum of five years of imprisonment.¹³ However, those who are accused of “repeatedly inciting others to commit acts that severely disrupt social order” may face up to ten years of imprisonment.¹⁴

In practice, the broad and vague application of Picking Quarrels makes it difficult to draw a direct connection between Article 293 and the mentioned cases. Article 293 lists four sub-categories, but each one is written in vague terms, such as “particularly grave circumstances” and “berating.”¹⁵ Moreover, compared with the other three sub-categories, sub-

separate version of the app tailored specifically for the Chinese market. In China, Douyin has become one of the most popular social media platforms. *See* Saheli Choudhury, “The Chinese Version of TikTok Now has 600 Million Daily Active Users”, CNBC (Sept. 15, 2020), <https://www.cnbc.com/2020/09/15/bytedance-douyin-has-600-million-daily-active-users.html>.

¹¹ Wen Changhu Juzhong Douou Yi’an Xingshi Yishen Panjueshu(文长户聚众斗殴一案刑事一审判决书)[Criminal First Instance Verdict of Wen Changhu Affray] Xiang 1124 Xingchu No. 119 (Daoxian Basic People’s Ct. May 21, 2019) (CHINA).

¹² The translation of “Picking Quarrels” need to bridge the gap between the Chinese context and the English language. *See* Jeremy Daum, *Updated: Quick Note on ‘Picking Quarrels’*, CHINA L. TRANSLATE (May 6, 2014), [<https://perma.cc/4TK5-WQMJ?type=image/>].

¹³ China Law Translate, *Criminal Law (2021 edition)*, CHINA L. TRANSLATE (Dec. 28, 2020), <https://www.chinalawtranslate.com/en/criminal-law-2021/>.

¹⁴ *Id.*

¹⁵ *See, e.g.*, Liu Hao (刘浩), Xunxinzhishizui Koudaihua de Sifa Xiansuo Lujing (寻衅滋事罪口袋化的司法限缩路径) [*Judicially Narrowing the Crime of Picking Quarrels and Provoking Trouble*] 24 Beijing Ligong Daxue Xuebao (Shehui Kexue Ban) (北京理工大学学报 (社会科学版) [J. OF BEIJING INST. OF TECH. (SOC. SCI. EDITION)]), 162 (2022); Zhang Mingkai (张明楷), “Xunxinzhishizui tanjiu shangbian (寻衅滋事罪探

category four, involving “making a commotion,” acts as a catchall within a catchall, allowing the authorities to prosecute objectionable act or speech under the guise of “causing serious disorder in a public venue.”¹⁶ As one Chinese judge said, if China’s Criminal Code were to include only one crime, it would be Picking Quarrels.¹⁷

As demonstrated by this research, whether a case is inherently politically motivated persecution or not, it appears to have little impact in the context of Picking Quarrels, as the same offence can be arbitrarily applied in both situations. This raises an intriguing question: to what extent does the boundary between political and non-political spheres matter within a contemporary authoritarian legal system like China’s?

Today, there is extensive scholarly debate surrounding the concept of “authoritarian legality” with China often serving as a case study. Optimistic perspectives argue that while the country has become more authoritarian, this centralization of power is achieved through highly legalistic means.¹⁸ Conversely, more critical assessments suggest that China is deviating from the principles of the rule of law, as its once semi-autonomous legal order undergoes a shift towards being subjugated to the political agenda, particularly under Xi’s leadership.¹⁹

Recently, the concept of legal duality has gained prominence. This theory posits that authoritarian legal systems like China’s maintain both a conventional state where a genuine legal order exists and a prerogative state where politics take precedence over law.²⁰

究（上编））[*Studies of Picking Quarrels Crime I*] 1 Zhengzhi yu Falü (政治与法律) [POL. AND L.] 1 (2008).

¹⁶ Chen Xingliang (陈兴良), *Xunxinzhizui de Fajiaoyixue Xingxiang: yi Qihongnaoshi wei Zhongxin Zhankai* (寻衅滋事罪的法教义学形象：以起哄闹事为中心展开) [The Omage of Jurisprudence on the Crime of Picking Quarrels and Provoking Trouble: Focusing on Making Commotion], 3 *Zhongguo Faxue* (中国法学) [China Legal Sci.] 265 at 266-267 (2015).

¹⁷ Interview with a judge in Shenzhen Intermediate People’s Court, in Shenzhen, China (Oct. 1, 2019).

¹⁸ Randell Peerenboom, *Fly High the Banner of Socialist Rule of Law with Chinese Characteristics! What Does the 4th Plenum Decision Mean for Legal Reforms in China?*, 7, *HAGUE J. RULE L.* 49, at 55-56 (2015); see Taisu Zhang & Tom Ginsburg, *China’s Turn Toward Law*, 59 *VA. J. INT’L L.* 306, 281 (2019). Zhang and Ginsburg’s view echo some earlier optimistic accounts, exemplified by Randell Peerenboom. Randell Peerenboom, *The Battle Over Legal Reforms in China: Has There Been a Turn Against Law?*, 2 *CHINESE J. COMPAR. L.* 188 (2014).

¹⁹ Donald Clarke, *Order and Law in China*, 2 *UNIV. ILL. L. REV.* 541, at 559 (2022); Eva Pils, *China’s Dual State Revival Under Xi Jinping*, 46 *FORDHAM INT’L L. J.* 339, 343-45 (2023).

²⁰ Hualing Fu & Michael Dowdle, *The Concept of Authoritarian Legality: The Chinese Case*, in *AUTHORITARIAN LEGALITY IN ASIA: FORMATION, DEVELOPMENT AND TRANSITION* 64 at 64-67 (Chen Weitseng & Fu Hualing eds., 2020; Hualing Fu, Editorial,

Many of these arguments—including optimistic, critical or dualistic, however, tend to assume China’s authoritarian legality is inherently tied to how strong the political nature of the issue is—whether it’s deemed “political” or not.

Despite ongoing scholarly debates, the importance of law in governing authoritarian systems is widely acknowledged.²¹ With this in mind, it becomes crucial to grasp the essence and characteristics of authoritarian law. This article introduces the concept of legal rationality to the discussion of authoritarian legality. It proposes that, whether a system is democratic or authoritarian, legal rationality denotes the intrinsic value of law that is publicly accessible, transparent, and consistent, serving to restrict the arbitrary discretion of individuals in positions of authority. Thus, if there is a decline in legal rationality within an authoritarian system, it may not only result in more political prosecutions but could also lead to increased arbitrariness in non-political domains as well.

China’s post-Mao legal reform can be characterized as an effort to establish a certain level of legal rationality within its authoritarian governance. On one hand, the post-Mao reform aimed to develop a regular legal system to ensure the regime’s stability and legitimacy by promoting economic and social progress.²² On the other hand, the reform sought to standardize the political arena with the hope of helping to prevent political catastrophes like Mao Zedong’s Cultural Revolution.²³

However, despite appearances of China becoming more legalistic under Xi’s leadership, this article argues that the decline in legal rationality reflects not only an increase in arbitrary political suppression but also a rise

Duality and China’s Struggle for Legal Autonomy 1 CHINA PERSPECTIVES 3, 2019, at 3; Wang Yuhua, TYING THE AUTOCRAT’S HANDS: THE RISE OF THE RULE OF LAW IN CHINA at 4 (2014); Flora Sapio, SOVEREIGN POWER AND THE LAW IN CHINA at 3-4 (2010).

²¹ As Zhang and Ginsburg state, “a willingness to both operate in accordance with the written law and to strengthen the institutions charged with its enforcement”, Zhang, Taisu, & Tom Ginsburg, *Legality in Contemporary Chinese Politics*, VA. J. OF INT’L L., (forthcoming) (manuscript at 3) https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2260&context=public_law_and_legal_theory; see also Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. SOC. SCI. 281 at 283-87 (2014) (summarizing several key functions playing by law and courts in authoritarian regimes).

²² Yuhua Wang, TYING THE AUTOCRAT’S HANDS: THE RISE OF THE RULE OF LAW IN CHINA at 4-6 (2014); Donald Clarke et al., *The Role of Law in China’s Economic Development*, in CHINA’S GREAT ECONOMIC TRANSFORMATION 375 (Loren Brandt & Thomas G. Rawski eds.) (2008); Pitman B. Potter, *Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China*, 138, 334, 357 THE CHINA Q. 325 (1994).

²³ This comes from Deng’s own remark. Deng Xiaoping, *On the Reform of the System of Party and State Leadership*, WORDPRESS (Aug. 18, 1980), <https://dengxiaopingworks.wordpress.com/2013/02/25/on-the-reform-of-the-system-of-party-and-state-leadership/>; see also Susan Shirk, *China in Xi’s ‘New Era’: The Return to Personalistic Rule*, 29:2 J. OF DEMOCRACY 22 (2018).

in arbitrariness within the routine legal system. There are at least two explanations for this decline. First, in an authoritarian system, officials tend to exercise arbitrary power as a convenient means to not only exert political control but also address governance issues---they may benefit personally from such actions as well. Second, China's partial legal rationality has been mainly maintained through self-restraint by the Communist Party in the post-Mao era. As this self-restraint weakens, both political and non-political spheres are increasingly vulnerable to arbitrary power of dominant officials.

The example of Picking Quarrels, a catch-all crime that blurs the line between political and non-political offenses, vividly illustrates the diminishing legal rationality in Xi's China. Throughout Mao Zedong's reign from 1949 to 1978, hooliganism functioned as a versatile crime, diverging from legal rationality by being widely applied across both political and non-political contexts. China's 1997 Criminal Code has replaced hooliganism with picking quarrels. Subsequent efforts in the 2000s and early 2010s aimed at rationalizing picking quarrels through clarification of legal terms, moral detachment, and to a limited extent, depoliticization²⁴. As discussed in this Article, under Xi's administration, however, the abuse of Picking Quarrels for political persecution signifies a rise in arbitrary actions within the political realm. Its purpose has shifted from merely preventing challenges to authoritarian rule to zealously discouraging public engagement. On the other hand, the decline of legal rationality is conspicuous in the increasingly arbitrary use of Picking Quarrels within China's routine criminal justice system. This excessive application comes at the cost of the principles of publicly accessible, transparent, and consistent law that had been developed in China during the reform and opening-up era.

The decline of legal rationality across political spheres and ordinary justice in the case of China highlights the necessity of reevaluating our understanding of authoritarian systems—it might be the (ir)rationality of the law, rather than its political nature, that defines authoritarian legality.

The remainder of the article is divided into four main sections. Part I engages in scholarly discussions surrounding China's legal system and introduces a new framework of legal rationality to re-evaluate China's legal reforms post-Mao and their regression during Xi's administration. Part II examines the historical development of the Picking Quarrels offense and its precursor, spanning from Mao to the Hu-Wen era, to better understand the foundation of legal rationality established during China's post-Mao reform. Part III examines why and how the excessive use of Picking Quarrels indicates a growing trend of arbitrariness in political repression under Xi's rule. Part IV explores the abuse of Picking Quarrels in non-political cases, highlighting the parallel decline in legal rationality within China's routine governance.

²⁴ See *infra* discussion on Part II of this Article.

II. AUTHORITARIAN LEGAL RATIONALITY: THE CASE OF CONTEMPORARY CHINA

Scholars have been engaged in an ongoing debate over the meaning of “authoritarian legality” when characterizing contemporary China’s legal system. Some assert with confidence that the CCP is increasingly embracing and relying on legal mechanisms. In contrast, more critical accounts argue that China lacks true legal order, as its legal system is entirely subservient to the Party’s political control. A more recent perspective, the “dual state” argument, offers a more balanced understanding. It acknowledges the co-existence of a legal order and prerogative political power within China’s governance and legal system.

This section enters this productive discourse by introducing the concept of “legal rationality.” It refers to the ability of clear, consistent, and publicly accessible legal rules to restrain the arbitrary discretion of those in power, which is key to the development of China’s authoritarian legal system. Subsequently, a theoretical examination is undertaken to elucidate why and how legal rationality has eroded under Xi Jinping’s leadership, affecting both political and non-political domains.

A. *The Myths of Authoritarian Legality*

As demonstrated by Zhang and Ginsburg’s work titled “China’s Turn Toward Law,” some optimistic scholars contend that the CCP is displaying a greater commitment to observing more laws during Xi Jinping’s era. Zhang and Ginsburg’s argument centers on the idea that despite the trend of centralization under Xi, centralization occurred in a highly legalistic manner.²⁵ In support of this argument, Zhang and Ginsburg note the growing institutional authority of Chinese courts and their increasing political independence against other state apparatuses,²⁶ and “a status boost of Chinese Constitution” as more “instrumentally important” for the Party’s rule than before.²⁷ While adopting a more critical stance, this viewpoint does evoke echoes of earlier optimistic discussions, such as the “thin/thick version” of the rule of law, which posited that the development of legal institutions is a crucial step in the advancement of the “China Model,” including the potential to progress toward a genuine rule of law system.²⁸

²⁵ Zhang & Ginsburg, *supra* note 18 at 281.

²⁶ *Id.* at 295-96.

²⁷ *Id.* at 318-19.

²⁸ See, e.g., Randall Peerenboom, CHINA’S LONG MARCH TOWARD RULE OF LAW at 2-6 (2002) (discussing the “thin/thick version” of the rule of law) [hereinafter Peerenboom (2002)]; Randall Peerenboom, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST at 72-77 (2007) (discussing the China Model and legal development); Randall Peerenboom, JUD. INDEP. IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION (Randall Peerenboom ed., 2009) (Chapter 1 and 2 of the book

These arguments are not incorrect when it comes to the factual observations. Indeed, under Xi's leadership, China has seen an increase in the number of laws enacted in the past decade,²⁹ and Chinese judges have become more professionally trained.³⁰ However, does having more black-letter laws enacted necessarily mean better quality of law? Do better-educated judges necessarily and sufficiently bring about better justice? Therefore, it is the framework, or the way we interpret these facts, that requires reevaluation and further elucidation.

In particular, we may need to critically reassess the concept of "legality."³¹ The issue might not be whether China has "more or fewer" laws, but rather the nature and quality of those laws. Arguing that China is moving toward greater legality may raise more questions than answers. This is because arguments about "turning toward law" tend to categorize phenomena with a legal label as legality, without critically examining the essence of that legality. Consequently, the term "legality" may become either too vague or difficult to define.

One particularly questionable use of "legality" in authoritarian systems is equating a strategic attachment to the law with having true legality. This can involve a focus on the sheer volume of rules issued, the number of cases brought to court, or how the regime uses the language of the law rhetorically. Without considering the substantive meaning of the law, the term "legality" risks encompassing a wide range of legislations and court orders, including antisemitic legislations under Nazi Germany's rule in the 1930s or Putin's signing of laws to annex four Ukrainian regions during the Russian military invasion in 2022.³² This interpretation may not hold up under closer scrutiny.

"Legality" should indeed entail more than merely acting "in the name of the law." At the end of the day, creating a rule doesn't automatically make it a law. Instead, we need to scrutinize the intrinsic values of legality.

emphasize a pluralistic perspective to examine judicial independence in China, while Chapter 3 argues for contextualizing ways of understanding judicial independence.)

²⁹ This indeed has been propagandized as one of Xi's achievements in the recent decade. See Lifa Shuliang Dafu Zengjia, Xianxing Youxiao Falü 292 Jian (立法数量大幅增加, 现行有效法律 292 件) [the amount of legislation has increased significantly; there are currently 292 effective laws]. Nat'l People's Cong. of PRC, June 6, 2022, <http://www.npc.gov.cn/npc/c30834/202206/4e90e8b6e867495d82e82722a563d284.shtml>.

³⁰ Such a new trend of judicial professionalization are well documented by, for example, Mark Jia, *Special Courts, Global China*, 62 VA. J. INT'L L. 1, at 573-55; 583-88 (2022); see also Sun Ying & Hualing Fu, *Of Judge Quota and Judicial Autonomy: An Enduring Professionalization Project in China*, 251 THE CHINA Q. 866, at 866-67 (2022).

³¹ Eva Pils even argued that the concept "authoritarian legality" is a misleading one. See Pils, *supra* note 19 at 27.

³² Saul Friedländer, *NAZI GERMANY AND THE JEWS: VOLUME 1: THE YEARS OF PERSECUTION 1933-1939*, Ch. 1-5 (1998) (offering a detailed analysis of these laws).

In China's context, for example, it's equally important to unveil the underlying tenets of "legality" as it is to acknowledge its pragmatic benefits for the Party. In other words, since the Party's authority has a growing interest and attachment to law, it's imperative to understand the nature of this "law." For these essential questions, neither the "rule of law discourse" nor the "turn toward more law" arguments have fully addressed these fundamental questions.³³

In this regard, Clarke's theory of order maintenance offers insights into addressing some of the challenges posed by the more optimistic viewpoints.³⁴ The order maintenance theory asserts that in China, the legal order is subservient to the political order. Laws, according to this theory, are essentially political directives for the Party.³⁵ Clarke argues that these political directives are not primarily designed to facilitate legal activities or dispense justice but rather to introduce an additional control mechanism for upholding and reinforcing political authority.³⁶

While one does not need to entirely dismiss the existence of an autonomous legal order in China's authoritarian system, Clarke's theory encourages us to think about the true nature of laws in such regimes---it's misleading to label institutions primarily focused on order maintenance as legal when their main purpose is not legal activity.³⁷

The goal of this article, of course, isn't to pinpoint which Chinese institutions are mischaracterized as legal or to explore how China falls short of the "rule of law" standard. Rather, it aims to propose an alternative, more nuanced paradigm for understanding the Chinese legal order and its relation to authoritarian rule.

For that purpose, it may be more suitable to acknowledge that the Party-State utilizes autonomous law as a means to bolster its authority, rather than outright rejecting the existence of an autonomous legal order in China. This article takes a more nuance position and notes that China does possess a functional legal system and a genuine legal order on *some* occasions.

This should not be surprising. As Solomon points out, since the collapse of the former Soviet Union in the early 1990s, many authoritarian regimes worldwide (including China and Russia) have had to engage with

³³ For instance, in Zhang and Ginsburg's piece, the meaning of "legality" wasn't clearly defined, and the key aspects of the concept weren't fully articulated.

³⁴ The order maintenance theory could be associated with other similar accounts, such as the "law and order" theory, and Thomas Stephens's "disciplinary model." See Nick Cheesman, *OPPOSING THE RULE OF LAW: HOW MYANMAR'S COURTS MAKE LAW AND ORDER*, 34 (2016); Thomas Stephens, *ORDER AND DISCIPLINE IN CHINA: THE SHANGHAI MIXED COURT: 1911-1927*, 5-8 (1992).

³⁵ Clarke, *supra* note 19 at 554.

³⁶ *Id.* at 542, 554.

³⁷ *Id.* at 554.

the global market and international legal order mainly built by the United States and its allies to ensure their survival.³⁸

In the context of contemporary authoritarian regimes, it has become vital to establish a legal system sharing certain commonalities with the global legal framework. This system is characterized not only by impartial legal rules and independent courts but also by a degree of legal rationality.³⁹ Legal rationality involves offering transparent, consistent, and accessible rules that can partially address commitment issues across various domains, including international investment.⁴⁰ These qualities of law are particularly important for addressing the inherent arbitrariness of decision-making in authoritarian governance and is essential for the continuation of such regimes.⁴¹

B. *The Thesis of Dual State*

A fundamental paradox within a functional contemporary authoritarian legal system is that, when deemed necessary, the authorities can suspend the normal operation of this system and replace it with their arbitrary discretion.⁴² This dilemma is highlighted by the concept of legal duality, drawing from Ernst Fraenkel's model of the dual state, which has been used to characterize China's legal order under a one-party dictatorship.

Ernst Fraenkel's work, published in 1941, examined the erosion of the rule of law in the German Weimar Republic as it was undermined by the

³⁸ Peter Solomon, *Authoritarian Legality and Informal Practices: Judges, Lawyers and the State in Russia and China*, 43 COMMUNIST AND POST-COMMUNIST STUDIES 351, 360 (2010).

³⁹ *Id.*; Peter Solomon, *Review Article: Courts and Judges in Authoritarian Regimes*, 60 WORLD POLITICS 122 at 141-45 (2007) [hereafter Solomon (2007)]; Tom Ginsburg & Tamir Moustafa, *Introduction*, in RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 1, 17 (Tom Ginsburg & Tamir Moustafa eds., 2008).

⁴⁰ For instance, a classic argument, as articulated by Judge Richard Posner, suggests that for a modernizing nation to achieve economic prosperity, it must establish a fundamental legal framework that prioritizes the safeguarding of property and contract rights. See Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RSCH. OBSERVER 1, 1 (Feb. 1998). This principle holds true even in authoritarian settings, as evidenced by Peter Solomon's examination of courts and judges in such regimes. See Solomon (2007), *id.* The significance of this perspective is also well-documented in the context of China. For example, scholars like Shitong Qiao and Frank K. Upham have extensively explored China's evolving property law landscape. See Shitong Qiao & Frank K. Upham, *China's Changing Property Law Landscape*, in COMPAR. PROP. L.: GLOB. PERSP. 311 (Michele Graziadei & Lionel Smith eds., 2017), while Jacques deLisle has examined the relationship between law and the development model in China. See Jacques deLisle, *Law and the China Development Model*, in IN SEARCH OF CHINA'S DEV. MODEL: BEYOND THE BEIJING CONSENSUS 147 (S. Philip Hsu et al. eds., 2011).

⁴¹ For example, see Jothie Rajah, *Authoritarian Rule of Law: Legislation, Discourse, and Legitimacy in Singapore*, 21 IND. J. OF GLOB. LEGAL STUD. 1-3 (2014).

⁴² Pils, *supra* note 19, at 27.

fascist Nazi government. Fraenkel's argument centered on the idea that the "political sphere" or the "prerogative state," governed by the arbitrary measures of dominant officials, had emerged alongside a legal order that had evolved over centuries in Germany.⁴³ This "prerogative sphere" existed in parallel with the "normative sphere", which was regulated by established legal rules. Together, these two spheres constituted what Fraenkel termed a "Dual State."⁴⁴

Under Fraenkel's theory, the prerogative state is described as "a vacuum as far as law is concerned" and it is exemplified by politically motivated prosecutions.⁴⁵ Fraenkel defines the prerogative state as a political sphere governed solely by the arbitrary discretion and actions of dominant officials.⁴⁶ In contrast, within the realm of the normal state where the law and courts primarily address non-political matters such as ordinary crimes, cases are typically handled in a rights-based and routine manner.⁴⁷

Indeed, the theory of legal duality serves as a useful framework for understanding authoritarian legal systems like China's. This perspective posits that China's legal reform diverges from the liberal-democratic rule of law model by simultaneously tightening political control and investing a routine legal order.⁴⁸ Importantly, legal duality is not viewed as a transitional concept toward liberal democracy, but as the regime's ambiguous and strategic commitment to the law.⁴⁹ This commitment aims to modernize authoritarian rule with the goal of making the regime more stable and prosperous, all while retaining its authoritarian nature.⁵⁰ The theory of legal duality can shed light on why authoritarian leaders might tolerate or even promote some level of transparency, accountability, and protection of rights to achieve practical objectives, as long as these

⁴³ Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (E.A. Shils, Edith Lowenstein & Klaus Knorr trans. OXFORD UNIV. PRESS, INC.) (2017).

⁴⁴ Fu & Dowdle, *supra* note 20, at 67.

⁴⁵ Pils, *supra* note 19, at 2.

⁴⁶ Fraenkel, *supra* note 43, at 3.

⁴⁷ See Fu, *supra* note 20, at 3; Albert H.Y. Chen, *China's Long March Towards Rule of Law or China's Turn against Law?* 4 THE CHINESE J. OF COMPAR. L. 1 (2016); Rachel Stern, ENVIRONMENTAL LITIGATION IN CHINA: A STUDY IN POLITICAL AMBIVALENCE (2014).

⁴⁸ Jacques deLisle, *Law in the China Model 2.0: Legality, Developmentalism and Leninism under Xi Jinping*, 26 J. OF CONTEMP. CHINA 68, 68 (2017); Wang, *supra* note 22, at 3-4; Hualing Fu, *Politicized Challenges, Depoliticized Responses: Political Monitoring in China's Transition in SURVEILLANCE, COUNTER-TERRORISM AND COMP. CONSTITUTIONALISM*, 296 (Fergal Davis et al. eds., 2014).

⁴⁹ Weitseng Chen & Hualing Fu, *Introduction: Authoritarian Legality, the Rule of Law, and Democracy, in AUTHORITARIAN LEGALITY IN ASIA: FORMATION, DEVELOPMENT AND TRANSITION* 1, 2-3 (Weitseng Chen & Hualing Fu eds., 2020).

⁵⁰ *Id.* at 3, 5, 13.

measures do not pose a threat to the regime's survival.⁵¹

However, the thesis of dual state has its significant limitations when we examine more closely its application to the case of contemporary China. One limitation of dual state arguments is the assumption that the prerogative state only exists within the political sphere, while the non-political sphere is presumed to be a separate and functional routine legal system.⁵² This assumption may be rooted in the fact that Fraenkel's original theory was developed based on the experience of the Third Reich.⁵³ During this period, the prerogative state was superimposed by the Nazi Government upon a mature rule of law system that had been built on natural law principles since the 17th century.⁵⁴ This mature legal system was suspended by the 1933 Martial Law, primarily for the imposition of Nazi political radicalism.⁵⁵

More importantly, the relatively short history of Nazi Germany may not fully reveal a critical aspect of a dual-state system: the natural tendency of the prerogative state to erode the normal state.

Unlike the Nazi government, where the prerogative order was established upon a mature legal system, throughout the history of the PRC since its establishment in 1949, we have not witnessed the development of a fully mature functional legal order.⁵⁶ Quite the contrary, in China's case, the arbitrariness of dominant officials serves as not only the foundation of the political sphere but also an integral component in the development of its routine legal system since 1978.⁵⁷ If anything, this situation has rendered China's routine governance more susceptible to erosion by the prerogative power.

In light of this theoretical foundation, the next section will introduce the concept of legal rationality to develop a more nuanced framework aimed at bridging the gaps left by the theory of legal duality, "turn toward law"

⁵¹ *Id.* at 5, 13.

⁵² For a proponent of this stance, *see, e.g.*, Fu *supra* note 20 at 6-7.

⁵³ *See generally* Fraenkel, *supra* note 43 (The main argument of the book seems to be largely based on Fraenkel's observations of the Third Reich.).

⁵⁴ Pils, *supra* note 19, at 341.

⁵⁵ This is one of the primary points emphasized by Fraenkel. *See* Fraenkel, *supra* note 43, at 9-14.

⁵⁶ For example, during Mao's China (1949-1976), only a few laws were enacted, such as the PRC Constitution, Marriage Law, Land Reform Law, and Union Law. Other laws that are fundamental to a legal system, including criminal law and contract law, were absent until the late 1970s. *See* Wang Chen, Jianchi Quanmian Yifa Zhiguo Fazhi Zhongguo Jianshe Maichu Jianshi Bufa (坚持全面依法治国 法治中国建设迈出坚实步伐) [Adhering to Comprehensively Governing the Country According to Law, the Construction of the Rule of Law in China Has Taken Solid Strides], PEOPLE.CN (Nov. 23, 2021) <http://politics.people.com.cn/n1/2021/1123/c1001-32289162.html>.

⁵⁷ *See infra* the example of hooliganism in Part II of this Article.

and “order maintenance” discourses.

C. *Legal Rationality in Post-Mao China and its Decline Under Xi*

1. Authoritarian Legal Rationality

This article defines “legal rationality” as a condition in which dominant officials’ arbitrary discretion is constrained by publicly accessible, clear, and consistent legal rules. The term “rational” inherently implies the imposition of limits on irrational impulses or arbitrariness, making legal rationality a fundamental component of any operational legal system, even within an authoritarian context.⁵⁸ Irrational legal systems, or at least non-rational legal systems in Max Weber’s ideal type, refer to those that rely on non-rational features such as personal insight, passion, whims, or feelings.⁵⁹

Legal rationality is a commitment in modern legal systems including the American legal system.⁶⁰ While authoritarian legality serves as an instrumental commitment, it necessitates a degree of respect for the substance or internal value of the law to ensure its functionality.⁶¹ If rules are vague, obscure, or self-contradictory, a functioning legal system becomes compromised, potentially devolving into what Bentham termed “Dog Law.”⁶² This wrecked approach entails punishing individuals for actions retroactively, without prior guidance, which fundamentally arises from irrational human impulses rather than the rationality inherent in a legal system.⁶³

Legality, irrespective of its political context, hinges on rules that are easily accessible, unambiguous, and uniform. In Lon Fuller’s argument, these components represent an internal morality of law, fostering

⁵⁸ For example, Collins Dictionary defines “rational” as decisions and thoughts are based on reason rather than emotion. COLLINS DICTIONARY, [https://www.collinsdictionary.com/us/dictionary/english/rational#:~:text=\(r%C3%A6%C A%83%C9%99n%C9%99l,come%20to%20a%20rational%20decision](https://www.collinsdictionary.com/us/dictionary/english/rational#:~:text=(r%C3%A6%C A%83%C9%99n%C9%99l,come%20to%20a%20rational%20decision) (last visited Apr. 15, 2024).

⁵⁹ Max Weber, *ECONOMY AND SOCIETY* 844-48 (Guenther Roth & Claus Wittich eds. Fischhoff et al trans., UNIVERSITY OF CAL. PRESS, 1978).

⁶⁰ For discussion of legal rationality in American legal system, see Mark Jia, *American Law in the New Global Conflict*, N.Y.U. L. REV., forthcoming (2023).

⁶¹ Fu & Dowdle, *supra* note 20 at 84.

⁶² Caveat: Bentham described the “dog-law” as “When your dog does anything you want to break him of, you wait till he does it, and then beat him for it...” Today, subjecting a dog to verbal or physical violence is not acceptable. No dog should endure such treatment. However, during Bentham's time in 18th-19th century Europe, beating one's dog as a form of physical discipline was considered an effective method to deter bad behavior.

⁶³ Jeremy Bentham, *THE WORKS OF JEREMY BENTHAM* Vol. V, 235 (John Bowring ed., William Tait, 1843).

predictability for rational decision-making and behaviors.⁶⁴ Shapiro's rational social planning theory extends this notion, suggesting that law transcends mere rule-making and enforcement, serving as a rational mechanism to resolve behavioral uncertainties, encourage compliance, and form purposeful action.⁶⁵ In other words, the provision of predictability in law enables citizens to effectively plan their lives.⁶⁶ In this regard, Max Weber's classic discussion of rationality in modern society is also useful for unpacking our definition legal rationality. In the writings of Max Weber, rationality within governance systems supports modern economic rationalism, enabling individuals to organize their lives in a practical and rational manner.⁶⁷

Legal rationality, while essential, does not singularly constitute the rule of law. The latter requires additional liberal-democratic principles, particularly concerning political rights and the separation of powers. However, it's crucial to note that legal rationality in an authoritarian system may exhibit similarities with legal rationality in a liberal democracy. This includes the presence of publicly accessible, clear, and uniform laws to ensure that government actions align with the objectives set by the regime.

In sum, the law serves as a critical tool for rationalizing the governance structure of modern authoritarian regimes. While such systems may not embrace the liberal-democratic model, a functional legal system can offer certain alternatives to checks and balances. These measures may partly restrain arbitrary actions within the political sphere and everyday administration. Therefore, in this regard, legal rationality within an authoritarian regime act as a mechanism of self-restraint for those in power, aimed at averting excessive arbitrariness and fostering the regime's stability and development.

In this context, employing the lens of legal rationality in the previously discussed dual state framework, the "Normal End" seems to signify a rational domain where legal regulations can effectively curb arbitrary actions. Conversely, the "Prerogative End" denotes a situation where dominant officials wield arbitrary power without any legal constraints. It's worth noting that the "prerogative end" may involve "laws" that are exceedingly vague, secretive, and inconsistent, making them entirely irrational.

Therefore, it may be more accurate to characterize the "dual state" as an Irrational-Rational continuum rather than a political versus non-

⁶⁴ LON FULLER, *The Morality That Makes Law Possible in THE MORALITY OF LAW*, Chapter II (rev. ed Yale University Press, rev. ed., 1964).

⁶⁵ SCOTT J. SHAPIRO, LEGALITY 195, 201, 203 (2011).

⁶⁶ *Id.* at 395-96.

⁶⁷ MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 160 (Talcott Parsons trans., 2nd ed. 2001).

political dichotomy:

Prerogative (Irrational) End ————— Normal (Rational) End

In this regard, China serves as a compelling case study to explore the intricacies of legal rationality within an authoritarian framework. Following the post-Mao reform (1978-), the CCP demonstrated a degree of self-restraint, seeking to modernize its authoritarian governance by incorporating a limited form of legal rationality into its system. After the turbulence of the Cultural Revolution, the Party's reformists introduced elements of Weberian rational-legal authority⁶⁸ to restrain *individual* leaders and dominant officials, aiming to uphold the *Party* as a collective hegemony. The reformists believed that rationalizing the Party-State through legal reforms could facilitate the effective management of routine affairs and preempt potential political chaos resulting from irrational political leadership, all while allowing the Party to employ its *ad hoc*, extra-legal power in more calculated ways.

However, the era under Xi's leadership has witnessed a decline in legal rationality, despite the authoritarian regimes apparent commitment to upholding the law on the surface. During Xi's administration, the efficacy of laws in curbing arbitrary discretion and measures has waned, leading to repercussions in both the political and non-political domains within China's governance and legal system⁶⁹.

In the subsequent sections, I present two explanations for the decline of legal rationality within China's authoritarian system. First, the inherent prerogative power of dominant officials tends to undermine the regular legal order, not solely for political reasons, since the same prerogative power could benefit the self-interest of officials and offer more quick fixes to address challenges in routine governance. Second, and of greater significance, the foundation of legal rationality established during China's post-Mao reform heavily relied on the Party's self-restraint. With a reduction or abandonment of this self-restraint, there are fewer constraints left to impede the natural expansion of arbitrary power.

2. Erosion of the "Normal State" by the Prerogative State

In an authoritarian system, officials often leverage their prerogative to wield arbitrary discretion, using it to address daily issues and, at times,

⁶⁸ The Weberian definition of "legal order in rational-legal authority" describes a system where rules are enacted and obeyed as legitimate because they align with other laws on how they should be enacted and obeyed. As an extension, contemporary authoritarian regimes can govern using legal-rational authority as long as leaders recognize a set of laws external to their powers. See Weber, *supra* note 59, at 217-23.

⁶⁹ See discussion on *infra* Parts IV and V.

to their personal advantage. In Fraenkel's original "dual state" framework, the pervasive impact of the prerogative state on the normal state was prominently highlighted.⁷⁰ An illustration provided by Fraenkel from the Third Reich concerned the deprivation of rights of homosexual individuals, mirroring the treatment of those facing prosecution for political reasons. According to Fraenkel, this was because the political authorities had the prerogative power to determine whether the matter would be dealt with according to legal rules or their arbitrary decisions.⁷¹ Fraenkel therefore concluded that the creation of the prerogative state essentially amounts to, in Fraenkel's words: "pronounced the death sentence on the Rule of Law," since "there are no matters safe from the intervention of the political authorities who, without any legal guarantees, are free to exercise discretion for political ends."⁷²

Nonetheless, Fraenkel did not explore the issue of prerogative erosion further. This omission is understandable given that Fraenkel's book was published in 1941, a significant time before the flourishing of contemporary social science theories such as behaviorism/rational choice and neo-institutional theories, which gained prominence in the latter half of the 20th century. Nevertheless, we can enhance Fraenkel's insightful observations by integrating some social science theories to better elucidate the phenomenon of prerogative erosion in modern-day authoritarian systems like the one in China.

First, the prerogative erosion could be understood through the lens of the principal-agent theory (P-A Theory). While my intention is not to confuse the readers with additional concepts, the usage of P-A Theory here aims to illustrate that the relationship between authoritarian rulers and their officials transcends a simple binary dynamic of superiors and order-followers. The P-A theory also suggests that in practice, agents tend to prioritize personal gain at the expense of the organizational goals.⁷³ Therefore, the ruler's ability to address the agency problem hinges on whether public officials could be held politically accountable.⁷⁴

⁷⁰ Fraenkel, *supra* note 43, 70-71.

⁷¹ *Id.* 42-43.

⁷² *Id.* at 43,45.

⁷³ Dietmar Braun & David H. Guston, *Principal-Agent Theory and Research Policy: An Introduction*, 30 SCIENCE AND PUBLIC POLICY, 302, at 303-304 (2003); *see generally*, Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANNUAL REVIEW OF POLITICAL SCIENCE, 203 (2005) (discussing the evolution of using P-A models to analyze political institutions).

⁷⁴ *See generally*, Sean Gailmard, *Accountability and Principal-Agent Theory*, in THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY (Mark Bovens et al. eds., 2014). Discussing holding accountable politicians via electoral systems, and oversight of bureaucracies by legislative, executive, and/or judicial entities within the framework of the P-A Model.

In authoritarian regimes like China, officials' arbitrary discretion can offer them considerable benefits without significant accountability. This is primarily due to authoritarian rulers' limited attention span and lack of capacity in monitoring individual behaviors within a vast bureaucracy,⁷⁵ coupled with the general powerlessness of the citizenry to hold officials accountable within a closed political system.⁷⁶ Consequently, officials in authoritarian systems may incline toward the abuse of power in domains where such authority should not be wielded.

Second, in an authoritarian setting, resources are primarily directed towards politically sensitive and prioritized issues crucial for the regime's survival, as opposed to routine governance. Given their ability to manage these resources with limited public accountability, officials are prone to employing the resources and methods from the prerogative state as "quick fix" solutions for addressing issues in routine state administration. In this context, the "garbage can" theory is pertinent in explaining this trend. Essentially, the "garbage can" theory characterizes a decision-making pattern prevalent in human institutions as solutions in search of problems, indicating a tendency to prioritize familiar responses over exploring alternative measures that deviate from the most conventional toolkits.⁷⁷ In our case, suspending rights and adopting extra-law methods to address exigencies plays right into the authoritarian regime's wheelhouse. For officials in authoritarian regimes, resorting to prerogative methods might appear as convenient, immediate solutions for addressing daily challenges. However, this often results in the imposition of arbitrary measures into non-political, routine affairs.

Consequently, the arbitrary authority of officials in authoritarian systems may tend to infiltrate the legal order like a spreading cancer, encroaching upon diverse aspects of authoritarian governance and persistently establishing new prerogative zones, regardless of the situation's political nature.

These theoretical discussions should offer valuable insights into understanding the dynamics of authoritarian legality in China, especially in the context of the decline of legal rationality during Xi's leadership.

⁷⁵ See Mayling Birney, *Decentralization and Veiled Corruption Under China's "Rule of Mandates"*, 53 *WORLD DEVELOPMENT* 55 (2014); Yongshun Cai, *State and Agents in China: Disciplining Government Officials*, 2016 *CHINA PERSPECTIVES* 71 (2015).

⁷⁶ Marlies Glasius, *What Authoritarianism is...and is not: A Practice Perspective*, 94 *INT'L AFF.* 515, 525-26 (2018).

⁷⁷ Michael D. Cohen et al., *A Garbage Can Model of Organizational Choice*, 17 *ADMINISTRATIVE SCIENCE QUARTERLY* 1, 2-4 (1972); JON PIERRE & B. GUY PETERS, *GOVERNING COMPLEX SOCIETIES: TRAJECTORIES AND SCENARIOS*, chapter 3 (1st ed. 2005) (generally updating the discussion of governance in the perspective of garbage can).

3. Building Partial Legal Rationality in post-Mao China

Following Mao Zedong's death, China's reformists embraced legal rationality, attempting to transform the Party-State as a capable bureaucratic apparatus while preventing arbitrariness from dismantling the Party's rule. However, unlike Germany before the rise of the Nazis, which had a well-established legal framework dating back to the 17th century, China, during its legal reform in the late 1970s, had little legal foundation remaining from the Maoist era.

One of the most significant driving forces behind China's post-Mao legal reform was the Party's adoption of self-restraint, a proposition advocated by reformists like Deng Xiaoping. They recognized that legal rationality could serve as an effective means to curb arbitrariness in both political repression and everyday governance. Deng Xiaoping articulated this perspective with his statement: "Both the Party and the masses should be subject to the authority of law", "making sure that the political system and laws do not change with shifts in leadership, and do not change with alterations in the perspectives and focus of leaders."⁷⁸ The statement was not a mere platitude but evolved into a concrete goal that guided substantial efforts in institutional reform starting from 1978.

On one hand, the Party required a regular legal framework to facilitate China's economic reform and international involvement. The principle of "governing the country according to law" was introduced by the Party. Despite laws being established by CCP leaders rather than through a democratic process, Party-State officials were required to adhere to legal authority in addition to Party authority.⁷⁹ The criminal justice system began to be institutionalized, and a rule-based work style began to be promoted.⁸⁰

⁷⁸ Jiang Chuanguang (蒋传光), *Dèngxiǎopíng fǎzhì sīxiǎng yǔ zhōngguó fǎzhì jiànshè de lǐchéngbēi* (邓小平法治思想与中国法治建设的里程碑) [*Deng Xiaoping's Thoughts on the Rule of Law and Milestones in China's Rule of Law Construction*], 1 HUAN QIU FA LÜ PING LUN (环球法律评论) [GLOBAL LAW REVIEW] 5,7 (2017). See also, PITMAN B. POTTER, FROM LENINIST DISCIPLINE TO SOCIALIST LEGALISM: PENG ZHEN ON LAW AND POLITICAL AUTHORITY IN THE PRC (2003) (discussing how the mindset and interests of key Party leaders in bolstering their institutional power base shaped legal reform in China during the reform and opening-up era).

⁷⁹ The example of Deng Xiaoping's Campaign of Legal Popularization started in the 1986. See Zhao Tianbao (赵天宝), "Zhongguo Pufa Sanshinian (1986-2016) de kundun yu chao Yue (中国普法运动三十年: 困顿与超越) [The Difficulties and Transcendence of the Thirty Years of Law Popularization in China (1986-2016)]" 4 Huanqiu Falü Pinglun (环球法律评论) [GLOBAL LAW REVIEW] 60 (2017); see also, generally, Xu Zhangrun (许章润), *Pufa Yundong* (普法运动) [Campaign of Legal Popularization] (2011).

⁸⁰ This has been reflected in criminal laws and policies issued during the early reform and opening-up period. See, e.g., SIDA LIU & TERENCE HALLIDAY, CRIMINAL DEFENSE IN CHINA: THE POLITICS OF LAWYERS AT WORK 22-23 (2016); Hualing Fu, *Autonomy, Courts, and the Politico-Legal Order in Contemporary China*, in THE

On the other hand, in their efforts to stabilize the regime, China's reformist leaders aimed to partially rationalize the distribution of political power. Deng introduced rational-legal institutions to the apex of the power structure, emphasizing collective leadership.⁸¹ The short-lived experiment of separating the Party and the State in the 1980s,⁸² and the establishment of an informal constitutional convention limiting the presidential term,⁸³ were some of the notable examples of these efforts. Furthermore, even political suppression underwent a process of increased rationalization, with officials becoming subject to limited constraints imposed by legal procedures. Notably, in certain high-profile politically motivated prosecutions in the early reform period, such as the trials of the Gang of Four and Wei Jingsheng, defendants were permitted to present their self-defense in languages not sanctioned by the Party.⁸⁴

However, at no stage did Deng or the Party reformists intend to relinquish the Party's prerogative power in either routine governance or the political realm. Their dedication to legal rationality was, at best, half-hearted.

During the Jiang Zemin and Hu-Wen era (1992-2012), the Party leadership broadly followed Deng Xiaoping's framework of rationalizing China's governance and legal system through the Party's exercise of self-restraint. For instance, literature from this period indicated that the Party aimed to reduce its intervention in the daily operations of the criminal process, allowing greater autonomy for state apparatuses to handle criminal cases.⁸⁵ Additionally, there was an increasing reliance on established rules in handling day-to-day criminal cases.⁸⁶ Despite heavy restrictions and monitoring,

ROUTLEDGE HANDBOOK OF CHINESE CRIMINOLOGY 76 at 84 (Liqun Cao et al. eds., 2014).

⁸¹ See, e.g., Deng Xiaoping, *Zucheng Yige Shixing Gaige de Youxiwang de lingdao Jiti* (组成一个实行改革的有希望的领导集体) [*Form a Promising Leadership group to Implement Reforms*], in 3 SELECTED WORKS OF DENG XIAOPING 296-301 (1989).

⁸² See, e.g., Hsiao Pen, *Separating the Party from the Government*, in DECISION-MAKING IN DENG'S CHINA 153 (Carol Lee Hamrin, Suisheng Zhao, A Doak Barnett eds., 1995).

⁸³ Andrew J. Nathan, *China's Changing of the Guard: Authoritarian Resilience*, 14 J. OF DEMOCRACY 6, 8 (2003).

⁸⁴ Jerome Cohen, *Criminal Justice in China: From the Gang of Four to Bo Xilai*, HUMAN RIGHTS WATCH (Jul. 25, 2013), <https://www.hrw.org/news/2013/07/25/criminal-justice-china-gang-four-bo-xilai>; see also Stéphanie Balme & Michael W. Dowdle, *Introduction: Exploring for Constitutionalism in 21st Century China*, in BUILDING CONSTITUTIONALISM IN CHINA 1 (Stéphanie Balme & Michael Dowdle eds., 2009).

⁸⁵ Fu, *supra* note 80, at 76.

⁸⁶ See, e.g., Hualing Fu, *Institutionalizing Criminal Process in China*, in THE DEVELOPMENT OF THE CHINESE LEGAL SYSTEM: CHANGE AND CHALLENGES 26 (Guanghua

civil society was permitted to exist as a coping strategy for mitigating social issues.⁸⁷ Nevertheless, again, it is clear that the Party never intended to relinquish its prerogative power in any way. For example, China's new 1997 Criminal Code merely renamed most counterrevolutionary crimes as national security offenses, retaining their original political application.⁸⁸ Furthermore, extralegal measures continued to be employed in cases of intense political persecution, such as the suppression of Falungong during the Jiang era⁸⁹ and the case of Liu Xiaobo during the Hu-Wen administration.⁹⁰

In summary, unlike the Nazi prerogative state, which was established within a mature rule of law system, China's rational-legal governance system was constructed by the CCP in the post-Mao era with a cautious but half-hearted implementation of self-restraint. Consequently, in the case of China, the prerogative power not only defines what is the political sphere but also has been constituted an integral part of legal order and routine governance, a characteristic inherent from the onset of the post-Mao reform. This inherent deficiency in legal rationality renders both the political and non-political domains in China more susceptible to the resurgence of the prerogative power under Xi Jinping's administration.

Yu ed., 2011); Mike Chu, *Criminal Procedure Reform in the People's Republic of China: The Dilemma of Crime Control and Regime Legitimacy*, 18 PAC. BASIN L. J. 157 (2000).

⁸⁷ See, e.g., JESSICA C. TEETS, CIVIL SOCIETY UNDER AUTHORITARIANISM: THE CHINA MODEL (2014) (discussing how authoritarian regime in China and its civil society learned from each other in the reform era which formed certain level of cooperation); TIMOTHY HILDEBRANDT, SOCIAL ORGANIZATIONS AND THE AUTHORITARIAN STATE IN CHINA (2013) (discussing how NGOs and other social organizations strategically use opportunity structure to survive and sprouted in the one-Party authoritarian states.).

⁸⁸ See DONALD CLARKE, WRONGS AND RIGHTS: A HUMAN RIGHTS ANALYSIS OF CHINA'S REVISED CRIMINAL LAW 43 (1998). (Clarke observes that "It is important to note, however, that the justifications offered do not reflect any kind of liberalizing impulse. Indeed, commentators stressed that the change of name was not intended to imply any change of substance")

⁸⁹ See PEI MINXIN, *China: Totalitarianism's Long Shadow* 32:2 J. of Democracy 5 at 14 (2021) (Pei notes that "As far back as 1999, when the CCP cracked down on the Falun Gong spiritual movement, the regime showed that it could dismantle a nationwide organization with more than a hundred- million followers through mass surveillance, arrests, imprisonment, torture, and political indoctrination."); see also, generally, JAMES W. TONG, REVENGE OF THE FORBIDDEN CITY: THE SUPPRESSION OF THE FALUNGONG IN CHINA (2009) (a study of systematic crackdown of Falungong in Mainland China).

⁹⁰ See generally, JEAN-PHILIPPE BÉJA, FU HUALING, EVA PILS, LIU XIAOBO, CHARTER 08 AND THE CHALLENGES OF POLITICAL REFORM IN CHINA (Jean-Philippe Béja et al. eds., 2012) (collecting essays discussing the case of Liu Xiaobo and its political, legal and social implication).

4. A Decline of Legal Rationality Under Xi Jinping

We are currently witnessing a decline in legal rationality within China's authoritarian system as the prerogative power experiences a resurgence, impacting both the political and non-political spheres under Xi's administration. Despite the outward appearance of an increased embrace of laws within China's governance system, this attachment to laws does not necessarily equate to the incorporation of additional rational elements. Instead, what we are observing is a growing arbitrariness during Xi's era that has eroded much of the legal rationality the Party-State had built during the reform era.

As Shirk observes, with support from Party bureaucratic interest groups, Xi has taken ambitious steps to centralize power, undermining the collective leadership system established during the reform era.⁹¹ This centralization has impeded the Party-State's ability to exercise self-restraint. Instead of bringing more legal accountability, China's legal system under Xi is now facilitating more unchecked discretion for Party-State officials, enabling the arbitrary suspension of citizens' rights.

On one hand, it is well-documented that China's authoritarian system is becoming increasingly repressive.⁹² While the scale of political suppression is expanding, the focus of repression has shifted from maintaining stability to deterring public participation. Examples are abundant, including the extensive crackdown on human rights lawyers⁹³, the establishment of Xinjiang's "mass education camps"⁹⁴, and the imposition of the national security law in Hong Kong.⁹⁵ In line with these observations, I argue that the excessive political repression in Xi's China is indicative of the declining legal rationality in the political sphere, where arbitrary actions have never been adequately constrained by the law.

On the other hand, and perhaps more surprisingly, China's "normal state" has also experienced the effects of receding legal rationality, with the prevalence of repressive methods leading to the arbitrary suspension of the rational legal order and the legal rights of citizens in routine governance

⁹¹ SUSAN L. SHIRK, *OVERREACH: HOW CHINA DERAILED ITS PEACEFUL RISE* 11-13 (2022).

⁹² Pils, *supra* note 19, at 340.

⁹³ Eva Pils, *The Party's Turn to Public repression: An Analysis of the '709' Crackdown on Human Rights Lawyers in China*, 3 *CHINA L. AND SOC'Y REV.* 1, 1 (2018); Hualing Fu and Han Zhu, *After the July 9 (709) Crackdown: The Future of Human Rights Lawyering*, 41 *FORDHAM INT'L L.J.* 1135 (2018).

⁹⁴ Pils, *supra* note 19, at 362-65.

⁹⁵ Lydia Wong et al. *Tracking the Impact of Hong Kong's National Security Law*, *CHINA FILE* (Oct. 25, 2022), <https://www.chinafile.com/tracking-impact-of-hong-kongs-national-security-law>.

under Xi's leadership. Consequently, the previously established consensus to build and maintain a clear distinction between routine governances and political exigencies is often intentionally or unintentionally disregarded. For instance, recent empirical accounts have indicated that China's routine criminal justice system essentially remains a mechanism for constructing guilt, despite limited reform having been carried out under Xi's administration.⁹⁶ Moreover, there has been a preventive and deterrent shift of China's criminal policy,⁹⁷ with a systematic transition of the hardline stability maintenance approach to cases with less political significance⁹⁸. An illustrative example is the crackdown on tele-scam operations from Myanmar commenced in the late 2010s, where Chinese authorities targeted the families of suspects by suspending their access to pensions and medical coverage, as well as dismissing their children from local schools⁹⁹.

The following section will illustrate how the case of Picking Quarrels, a catchall crime straddling the line between political and non-political offenses, serves as a faithful reflection of the evolution in China's legal rationality from the Mao era to Xi's leadership. During Mao's time, the precursor to the offense of Picking Quarrels was frequently abused to prosecute individuals for both political and non-political reasons. In the reform era, this catchall crime underwent a gradual process of rationalization. This involved providing clearer definitions, separating it from moral issues, and limiting its political utility. However, the Xi era has witnessed the resurgence of Picking Quarrels as a legalized pretext for political repression and a catchall "top crime" within the routine criminal system. Essentially, the rise of Picking Quarrels in the Xi era highlights how an apparent emphasis on the law might paradoxically bring more arbitrariness, thereby undermining legal rationality across both political and

⁹⁶ See generally, YU MOU, *THE CONSTRUCTION OF GUILT IN CHINA: AN EMPIRICAL ACCOUNT OF ROUTINE CHINESE INJUSTICE* (Michael Bohlander ed., 2020) (discussing why the Chinese criminal justice system remains a device for constructing guilt from both institutional and empirical perspectives); See also, CHINESE COURTS AND CRIMINAL PROCEDURE: POST-2013 REFORMS 6-10 (Björn Ahl ed., 2021) (discussing why the criminal justice reform under Xi is considered limited by observers).

⁹⁷ See generally, YING JI, *THE MAKING OF CHINESE CRIMINAL LAW: THE PREVENTATIVE SHIFT IN THE CONTEXT OF THE EIGHTH AMENDMENT* (1st ed. 2021); see also, Eva Pils, *Rule of Law Reform and the Rise of Rule by Fear in China*, in *AUTHORITARIAN LEGALITY IN ASIA: FORMATION, DEVELOPMENT AND TRANSITION* 90 (Weitseng Chen & Hualing Fu eds., 2020).

⁹⁸ See TAYLOR & FRANCIS GROUP, *LEGAL REFORMS AND DEPRIVATION OF LIBERTY IN CONTEMPORARY CHINA* (Elisa Nesossi, Sarah Biddulph, Flora Sapio & Susan Trevaskes eds., 2018); Yuhua Wang & Carl Minzner, *The Rise of the Chinese Security State*, 222 *THE CHINA Q.* 339 (2015).

⁹⁹ Gabriel Crossley, *In Crackdown on Fraud from Myanmar, China Authorities Target Suspects' Families*, *REUTERS* (June 8, 2021), <https://www.reuters.com/world/asia-pacific/crackdown-fraud-myanmar-china-authorities-target-suspects-families-2021-06-08/>.

non-political domains.

III. FROM HOOLIGANISM TO PICKING QUARRELS

During Mao Zedong's rule (1949-1978), hooliganism, the precursor to Picking Quarrels, was a widely employed catchall crime to punish individuals deemed politically threatening or morally dubious.¹⁰⁰ The use of hooliganism starkly contrasted with legal rationality, owing to its ambiguous nature and widespread application in both political and non-political contexts.

After Deng Xiaoping took control of the Party in 1978, the Party began incorporating a degree of legal rationality into China's governance system.¹⁰¹ During the post-Mao period, the ongoing reforms of catchall crimes underscored the reformists' attempts within the Party to rationalize China's authoritarian system. The 1979 PRC Criminal Code formally recognized hooliganism as a crime, marking an initial step. Subsequently, the 1997 Criminal Code subdivided hooliganism into five distinct offenses, including Picking Quarrels, and explicitly prohibited crime by analogy. In the 2000s and early 2010s, efforts to rationalize Picking Quarrels continued through the clarification of its legal components, detachment from moral connotations, and depoliticization. However, as elucidated in Part III and Part IV, this trend of rationalization experienced a substantial reversal during Xi's tenure.

A. *The Era of Hooliganism*

1. Hooliganism in Mao's China

During Mao's era (1949-1978), in the absence of legal basis, hooliganism served as a prominent catchall offense employed by authorities to target behaviors that they considered as public nuisances or morally objectionable.

Following the establishment of the People's Republic in 1949, the Communists dismantled the legal system of the former Republic of China government (1912-1949) in Mainland China, including its criminal code and criminal procedural law.¹⁰² Although the CCP had some initial commitment to law in the 1950s,¹⁰³ no formal criminal law existed in China

¹⁰⁰ See discussion *infra* Part A.1.

¹⁰¹ See *supra* Part II.C.3 of this Article.

¹⁰² Jerome Alan Cohen, *The Criminal Process in the People's Republic of China: An Introduction*, 79 HARV. L. REV. 469, 477-478 (1966).

¹⁰³ Mao's associates, Liu Shaoqi and Deng Xiaoping, advocated for a more legalistic approach to handling criminal cases and believed that the law should offer guidance to the public while restraining lower-level officials. In the mid-1950s, Mao briefly experimented with a formal legal model, seen in two drafts of the PRC criminal code: the 1950 Draft and the 1954 Draft, both later serving as blueprints for the 1979 Criminal Law

until 1979. However, it did not preclude the authorities from sentencing millions of people to long-term imprisonment and heavy labor camp,¹⁰⁴ and sent hundreds of thousands to death.¹⁰⁵

The term “hooligan” (流氓), originally used colloquially in the Chinese language to denote people living without a regular occupation or stable residence, was employed by the Party-State authorities to penalize those perceived as violating political and social norms during Mao’s era. For instance, a 1950 Party Document broadly classified “hooligans” as individuals without fixed residences or steady employment, who lived on theft, robbery, begging, gambling, prostitution, and other morally questionable means. The prescribed criminal sentence for “hooligans” was three years of imprisonment according to this decree.¹⁰⁶ Such arbitrary definitions were further expanded and incorporated into draft criminal codes in the 1950s. For example, Article 49 of the 1954 Draft of the PRC Criminal Code expanded the scope of hooliganism to include “gambling, human trafficking, harassing women, corrupting the youth, and other behaviors that disturbed public order,” with severe penalties such as life imprisonment or even the death penalty for those deemed to have committed offenses under “serious circumstances.

In practice, even though the 1954 Draft of PRC Criminal Code was never implemented, hooliganism was commonly used to punish individuals deemed morally objectionable by Party officials. After the 1957 “anti-rightist” campaign, “hooligans” were officially classified as “bad elements,” one of the five black categories that were considered state enemies.¹⁰⁷ Individuals with homosexual orientation, for instance, were subjected to severe punishment under the guise of hooliganism.¹⁰⁸

of the PRC. Notably, in the Maoist era, even attempts to establish a more rational legal system involved ruthlessly cracking down on political crimes. *See* Jerome Cohen, *See id.* at 477 (1966).

¹⁰⁴ *See, e.g.,* Fu Hualing, *Re-Education through Labor in Historical Perspective*, 184 *THE CHINA Q.* 811 (2005); Martin King Whyte, *Corrective Labor Camps in China*, 13 *ASIAN SURV.* 253 (1973).

¹⁰⁵ Cohen, *supra* note 102, at 478.

¹⁰⁶ CHINA. GOVERNMENT AFFAIR OFFICIALS, *ZHONGYANG RENMIN ZHENGFU ZHENGWUYUAN GUANYU HUAFEN NONGCUN JIEJI CHENGFEN DE JUEDING* (中央人民政府政务院关于划分农村阶级成分的决定) [DECISION OF THE ADMINISTRATIVE COUNCIL OF THE CENTRAL PEOPLE'S GOVERNMENT ON CLASSIFICATION OF RURAL CLASSES], (1950) PEOPLE'S GOVERNMENT OF GUANGDONG PROVINCE, http://www.gd.gov.cn/zwgk/gongbao/1950/4/content/post_3352109.html.

¹⁰⁷ *See* Li Yinhe (李银河), *Zhongguo Tongxinglian zhe de Falü Diwei* (中国同性恋者的法律地位) [*Legal Status of Homosexuals in China*], AISIXIANG (爱思想) [LOVE THOUGHTS] (Jul. 28, 2009, 2:48 PM), [<https://perma.cc/2JC6-LJ5L>].

¹⁰⁸ *See id.*

Moreover, for most of Mao's era, hooliganism also served as a flexible political charge, falling under the broad category of "counterrevolutionary crime."¹⁰⁹ For instance, during the campaign to suppress counterrevolutionaries from 1950 to 1953, a substantial number of individuals labeled as "counterrevolutionaries" were unjustly classified as "hooligans."¹¹⁰ This group included former Republican government staff, "assorted bandits and robbers, local bullies and tyrants," religious leaders, and local notables.¹¹¹ Of the 710,000 people executed during the counterrevolutionaries campaign, over 240,000 were put to death under the pretext of "hooliganism."¹¹² Others sentenced for "hooliganism" were sent to re-education labor camps, where they endured strenuous labor and frequent torture.¹¹³

2. Hooliganism in China's Early Reform Era

In the early post-Mao period, the Party reformists formally legalized hooliganism while retaining its flexibility for political and other uses.¹¹⁴

¹⁰⁹ There were only three criminal decrees in the early 1950s. See GAO QICAI (高其才) & LUO CHANG (罗昶), *ZHONGGUO TONGXINGLIANZHE DE FALÜ ZHIDU GAIYAO* (中国法律制度概要) [AN OVERVIEW OF THE CHINESE LEGAL SYSTEM] 191-92 (2005).

¹¹⁰ Taking the 1951 "Counter-revolutionaries Act" as an example. It allowed retroactive application to "counterrevolutionary" acts before the establishment of the PRC in 1949 (Art.18) and introduced the principle of crime by analogy for those "with counter-revolutionary intent yet not covered by this Act" (Art. 16). From 1950 to 1953, millions of "state enemies" were sentenced to death in extra-legal trials, and others received jail terms or re-education through labor for these reasons. See YANG YIFAN (杨一凡), ET AL., *ZHONGHUA RENMIN GONGHEGUO FAZHISHI* (中华人民共和国法制史) [LEGAL HISTORY OF THE PEOPLE'S REPUBLIC OF CHINA] 478 (2010); Hungdah Chiu, *Structural Changes in the Organization and Operation of China's Criminal Justice System*, 7:1 REV. OF SOCIALIST L. 53 (1981); PHILLIPS M. CHEN, *LAW AND JUSTICE: THE LEGAL SYSTEM IN CHINA, 2400 B.C. TO 1960 A.D.* 144-45 (1973).

¹¹¹ Julia C. Strauss, *Paternalist Terror: The Campaign to Suppress Counterrevolutionaries and Regime Consolidation in the People's Republic of China, 1950-1953* 44 COMPAR. STUD. IN SOC'Y AND HIST. 80, 90 (2002); See Yang Kuisong, *Xinzhongguo 'Zhenya Fangeming' Yundong Yanjiu* (新中国'镇压反革命'运动研究) [Studies on the Campaign of "Anti-Counterrevolutionaries" in the People's Republic of China] 1 *Shixue Yuekan* (史学月刊) [HISTORIOGRAPHY MONTHLY REV.] 45, 56-57 (2006).

¹¹² 44.6% of these 710,000 people were classified as bandits, and 34.2% were labeled as hooligans, with less than 20% being executed for their previous political affiliations with the nationalist government See Cai Daotong (蔡道通), *Jianguo chuqi de 'Diren Xingfa' jiqi chaoyue---Jianping Yakebusi de 'Diren Xingfa' (‘敌人刑法’及其超越---兼评雅科布斯的‘敌人刑法’)* [Enemy Criminal Law' and Its Transcendence in the Early Years of the People's Republic of China--- Comment on Gunther Jakobs' Terminology of 'Enemy Criminal Law'] 28 *XINGSHIFA PINGLUN* (刑事法评论) [CRIMINAL LAW REVIEW] 251, 261 (2011).

¹¹³ See *id.*

¹¹⁴ See discussion *infra* in this section.

During this time, while addressing minor offenses and public nuisances,¹¹⁵ the crime of hooliganism exemplified in Clarke and Feinerman's summary that "the definition of crime is accomplished outside the Criminal Law by reference to political exigencies or generally accepted standards of morality."¹¹⁶

Mao died in 1976, marking the end of an era characterized by lawlessness. Mao's successors began the process of establishing a new legal order¹¹⁷. Hooliganism was formally included as a criminal offense in the 1979 PRC Criminal Code. After Deng Xiaoping and other reformists initiated the legal reform, the 1979 Criminal Code and the 1979 Criminal Procedural Law became two of the earliest laws passed by the Chinese legislature.¹¹⁸ Despite being riddled with contradictions and vagueness, both laws provided some expedient fixes to the lawlessness of China's authoritarian system back then.¹¹⁹ However, these laws only demonstrated limited progress towards rationalization. For example, while Article 9 of the 1979 Criminal Law formally prohibited retroactivity, Article 79 allowed for the application of crimes by analogy, permitting the "analogizing of crimes according to the most similar provisions."¹²⁰ Overall, with only 192 articles, the 1979 Criminal Code contained numerous "vague and sweeping provisions," subject to the arbitrary interpretations of officials.¹²¹

Against this backdrop, Article 160 of the 1979 PRC Criminal Code formally introduced the crime of hooliganism at the legislative level:

¹¹⁵ For example, individuals who "occupied the flight ticket window and forced passengers to purchase self-made serial numbers when they queued for the flight ticket" could be criminally punished under hooliganism, according to the "Notice on Punishing the Criminal Activities of Scalping Airline Tickets According to Law", promulgated in 1988. *See, e.g.*, Yang Zekun, Tighter Rules to Prevent Ticket Scalping, CHINA DAILY (Sept. 13, 2023, 10:21 PM), [<https://perma.cc/HZL4-LSEP>].

¹¹⁶ Donald C. Clarke & James V. Feinerman, *Antagonistic Contradictions: Criminal Law and Human Rights in China* 141 THE CHINA Q. 135, 137 (1995).

¹¹⁷ *See* LENG SHAO-CHUAN & CHIU HUNGDAH, CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS, 127-28 (1985).

¹¹⁸ *See id.*

¹¹⁹ For example, for the first time in PRC history, Article 3 of 1979 PRC Criminal Procedure Law provides that "the People's Court is responsible for conducting court trial. No other organs, groups, or individuals have the right to exercise these powers." *See* Criminal Law of the People's Republic of China (promulgated by Order No. 5 of the Chairman of the Standing Committee of the National People's Congress, July 6, 1979, effective Jan. 1, 1980 (China) [hereinafter 1979 PRC Criminal Code]. *1979 Criminal Law of the People's Republic of China*, CHINALAWINFO DATABASE, <http://www.lawinfochina.com/display.aspx?lib=law&id=3&CGid=> [<https://perma.cc/2NMK-UKCG>] (last visited Apr. 9, 2024).

¹²⁰ *See id.* at art. 9, 79.

¹²¹ LENG & CHIU, *supra* note 117, at 130.

“Anyone gathering mass to fight, Picking Quarrels and Provoking Troubles, harassing women or engaging in other hooligan activities, which undermine the public order, and if the circumstances are serious, he/she should be sentenced to imprisonment, penal servitude or public surveillance for no more than seven years; for the chief of the hooligan group, the sentence should be over seven years of imprisonment.”

Clearly, the catchall nature of hooliganism was preserved in the 1979 Criminal Code, as the crucial elements of the crime were inherently ambiguous. In particular, the inclusion of the term "engaging in other hooligan activities"¹²² established an open-ended category, subjecting the interpretation of "other hooligan activities" entirely to the discretion of dominant officials such as the police, prosecutors or Party-State cadres. In fact, hooliganism was intentionally designed as a catchall crime by the drafters of the 1979 Criminal Code, as its vagueness facilitated the apprehension of various forms of deviant behavior that may not fit into specific crimes.¹²³

In the 1980s, Chinese authorities infamously employed hooliganism to penalize behaviors that officials considered morally corrupt, particularly during the "Strike Hard" campaigns from 1983 to 1986.¹²⁴ The "Strike Hard" campaign aimed to eliminate widespread crime throughout China through the swift and severe application of criminal law.¹²⁵ For instance, in 1983, over one million people were arrested in the "Strike Hard" campaign.¹²⁶ Of the over one million people, 861,000 individuals received guilty sentences, and 24,000 faced execution.¹²⁷

¹²² See 1979 PRC Criminal Code, *supra* note 119, at art. 160.

¹²³ Li Yunhong, *Liurangzui de Qianshi Jinsheng* (流氓罪的前世今生) [The Past and Present of Hooliganism] 2 FALÜ YU SHENGHUO (法律与生活) [LAW AND LIFE] 45, 45 (2011).

¹²⁴ See, e.g., Heather Worth et al, 'There was no mercy at all': Hooliganism, Homosexuality and the Opening-up of China 34 (1) INT'L SOCIOLOGY 38, 49-50 (2019).

¹²⁵ See, e.g., SUSAN TREVASKES, COURTS AND CRIMINAL JUSTICE IN CONTEMPORARY CHINA (2007) (discussing the use of criminal law as a harsh and suppressive tool during strike hard period in China).

¹²⁶ Renmin Wang (人民网), 1984nian 10yue 31ri, 'Yanda' Diyizhanyi Chengguo Xianzhu (1984年10月31日, '严打'第一战役成果显著) [The First Battle of "Strike Hard" on October 31, 1984 Achieved Remarkable Results], SOHU NEWS (Oct. 31, 2009), [https://perma.cc/VG22-59VQ].

¹²⁷ *Id.*; see also Jiancha Ribao (检察日报), *Bainian Dangshi Zhong de jiancha dang'an: Quanguo Jiancha jiguan quanliyifu touru diyici 'yanda' douzheng* (百年党史中的检察档案: 全国检察机关全力以赴投入第一次'严打'斗争) [Procuratorial Archives in a Century of Party History | Procuratorates Across the Country Go All Out to Invest in the First 'Strike Hard' Struggle], THE SUPREME PEOPLE'S PROCURATORATE OF THE PRC (Aug. 3 2021), [https://perma.cc/78E8-UNZW].

The category of "other hooligan acts" gained particular notoriety for its excessive and arbitrary application during the "Strike Hard" Campaign¹²⁸.

During the Strike Hard Campaign, the Supreme People's Court (hereafter "SPC") and the Supreme People's Procuratorate (hereafter "SPP") issued the 1984 joint Judicial Interpretation titled "Answers To Several Questions regarding Specific Application of Law in the Current Handling of Hooligan Cases" (hereinafter referred to as the 1984 Hooligan Answers). It categorized activities such as womanizing, seducing foreigners, and engaging in other disapproved sexual conduct as "other hooligan acts".¹²⁹ Therefore, the 1984 Hooligan Answers effectively expanded the scope of hooliganism. Moreover, with the support of the top legislative body in China, legal rules enacted during the Strike Hard Campaign granted officers the authority to impose heavier penalties, exceeding even the maximum penalty outlined in Article 160, such as the death penalty for hooligan acts.¹³⁰

In fact, during 1980s, the criminalization of "hooligan acts" was almost exclusively contingent on crime by analogy.¹³¹ In practice, behavior regarded as detrimental to "socialist morality," such as having dance parties,¹³² engaging in pre-marital sex, and ending a romantic relationship

¹²⁸ *Fazhi de Xijie: Liumangzui Weihe Xiao'erbuwang* (法治的细节: 流氓罪为何消而不亡) [*Details of the Rule of Law: Why Does Hooliganism Disappear but not Disappear?*], THE PAPER (Aug. 21, 2018), [<https://perma.cc/VH7Q-KUD9>].

¹²⁹ Guanyu Dangqian Ban Li Liumang Anjian Juti Yingyong Falü de Ruogan Wenti de Jieda (关于当前办理流氓案件具体应用法律的若干问题的解答) [Answers To Several Questions regarding Specific Application of Law in the Current Handling of Hooligan Cases] [hereinafter 1984 Hooligan Answers] (promulgated by Sup. People's Ct. and Sup. People's Procuratorate, Nov. 12, 1984) (China) [hereinafter 1984 Hooligan Answers] CHINACOURT.ORG <https://www.chinacourt.org/law/detail/1984/11/id/3852.shtml>

¹³⁰ These Legal Rules include: Guanyu Yancheng Yanzhong Weihai Shehui Zhi'an de Fanzui Fenzi de Jueding (关于严惩严重危害社会治安的犯罪分子的决定) [Decision of the NPC Standing Committee regarding the Severe Punishment of Criminals Who Seriously Endanger Public Security] (promulgated by the Standing Comm. of Nat'l People's Cong., Sept. 2, 1983) (China); Guanyu Zenyang Rending he Chuli Liumang Jituan de Yijian (关于怎样认定和处理流氓集团的意见) [Opinions regarding How to Determine and Handle hooligan groups], (promulgated by the Sup. People's Procuratorate, Sup. People's Ct. and the Bureau of Public Security, May 26, 1984) (China) LAW-LIB.COM http://www.law-lib.com/law//law_view.asp?id=2882; 1984 Hooligan Answers, *id.*

¹³¹ "Analogy" in substantive criminal law allows for the conviction of an accused even in the absence of explicitly defined criminal conduct. It was an established principle in former Soviet Criminal Legal system. See Dana Giovannetti, *The Principle of Analogy in Sino-Soviet Criminal Laws*, 8:2 DALHOUSIE L. J. 382, 382 (1984).

¹³² For instance, Article 2 of the 1984 Hooligan Answers provides examples of what constitutes "other hooligan activities," including those who "gather a crowd to carry out promiscuous activities (including any form of intersexual group spending the night or

after engaging in sexual activities, were regarded as hooliganism¹³³. Moreover, the *mens rea* of hooliganism, referred to as "hooligan intent," is a highly ambiguous term in many hooligan cases.¹³⁴ It has been interpreted synonymously with "wrongful thoughts" and unjustifiably linked with ideology.¹³⁵ Further, the causation between the act and harm was almost irrelevant to the construction of guilt.¹³⁶

On the other hand, in the 1980s the Chinese authorities continued to use hooliganism to prosecute various types of political dissidents and protesters, exemplified by the "Tiananmen Hooligans" cases¹³⁷---After the 1989 Tiananmen protests, high-profile participants, such as principal organizers and student leaders, were prosecuted for more serious counterrevolutionary crimes, while hundreds of less famous protestors and ordinary participants were sentenced under hooliganism charges.¹³⁸ The ambiguous meaning of hooliganism provided officials with a convenient tool to impose harsh criminal penalties against Tiananmen protestors.¹³⁹ For instance, Hu Min, one of the organizers in Hunan province during the

conducting activities together) and "other hooligans who could not be reformed." *See supra* note 129.

¹³³ For example, statistics in a Chinese city showed that "womanizing acts" accounted for 35.5% of all hooligan cases from 1983 to 1984. See Ling Churui (凌楚瑞) & Li Li (李黎), *Ruhe Rending Liurangzui zhong de Qita Liurang Huodong* (如何认定流氓罪中的流氓活动) [*How to Identify Other Hooligan Activities in Hooliganism*], 1 XIANDAI FAXUE (现代法学) [MOD. LAW SCI.] 27, 27-28 (1985); *See also* Wang Yaohua (王尧华), Qianxi yi Lian'ai Weiming Jianwu Funü de Liurangzui (浅析以恋爱为名奸污妇女的流氓罪) [A Brief Analysis of the Hooligan Crime of Raping Women in the Name of Romantic Relationship] 3 FAXUE PINGLUN (法学评论) [LAW REVIEW] 46, 46-47. (1985)

¹³⁴ *See* Zhang Zhihui (张智辉), *Lun Liurangzui de Keti* (论流氓罪的客体) [*On the Object of Hooliganism*] 1 ZHENGZHI YU FALÜ (政治与法律) [POLITICS AND LAW] 43, 44-45 (1987).

¹³⁵ *See* Wang Xiren (王希仁), *Shilun Liurangzui* (试论流氓罪) [Discussion on Hooliganism Offense] 2 ZHENGZHI YU FALÜ (政治与法律) [POLITICS AND LAW] 11, 11 (1984)

¹³⁶ *See id.*; Sun Yingzheng (孙应征), *Liurangzui Rending Qianxi* (流氓罪认定浅析) [*A Brief Analysis on the Determination of Hooliganism*], 1 FAXUE PINGLUN (法学评论) [LAW REVIEW], 21, 21-23 (1985); *see also* Zhang Zhihui, *supra* note 134.

¹³⁷ *See Imprisonment for Crimes no Longer in the Criminal Law*, DUIHUA, (Dec. 20, 2017), [https://perma.cc/3PWP-EWPQ].

¹³⁸ *See, e.g., id.*; *Dialogue-Issue 30: Release of Last Known June Fourth Spy*, DUIHUA, [https://perma.cc/7HBN-XWXD].

¹³⁹ *See* Humin Deng *Liurangzui Yishen Panjueshu* (胡敏等流氓罪一审判决书) [*Criminal First Instance Verdict of Humin and Others Hooliganism*] Xingyichuzi No.25 (Yueyang Interim. People's Ct., Yueyang, Aug. 8, 1989) (China).

Tiananmen Protest, received a lifelong prison sentence for hooliganism in 1989.¹⁴⁰

B. *When Picking Quarrels was a Reform Measure*

1. The Abolishment of Hooliganism

The 1989 Tiananmen Protest was a watershed moment in contemporary China, leading to a shift in focus towards legal reform in the post-Tiananmen era.¹⁴¹ The reform agenda aimed to establish a more functional legal system within China's authoritarian framework¹⁴² while preserving the Party's prerogative power and extralegal authority.¹⁴³ The CCP reformists believed that establishing a more rational legal system and separating politics from the law, along with other institutional adaptation, could help curb the abuse of power by lower-ranking officials, which in turn, would support China's market economy and international engagement.¹⁴⁴ Throughout the 1990s, legal reforms were implemented to institutionalize imported legal norms and even international human rights standards, often with the support of China's growing civil society.¹⁴⁵ Given this evolving landscape, the principles and provisions of the 1979 Criminal Law, encompassing concepts like crimes by analogy and counterrevolutionary offenses, alongside the crime of hooliganism¹⁴⁶, were widely seen as outdated.¹⁴⁷

¹⁴⁰ See *id.*

¹⁴¹ See Carl F. Minzner, *China After the Reform Era* 26 J. OF DEMOCRACY 129, 13-32 (2015).

¹⁴² See Carlos Wing-hung Lo, *The Legal System and Criminal Responsibility of Intellectuals in the People's Republic of China 1949-1982*, 1985 OCCASIONAL PAPERS/REPRINT SERIES IN CONTEMP. ASIAN STUD. 1, 10-11 (1985).

¹⁴³ Sebastian Heilmann's discussion on China's normal and crisis mode is very helpful here. See, e.g., SEBASTIAN HEILMANN, *RED SWAN: HOW UNORTHODOX POLICY-MAKING FACILITATED CHINA'S RISE* (2018); MERCATOR INSTITUTE FOR CHINA STUDIES, *CHINA'S POLITICAL SYSTEM* (Sebastian Heilmann ed., 2016).

¹⁴⁴ See Martin K. Dimitrov, *Understanding Communist Collapse and Resilience*, in *WHY COMMUNISM DID NOT COLLAPSE: UNDERSTANDING AUTHORITARIAN REGIME RESILIENCE IN ASIA AND EUROPE* 3 (Martin K. Dimitrov ed., 2013); Thomas P. Bernstein, *Resilience and Collapse in China and the Soviet Union*, in *WHY COMMUNISM DID NOT COLLAPSE: UNDERSTANDING AUTHORITARIAN REGIME RESILIENCE IN ASIA AND EUROPE* 40 (Martin K. Dimitrov ed., 2013); Regina Abrami, et al., *Vietnam through Chinese Eyes: Divergent Accountability in Single-Party Regimes*, in *WHY COMMUNISM DID NOT COLLAPSE: UNDERSTANDING AUTHORITARIAN REGIME RESILIENCE IN ASIA AND EUROPE* 237 (Martin K. Dimitrov ed., 2013); see also YASHENG HUANG, *CAPITALISM WITH CHINESE CHARACTERISTICS: ENTREPRENEURSHIP AND THE STATE* (2008).

¹⁴⁵ POTTER, *supra* note 78; Peerenboom (2002), *supra* note 28 at 6-8.

¹⁴⁶ TIMOTHY GELATT, *CRIMINAL JUSTICE WITH CHINESE CHARACTERISTICS: CHINA'S CRIMINAL PROCESS AND VIOLATIONS OF HUMAN RIGHTS*, 80-85 (1993).

¹⁴⁷ See The National People's Congress of the People's Republic of China,

Abolishing hooliganism was put on the reform agenda in the late 1980s as its catchall nature was widely criticized for violating criminal law principles---a broad consensus among Chinese legal scholars and reform-minded officials is that the vague definition of "hooligan act" is left to unchecked arbitrary discretion,¹⁴⁸ when its disproportionate punishment could include the death penalty.¹⁴⁹

The enactment of the 1997 PRC Criminal Code marked a significant step in the rationalization of the Chinese legal system. It notably incorporated the principle of *nullum crimen sine lege* ("no crime without law"), which formally prohibits crime by analogy.¹⁵⁰ However, the 1997 PRC Criminal Code represented only a partial commitment to legal rationality. For instance, the 1997 PRC Criminal Code is full of ambiguous terms such as "by other means" or "serious circumstances," allowing for the practical application of the system of crime by analogy.¹⁵¹

Nevertheless, the 1997 PRC Criminal Code abolished hooliganism and divided it into five specific crimes with clearer terms, including Picking Quarrels (Art. 293), affray (Art. 292), obscenity against women (Art. 237-1), obscenity against children (Art. 237-2), and the assembled prurience (Art. 301).¹⁵² Additionally, the new Criminal Code reduced the maximum criminal punishment for Picking Quarrels to five years imprisonment. Compared to the severe penalties, including the death penalty, stipulated for

GAIGEKAIFANG 40NIAN WOGUO XINGFA DE FAZHAN (改革开放 40 年我国刑法的发展)
[THE DEVELOPMENT OF CHINA'S CRIMINAL LAW IN THE 40 YEARS OF REFORM AND
OPENING] (Aug. 24, 2021),
http://www.npc.gov.cn/npc/c12434/wgggkf40nlfcjgs/202108/t20210824_313183.html.

¹⁴⁸ See He Xihai (何锡海), *Liumangzui Ying Fenli Liangzhong Zuiming--- Jianlun Sheli Wannong Funizui* (流氓罪应分立两种罪名---兼论设立玩弄妇女罪) [*The Crime of Hooliganism should be Divided into Two Kinds of Crimes---Also on the Establishment of the Crime of Womanizing*], 46 GUANGXI DAXUE XUEBAO ZHEXUE SHEHUI KEXUE BAN (广西大学学报(哲学社会科学版)) [J. of Guangxi Univ. (Phil. & Soc. Sci.)] 66 (1993); Zhang, *supra* note 134 at 44-45.

¹⁴⁹ See He, *supra* note 148; Feng Shiming (冯世名), *Liumangzui Ying Fenshe Zuiming* (流氓罪应分设罪名) [*The Crime of Hooliganism should be Divided*] 5 XIANDAI FAXUE (现代法学) [MOD. JURIS.] 25 (1989); Zhou Jue (周珏), *Xingshi Sifa Jieshi Gongzuo Jishi* (刑事司法解释工作纪实) [*Chronicle of Criminal Judicial Interpretation Work*], PEOPLE'S COURT DAILY, Aug. 2, 2008, at A2.

¹⁵⁰ Despite the change, the crime of endangering national security in the 1997 PRC Criminal Code remains problematic from various human rights perspectives. See Clarke, *supra* note 88, at 29-30, 44-45, 67 (1998).

¹⁵¹ *Id.* at 40-41; see also HRIC, EMPTY PROMISES: HUMAN RIGHTS PROTECTIONS AND CHINA'S CRIMINAL PROCEDURE LAW: A REPORT FROM HUMAN RIGHTS IN CHINA (2001) at 23-24, 27, 33-34.

¹⁵² See Criminal Law of the People's Republic of China (promulgated by Standing Comm. Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) P.R.C. LAWS (China).

the offense of Hooliganism in the 1979 PRC Criminal Code, the introduction of the offense of Picking Quarrels was a significant reform measure.

2. The Continuing Rationalization of Picking Quarrels

China's legal reform during the Jiang Zemin (1997-2002) and the Hu-Wen Administrations (2003-2012), by and large, followed Deng Xiaoping's Legacy.¹⁵³ As the 1997 Criminal Code set up a new perimeter for legal reform, the ongoing reforms concerning Picking Quarrels aim to establish clearer definitions to rationalize the crime, disassociate it from moral charges and rationalize its political abuse.

First, the reform aimed to reduce the ambiguity surrounding Picking Quarrels. For instance, a regulation issued in 2008 established specific standards for each sub-category of Picking Quarrels and provided more detailed criteria for what constitutes "serious circumstances."¹⁵⁴ Judicial Interpretation No.18,¹⁵⁵ jointly issued by the SPC and SPP in July 2013, took this a step further. Notably in Article 293 of the 1997 PRC Criminal Code, for the provision of "disturbing order in public places," Judicial Interpretation No.18 clearly delineated "public places" as physical locations such as "stations, docks, airports, hospitals, shopping malls, parks, theaters, exhibitions, sports fields, or other similar places."¹⁵⁶ Thereby excluding the internet and virtual spaces from being subject to the notion of "order of public places."¹⁵⁷

Second, the reform-focused regulations also aimed to dissociate picking quarrels from private disputes and moral charges. For example,

¹⁵³ See JIANFU CHEN, CRIMINAL LAW AND CRIMINAL PROCEDURE LAW IN THE PEOPLE'S REPUBLIC OF CHINA, COMMENTARY AND LEGISLATION 95 (2013).

¹⁵⁴ Guanyu Gong'an Jiguan Guanxia de Xingshi An'jian Zhuisu Biaozhun de Guiding (1) (关于公安机关管辖的刑事案件立案追诉标准的规定(一)) [Provisions on the Prosecution Standards of Criminal Cases Under the Jurisdiction of Public Security Organs (1)] (promulgated by the SPP and Bureau of Public Security, June 25, 2008) (China).

¹⁵⁵ Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Guanyu Banli Xunxin Zishi Xingshi Anjian Shiyong Falü Ruogan Wenti de Jieshi, Fashi [2013] No. 18 (最高人民法院最高人民检察院关于办理寻衅滋事刑事案件适用法律若干问题的解释, 法释[2013] 18号) [Interpretation on Several Issues concerning the Application of Law in the Handling of Criminal Cases of Picking Quarrels and Provoking Trouble, Judicial Interpretation No. 18 [2013]] (promulgated by the Judicial Comm. Sup. People's Ct., May 27, 2013, and the Procuratorate Comm. Sup. People's Procuratorate, Apr. 28, 2013, effective Jul. 22, 2013) (China) [hereinafter Judicial Interpretation No. 18].

¹⁵⁶ See *id.* at art. 5.

¹⁵⁷ See Sun Wanhuai (孙万怀) & Lu Hengfei (卢恒飞), Xingfa Yingdang Lixing Yingdui Wangluo Yaoyan: Dui Wangluo Zaoyao Sifajieshi de Shizheng Pinggu (刑法应当理性应对网络谣言: 对网络造谣司法解释的实证评估) [Criminal Law Should Rationally Respond to Internet Rumors: An Empirical Evaluation of the Judicial Interpretation of Internet Rumors], 11 Faxue (法学) [JURIS.] 3, 14 (2013).

Judicial Interpretation No.18 one of the ways this disassociation was done was through the Article 3 of Judicial Interpretation No. 18.---It stipulates that, as a general rule, instances involving insults or intimidation, damage, or occupation of other people's property resulting from private disputes should be excluded from the purview of picking quarrels.¹⁵⁸ This effort was designed to prevent officials from employing picking quarrels in a manner reminiscent of the abuse of hooliganism in the 1980s.

Third, Picking Quarrels seems to have been relatively less reported as being used politically during the 2000s and early 2010s, even though politically-specific crimes such as subversion were excessively employed to suppress petitioners, protestors, and demonstrators.¹⁵⁹ Furthermore, even when picking quarrels was used for political cases, it tended to target "mass incidents" in the physical world rather than online discourse and public participation. For example, in 2009, protester Zhao Lianhai was arrested and sentenced to two and a half years of imprisonment under the picking quarrels charge due to his offline protest activities.¹⁶⁰ Notably, Zhao's verdict only accused him of "inciting a large gathering in public places for unlawful assembly" without mentioning his influential online activism.¹⁶¹ Similarly, in 2011, Wang Lihong, a senior Chinese activist and rights defender, was sentenced to nine months of imprisonment for picking quarrels.¹⁶² The verdict also solely mentioned her offline protests and did not address her high-profile internet activism, a contrast with the Picking Quarrels cases under Xi's administration as we will discuss in the following section.

Furthermore, during the period from 2000 to 2012, certain Chinese courts even declined to incorporate with the politicized use of the picking quarrels charge. A notable instance occurred in 2012 in Handan, China, where the court boldly dismissed attempts to criminalize a petitioner under

¹⁵⁸ See Judicial Interpretation No. 18, *supra* note 155 at art 3.

¹⁵⁹ See Flora Sapio, *Legal Erosion and the Policing of Petitions*, in *COMPARATIVE PERSPECTIVES ON CRIMINAL JUSTICE IN CHINA* 345 (Mike McConville & Eva Pils eds., 2013); See also generally, Sapio, *supra* note 20.

¹⁶⁰ *Jieshi Baobao* (结石宝宝) [*Kidney Stone Baby*] CHINA DIGITAL TIMES (Nov. 16, 2010), [<https://perma.cc/F96E-RN3J>].

¹⁶¹ Zhao Lianhai Xunxinzhishi Yi'an Xingshi Yishen Panjueshu (赵连海寻衅滋事一案刑事一审判决书) [First Instance Criminal Verdict of Zhao Lianhai Picking Quarrels and Provoking Trouble] Da Xing Chu Zi No. 318 (Daxing Dist. People's Ct., Beijing, Nov. 10, 2010) (China).

¹⁶² Wang Lihong (王荔蕪) is a Beijing-based activist who has been involved in numerous human rights advocacy movements in the 2000s and early 2010s. See Michael Bristow, *China Rights Activist Wang Lihong Jailed*, BBC NEWS (Sept. 9, 2011), [<https://perma.cc/XML9-CTRQ>]; Zhao Sile (趙思樂), *Wang Lihong: Tuite shidai de Liushouzhe (Shang)* (王荔蕪:推特时代的留守者 (上)) [*Wang Lihong: The Left Behind in the Twitter Era (Part 1)*], THE INITIUM (Oct. 28, 2016), [<https://perma.cc/D7UW-P9N4>].

the charge of Picking Quarrels. The act of petitioning, or "letter and visit," is recognized as a constitutional right in China, providing citizens an avenue to voice grievances and concerns regarding government actions, particularly in addressing socio-economic issues.¹⁶³ In some cases, the act of petitioning has effectively held local officials accountable for their inaction or misconduct after a petition successfully reached higher-level government authorities.¹⁶⁴ In the Handan case, the defendant, Du, faced accusations of inciting quarrels during his petition in Beijing. Du was alleged to have threatened officials and caused injury to one official when they attempted to compel him to return to Handan.¹⁶⁵ However, upon reaching the Handan Intermediate Court, the judge emphasized that Du lacked the criminal intent to incite quarrels and did not cause significant disorder, despite noting the physical altercation between Du and the local officials.¹⁶⁶ The court thus determined that the indictment did not fulfill the requisite elements for the charge of picking quarrels.¹⁶⁷ This diverged from numerous other picking quarrel cases observed during Xi Jinping's administration, as we will examine and discuss in subsequent sections.

IV. POLITICAL ABUSE OF PICKING QUARRELS IN XI'S TIME

In the past decade, there has been a notable rise in political repression, as the criminal justice system and legal institutions are increasingly utilized to target individuals who are seen as threats to authoritarian rule, thereby serving as instruments for enhancing social control.¹⁶⁸ Chinese authorities have intensified their focus on almost all activist groups, launching an aggressive campaign against civil rights movements, independent NGOs, human rights lawyers, underground

¹⁶³ See Carl Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103 (2006).

¹⁶⁴ See Lei Guang & Yang Su, *Collective Petition and Local State Responses in Rural China*, in HANDBOOK OF PROTEST AND RESISTANCE IN CHINA 167 (Teresa Wright ed., 2019); Xujun Gao & Jie Long, *On the Petition System in China* 12 U. ST. THOMAS L.J. 34 (2015); KEVIN J. O'BRIEN & LIANJIANG LI, *RIGHTFUL RESISTANCE IN RURAL CHINA* (2006) (generally discussing the patterns of petition in early 2000s China).

¹⁶⁵ See Du Moumou fan Xunxinzhizui Er'shen Xingshi Panjueshu (杜某某犯寻衅滋事罪二审刑事判决书) [Second Instance Criminal Verdict of Du Moumou Picking Quarrels and Provoking Trouble] Danshixingzhongzi No.68 (Handan Interm. People's Ct., 2012) (China)

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ See Zhang Qianfan, *The Communist Party Leadership and Rule of Law: A Tale of Two Reforms*, 30 J. OF CONTEMP. CHINA 578 (2021); Susan Trevaskes, *A Law Unto Itself: Chinese Communist Party Leadership and Yifa zhiguo in the Xi Era*, 44 MOD. CHINA 347 (2018); Susan Trevaskes, *Using Mao to Package Criminal Justice Discourse in 21st-Century China*, 226 CHINA Q. 299, 299-300 (2016).

religious groups, and other civil society sectors that emerged during the reform era.¹⁶⁹

The increased political use of the Picking Quarrels charge under Xi's leadership has confirmed a shift in the political realm, indicating an expansion of political suppression from the relatively rational goal of maintaining stability to a paranoid deterrence of public participation. This is evidenced by the expansion of the criminal charge of 'Picking Quarrels' from offline activism to targeting online speeches.¹⁷⁰ The new rules pertaining to Picking Quarrels essentially provide greater discretion to dominant officials in prosecuting objectionable political activities and speeches under the guise of the law.

Moreover, an in-depth examination of politically motivated Picking Quarrels cases reveals a decline in legal rationality within political trials as well. The judicial process has been further distorted to establish the defendants' guilt, with the offence of Picking Quarrels often being interchangeable with other political crimes or used to add additional sentences to prisoners of conscience.

Additionally, under Xi, Chinese authorities have politically exploited the ambiguity surrounding Picking Quarrels outside the courtroom. For instance, the Party's propaganda machinery selectively broadcasts key Picking Quarrels cases to discourage public participation.

A. *A Political Catchall*

The use of criminal law to suppress political opposition and dissent in the post-Mao era has been well-documented. This was often done under the banner of stability maintenance, and those who directly challenged the authoritarian regime were either coerced into disbanding or forced into exile overseas for years.¹⁷¹ Under Xi, however, China's national security system

¹⁶⁹ See Eva Pils, *From Independent Lawyer Groups to Civic Opposition: The Case of China's New Citizen Movement*, 19 *ASIAN-PAC. L. & POL'Y J.* 110, 129-141 (2017) (detailing the collapse of China's human right defender groups in Xi's time); THOMAS KELLOGG, *THE FOREIGN NGO LAW AND THE CLOSING OF CHINA, AUTHORITARIAN LEGALITY IN ASIA: FORMATION, DEVELOPMENT AND TRANSITION* 114 (Weitseng Chen & Hualing Fu eds., 2020); Hualing Fu, *The July 9th (709) Crackdown on Human Rights Lawyers: Legal Advocacy in an Authoritarian State*, 27 *J. CONTEMP. CHINA* 554 (2018); Pils, *supra* note 93; Shucheng Wang, *Tripartite Freedom of Religion in China: An Illiberal Perspective*, 39 *HUM. RTS. Q.* 783, 808-09 (2017).

¹⁷⁰ See *infra* discussion in this section, especially section A,B and C.

¹⁷¹ Nesossi et al., *supra* note 98, at 6, 17; see Wang & Minzner, *supra* note 98 (explaining why and how that happened); *THE POLITICS OF LAW AND STABILITY IN CHINA* 21-79 (Susan Trevaskes et al. eds., 2014) (chapters 2-4 explaining how stability maintenance affects legal disputes in China). An example was Falun Gong. See James Tong, *An Organizational Analysis of the Falun Gong: Structure, Communications, Financing*, 171 *CHINA Q.* 636, 639-642 (2002); Ronald C. Keith & Zhiqiu Lin, *The "Falun Gong Problem": Politics and the Struggle for the Rule of Law in China*, 175 *CHINA Q.* 623, 636-638 (2003).

has undergone comprehensive enhancement.¹⁷² Examples of this trend include imposing national security laws in Hong Kong and attempting to build a data dystopia characterized by the social credit system.¹⁷³ Additionally, Xi's administration appears to have adopted a more strict, near-zero-tolerance approach toward criticism directed at the Party's authority.

Against this backdrop, the criminal charge of Picking Quarrels under Xi's term has regained its "hooligan nature" as a broadly applied political offense. The vague and ambiguous nature of Picking Quarrels facilitates arbitrary detention and prosecution, targeting individuals deemed as politically objectionable, including activists, protestors, petitioners, and anyone involved in public political expression.¹⁷⁴ Typically, such politically motivated persecution occurs under the subcategory of making commotion within the charge of Picking Quarrels. The following section will provide detailed illustrations of these cases respectively.

1. Civil Society Activism

In the era of Xi, Picking Quarrels is frequently abused to target individuals whom the Party authorities perceive as sources of civil unrest. This includes human rights activists, lawyers advocating for rights, protestors, and demonstrators. Small-scale protests and peaceful activists are increasingly subjected to severe criminal penalties.¹⁷⁵ Alongside other criminal allegations, thousands of Chinese activists have been imprisoned on charges of Picking Quarrels.¹⁷⁶

For example, since 2013, peaceful feminist movement organizers have been targeted as threats to Xi's comprehensive concept of national security and criminalized under the charge of picking quarrels.¹⁷⁷ This starkly contrasts the relative tolerance shown towards the same or similar feminist activists during the Hu-Wen administration.¹⁷⁸

¹⁷² Wang & Minzner, *supra* note 98.

¹⁷³ See Cora Chan, *Can Hong Kong Remain a Liberal Enclave within China? Analysis of the Hong Kong National Security Law* (Univ. of H.K. Faculty of Law Research Paper No. 2021/005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802681; Wong et al., *supra* note 99.

¹⁷⁴ See discussion *infra*.

¹⁷⁵ See CARL MINZNER, END OF AN ERA: HOW CHINA'S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE 86-102 (2018); Pils, *supra* note 93; EVA PILS, HUMAN RIGHTS IN CHINA: A SOCIAL PRACTICE IN THE SHADOWS OF AUTHORITARIANISM 125-129 (2018).

¹⁷⁶ See *supra* note 5.

¹⁷⁷ See LETA HONG FINCHER, BETRAYING BIG BROTHER: THE FEMINIST AWAKENING IN CHINA 1-3, 21, 27 and 163. (2019).

¹⁷⁸ Interview with a Chinese feminist activist, a scholar, Georgetown Center for Asian L., in D.C. (Apr. 12, 2023); see also Chloe Froissart, *Changing Patterns of Chinese Civil Society: Comparing the Hu-Wen and Xi Jinping eras*, in ROUTLEDGE HANDBOOK OF

Under Xi, Chinese authorities arrested the “Feminist Five” under the Charge of Picking Quarrels, a move that garnered international attention and shock.¹⁷⁹ Shan Lihua was one of the feminist activists who had long advocated for legal protection for children against sexual assaults.¹⁸⁰ In 2015, the authorities pressed charges against Shan for Picking Quarrels due to her participation in peaceful demonstrations.¹⁸¹ During these protests, Shan put up banners and slogans in several cities to protest the Chinese police officers’ arrest of other Chinese feminists.¹⁸² In her verdict, Shan was accused of “using hotspots and taking the initiative to create hassle in public places.”¹⁸³ Additionally, she was vilified as someone with “malicious criminal intent who tried to provoke hatred, confrontation, and undermine social order.”¹⁸⁴ The court sentenced her to two years and three months in jail.¹⁸⁵

2. Petitioning

Similar to the protestors and activists, petitioners in China face an increasing risk of imprisonment under the charge of picking quarrels. While the Party-State has been suppressing petitioners in Beijing since around 2008, the suppression of petitions was more focused on collective petitions rather than individual petitioners during the Hu-Wen era.¹⁸⁶

Under Xi, however, the new responsibility system imposed on petition officials incentivized them to adopt a more repressive approach to dealing with petitioners.¹⁸⁷ Consequently, individual petitioners and petitions in the preparation stage have increasingly become targets of the picking quarrels charge, marking a decline in the rationality of politically

THE CHINESE COMMUNIST PARTY 352 (Willy Wo-Lap Lam ed., 2017).

¹⁷⁹ Katie Hunt & Shen Lu, *Fighting for Their Rights Landed These Young Chinese Feminists in Jail*, CNN (Apr. 10, 2015), [https://perma.cc/6QBP-SBCS]; Chang Ping, *In Xi Jinping’s Crackdown on Civil Society, Even Women’s Rights Activists Aren’t Spared*, SOUTH CHINA MORNING POST (Mar. 16, 2015), [https://perma.cc/QX45-KSRZ].

¹⁸⁰ *Shan Lihua* 单利华, CHINESE HUMAN RIGHTS DEFENDERS (Dec. 7, 2017), [https://perma.cc/Z264-XUSW].

¹⁸¹ See Shan Lihua Xunxinzhishuzi Er’shen Xingshi Caidingshu (单利华寻衅滋事罪二审刑事裁定书) [Second Instance Criminal Verdict of Shan Lihua Picking Quarrels and Provoking Trouble], Su 06 Xingzhong No. 318 (Nantong Interm. People’s Ct. Dec. 25, 2016) (China).

¹⁸² See *id.*

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ See Lianjiang Li et al., *Petitioning Beijing: The High Tide of 2003-2006*, 210 CHINA Q. 313, 314, 332-333 (2012); Yongshun Cai, *Local Governments and the Suppression of Popular Resistance in China*, 193 CHINA Q. 24, 27-33 (2008).

¹⁸⁷ Lei & Yang, *supra* note 164 at 171-81.

motivated prosecutions.¹⁸⁸ Petitioners could receive severe sentences based on an irrational slippery slope logic: the notion that a petition, even in its preparatory stages, might inevitably lead to potential civil unrest and widespread chaos.

Currently, Chinese authorities are not hesitant in employing the charge of picking quarrels to suppress persistent petitioners, a sharp deviation from the Handan case in 2012.¹⁸⁹ Some officials are abusing the charge of picking quarrels as a means of ex post facto retaliation against petitioners. For instance, Zhou Zhizhong was sentenced to four years of imprisonment because he argued with local officials who had prevented him from petitioning and “criticized the leaders of government departments” on a local internet forum.¹⁹⁰ In his verdict, Zhou was charged with picking quarrels for allegedly “exerting pressure on the government.”¹⁹¹ This is just one of many cases where peaceful petitioners were criminalized under the picking quarrels charge as a form of retaliation for their petitions.

In particular, picking quarrels has become a legal repercussion for petitioning at higher levels of government, particularly for those expressing their grievances in Beijing.¹⁹² For instance, farmers Dai Tingyi and Yin Huari from Chengbu Miao Autonomous County in Hunan Province accused local officials of embezzling poverty alleviation funds and petitioning in

¹⁸⁸ See Zhu Jianhua (杨玉晓), *Xunxinzhishizui zai Shesu Xinfang Zhili zhong de Shiyong Yanjiu* (寻衅滋事罪在涉诉信访治理中的适用研究) [Studying the Application of Picking Quarrels and Provoking Troubles Crime in the Governance of Litigation-related Letters and Visits], 4 *Shanxi Jingcha Xueyuan Xuebao* (山西警察学院学报) [J. Shanxi Police Coll.], 53 (2021) (China); Zhu Jianhua (朱建华) & Li Juntao (李丁涛), *Feizhengchang Shangfang Xingwei Xingfa Guizhi de Fansi yu Xiansuo: yi 2018-2019 nianjian de 320 fen Caipan Wenshu wei Yangben* (非正常上访行为刑法规制的反思与限缩) [Reflection and Restriction of Criminal Law Regulation on Abnormal Letter and Visiting- Taking 320 Judgment Documents from 2018 to 2019 as Samples], 6 *Neimenggu Shifan Daxue Xuebao* (Zhexue Shehui Kexue ban) (内蒙古师范大学学报) (哲学社会科学版) [J. Inner Mong. Normal Univ.], 46 (2021) (China).

¹⁸⁹ See *Du Moumou fan Xunxinzhishizui Er'shen Xingshi Panjueshu* (杜某某犯寻衅滋事罪二审刑事判决书) [Second Instance Criminal Verdict of Du Moumou Picking Quarrels and Provoking Trouble], *Danshixingzhongzi* (Handan Interm. People's Ct. No. 68, 2012) (China).

¹⁹⁰ See *Zhou Zhizhong Xunxinzhishizui Ershen Xingshi Caidingshu* (周执忠寻衅滋事罪二审刑事裁定书) [Second Instance Criminal Verdict of Zhou Zhizhong Picking Quarrels and Provoking Trouble], *Wan 17 Xingzhong* (Chizhou Interm. People's Ct. No. 124, Dec. 11, 2019) (China).

¹⁹¹ See *id.*

¹⁹² See Wang Qinghua (汪庆华), *Tongguo Sifa de Shehui Zhili: Xinfang Zhongjie yu Xunxinzhishi* (通过司法的社会治理: 信访终结与寻衅滋事) [Social Governance Through Judiciary: The End of Letters and Visits and Picking Quarrels and Provoking Troubles], 1 *Zhejiang Shehui Kexue* (浙江社会科学) [Zhejiang Soc. Sci.], 49 (Jan. 2018) (China).

Beijing.¹⁹³ The county court sentenced them to two years in prison for picking quarrels.¹⁹⁴ The verdict did not explain how their petition disturbed the public order at the national capital, but it emphasized the Beijing petition as “seriously disrupting the order of government work in six townships of Chengbu county.”¹⁹⁵

3. Online Speeches

Under Xi, China has increasingly abandoned its previous, more tolerant approach to criticism of the government’s performance and Party policies, as well as online activism.¹⁹⁶ Under the guise of “Cyber sovereignty,” the Party’s control of speech has expanded from targeting speech that may incite collective action to actively deterring public discussion in a paranoid manner.¹⁹⁷ This signals a significant decline in the rationality of law, even within the already arbitrary realm of political suppression.

Picking Quarrels, as a catchall crime, has been increasingly weaponized to silence and deter public discourse, arbitrarily targeting almost all types of speech that dominant officials deem objectionable. This includes speech that may lead to civil unrest, critical discussions over socio-economic public policy, social media posts involving disrespectful remarks against individual traffic police, complaints about the condition of quarantine facilities, or even fictional works that imply an internal struggle within a state-owned enterprise.¹⁹⁸

¹⁹³ See Dai Tingyi Yin Huari Xunxinzhishi Yishen Xingshi Panjueshu (戴廷移、尹华日寻衅滋事一审刑事判决书) [First Instance Criminal Verdict of Dai Tingyi and Yin Huari Picking Quarrels and Provoking Trouble], Xiang 0529 Xingchu (Chengbu Miao Autonomous Cnty. Basic People’s Ct. No. 116, Nov. 11, 2019) (China).

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ See GUOBIN YANG, CHINA CONTESTED INTERNET, 230-232 (2015).

¹⁹⁷ See THE INTERNET, SOCIAL MEDIA, AND A CHANGING CHINA (Jacques deLisle et al., eds., 2016); Gary King et al., *Reverse-Engineering Censorship in China: Randomized Experimentation and Participant Observation*, 345 AAAS 891, 891-92 (2014); Gary King et al., *How Censorship in China Allows Government Criticism but Silences Collective Expression*, 107 AM. POL. SCI. REV. 326, at 326-28 (2013); ENGAGING SOCIAL MEDIA IN CHINA: PLATFORMS, PUBLICS, AND PRODUCTION (Guobin Yang & Wei Wang eds., 2021); see also *id.*

¹⁹⁸ See Pitman B. Potter & Sophia Woodman, *Boundaries of Tolerance: Chapter 08 and Debates over Political Reform*, in LIU XIAOBO, CHARTER 08, AND THE CHALLENGES OF POLITICAL REFORM IN CHINA 56 (Jean-Philippe Béja et al. eds., 2012); Kang Chengyu Xunxinzhishi ershen Caiding Shu (康成玉寻衅滋事二审裁定书) [Second Instance Criminal Verdict of Kang Chengyu Picking Quarrels and Provoking Trouble], Liao 11 Xingzhong (Panjin Interm. People’s Ct. No. 48, May 10, 2017) (China) [hereinafter reporter Kang’s case verdict]; Gao Xuwen Xunxinzhishi Yishen Xingshi Panjueshu (高学文寻衅滋事一审判判决书) [First Instance Criminal Verdict of Gao

Particularly, in comparison to the administration of Hu-Wen, ordinary social media users have been charged with Picking Quarrels for their online speech alone, without any possibility of creating civil unrest, highlighting the increasingly repressive and prerogative turn under Xi.¹⁹⁹ For instance, Twitter is blocked by the Great Chinese Firewall and thus is currently inaccessible in China.²⁰⁰ However, even without significant dissemination, speeches published on Twitter are sufficient grounds for severe punishment under the picking quarrels charge. As mentioned in the introduction, the case of Luo Daiqing is one example.²⁰¹ The verdict of Liu Hongbo serves as another example—Liu was found guilty of “online Picking Quarrels” in 2018 for reposting 72 posts that were deemed to “defame” national leaders and 329 posts as “damaging the Party and government’s image,” despite his Twitter account having only twelve followers.²⁰²

B. *New Laws Unleashing Political Arbitrariness*

Under Xi’s administration, a concerning trend has emerged wherein new laws often serve to legalize and legitimize the discretionary power of dominant officials, allowing them to employ the charge of picking quarrels for political suppression. The following section uses the creation of “online Picking Quarrels” through a judicial interpretation as an illustrative example.

On September 9, 2013, the Party Central directed the Chinese judiciary to issue “Interpretation of the Several Issues concerning the Specific Application of Law in the Handling of Defamation through Internet and Other Criminal Cases,” known as the “Judicial Interpretation No. 21” which empowers officials to arbitrarily criminalize objectionable online

Xuwen Picking Quarrels and Provoking Trouble], Yun 0423 Cingchu (Tonghai Cnty. People’s Ct. No. 369, Dec. 12, 2019) (China); Zhang Wenfang Xunxinzhishizui Yishen Xingshi Panjueshu (张文芳寻衅滋事罪一审刑事判决书) [First Instance Criminal Verdict of Zhang Wenfang Picking Quarrels and Provoking Trouble], Ji1 082 Xingchu (Sanhe Interm. People’s Ct. No. 263, Sept. 8, 2020) (China); Zou Guangxiang Liu Chengkun Xunxinzhishizui Yishen Xingshi Panjueshu (邹光祥刘成昆寻衅滋事一审刑事判决书) [First Instance Criminal Verdict of Zou Guangxiang and Liu Chengkun Picking Quarrels and Provoking Trouble], Nei 0103 Xingchu (Huimin Dist. People’s Ct. No. 181, Nov. 23, 2018) (China).

¹⁹⁹ See Picking Quarrels Cases discussed *infra* section “B” and “C”.

²⁰⁰ Chaitra Anand, *Why Twitter is Banned in China*, YAHOO FIN. (May 19, 2022), [<https://perma.cc/Y3WU-TWYK>].

²⁰¹ *Supra* note 4.

²⁰² See Liu Hongbo Xunxinzhishizui Yishen Xingshi Panjueshu (刘红波寻衅滋事罪一审刑事判决书) [First Instance Criminal Verdict of Liu Hongbo Picking Quarrels and Provoking Trouble], Su 1003 Xingchu (Hanjiang Dist. People’s Ct. No. 851, Dec. 25, 2018) (China).

speeches under the banner of picking quarrels, all without substantial procedural or substantive legal accountability for such actions, as demonstrated by the cases discussed below.²⁰³

Essentially, “online Picking Quarrels” has been created as a new subcategory of the Picking quarrels Charge, to specifically target online speech, as outlined in Article 5 of Judicial Interpretation No. 21. Article 5 stipulates that individuals who use the internet to abuse or threaten others, creating serious social disruption, or making a commotion online by fabricating or spreading misinformation that leads to significant public disorder, can face up to five years of imprisonment.

Compared to Judicial Interpretation No. 18, which was issued just two months earlier, Interpretation No. 21 evidently signifies a decline in legal rationality. Interpretation No. 18 offers more precise crime elements for all four sub-categories of Picking Quarrels and explicitly defines the “order of public places.”²⁰⁴ In contrast, Article 5 of Interpretation No. 21 creates the concept of “online Picking Quarrels” through vague, obscure, and inconsistent terms, as it fails to clarify what constitutes public places for the offense of online picking quarrels.

The new rule problematically equates “fabricating and distributing misinformation” with “making a commotion.” The literal meaning of “making a commotion” (起哄闹事) in the Chinese language refers to a group of people physically causing a disturbance and disrespecting social order.²⁰⁵ In practice, it remains unclear how an individual could incite a commotion online.²⁰⁶ Shang Yong, a Chinese legal scholar, argues that if

²⁰³ See Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Guanyu Banli Liyong Xinxin Wangluo Shishi Feibang Deng Xingshi An’jian de Sifa Jieshi, Fashi [2013] No. 21 (最高人民法院、最高人民检察院关于办理利用信息网络实施诽谤等刑事案件的司法解释, 法释 [2013] 21号) [Interpretation of the Several Issues concerning the Specific Application of Law in the Handling of Defamation through Internet and Other Criminal Cases, Judicial Interpretation] (promulgated by the Judicial Comm. Sup. People’s Ct., Sept. 5, 2013, and the Procuratorate Comm. Sup. People’s Procuratorate, Sept. 2, 2013, effective Sept. 10, 2013) Sup. People’s Ct. Gaz. No. 21, Sept. 5, 2013 (China).

²⁰⁴ Art. 5 of Judicial Interpretation No.18.

²⁰⁵ See *supra* note 6.

²⁰⁶ See Chen Xiaowei (陈小炜), Lun Xunxinzishizui ‘Koudai’ Shuxing de Xianzhi he Xiaomie (论寻衅滋事罪‘口袋’属性的限制和消灭) [On the Restriction and Reduction of the “Catchall” Nature of the Crime of Picking Quarrels and Provoking Trouble], 3 Zheng Fa Lun Cong (政法论丛) [J. Pol. Sci. & L.], 149 (2018) (China); Zhang Qianfan (张千帆), Xingfa Shiyong Ying Zunxun Xianfa de Jiben Jingshen: Yi Xunxinzishi de Sifajieshi Weili (刑法适用应遵循宪法的基本精神: 以寻衅滋事的司法解释为例) [The Imposition of Penalties Should Follow the Basic Spirit of the Constitution: Taking the Judicial Interpretation of Picking Quarrels and Provoking Troubles as an Example], 4 Faxue (法学) [L. Sci.] (2015) (China); Lu Hengfei (卢恒飞), Wangluo Yaoyan Ruhe Raoluan le Gonggongzhixu (网络谣言如何扰乱了公共秩序) [How do Internet rumors disrupt public order?: On the Understanding and Usage of the Crime of Picking Quarrels

online speech could be considered as causing a commotion, then, by the same logic, shooting someone in a video game could be deemed as murder.²⁰⁷

Essentially, “online Picking Quarrels” is a product of crime by analogy. While its legal definition remains ambiguous, the principal objective of Judicial Interpretation No. 21 appears rather explicit—to align with Xi Jinping’s political agenda of purging China’s online activism and public discourse.²⁰⁸ Faced with a perceived challenge from grassroots movements, Xi’s administration opted for a stringent approach toward China’s once relatively open Internet.²⁰⁹ In his declaration on August 19, 2013, Xi initiated a campaign against what he described as “negative online content,” emphasizing the imperative of securing the so-called “battlefield of propaganda and ideologies.”²¹⁰ Xi stated that “if we do not occupy the battlefield of propaganda and ideologies, the hostile forces will occupy it.”²¹¹ Xi characterized the war against negative online comments as an enduring struggle, stressing the need for unwavering determination and perpetual defense of the state’s ideology and propaganda ground.²¹² In essence, Xi’s “8.19 Speech” sent a hostile warning that dissenting expressions and online activism would find no place on the Chinese Internet.

On August 20, 2013, one day after the “8.19 Speech,” the Chinese authorities initiated a nationwide campaign against what they labeled as “online rumors.”²¹³ Introduced in the midst of this campaign, Judicial

and Provoking Trouble Regarding Internet Rumors], 1 *Jiaoda Faxue* (交大法学) [SJTU L. Rev.], 118 (2015) (China); *supra* note 162.

²⁰⁷ See Shang Yong (尚勇), *Lun Xunxinzhishizui dui Wangluo Zaoyao, Chuanyao Xingwei de Heli Guizhi* (论寻衅滋事罪对网络谣言、造谣行为的合理规制) [On the Reasonable Regulation of the Crime of Picking Quarrels and Provoking Troubles on the Behavior of Spreading Online Rumors], 4 *Fazhi yu Shehui* (法制与社会) [Legal Sys. & Soc’y], 295 (2016) (China).

²⁰⁸ See generally GOUBIN YANG, *THE POWER OF THE INTERNET IN CHINA: CITIZEN ACTIVISM ONLINE* (2011); Guobin Yang, *China Since Tiananmen: Online Activism*, 20 *J. DEMOCRACY* 33 (2009).

²⁰⁹ See generally Xiao Qiang, *The Road to Digital Unfreedom: President Xi’s Surveillance State*, 30 *J. DEMOCRACY* 53 (2019); Anne-Marie Brady, *Plus Ça Change?: Media Control Under Xi Jinping*, 64 *PROBS. OF POST-COMMUNISM* 128 (2017). Both discuss media control in Xi’s era in detail.

²¹⁰ Xuexi Lushang (学习路上), *Xi Jinping: Dang de Xinwen Yulun Gongzuo Bixu Tingqi Jingshen Jiliang* (习近平：党的新闻舆论工作必须挺起精神脊梁) [Xi Jinping: The Party’s News and Public Opinion Work Must Straighten Its Spiritual Backbone], *RENMINWANG* (人民网) [PEOPLE.CN], (Dec. 4, 2018), [<https://perma.cc/92AT-8WTX>].

²¹¹ *Id.*

²¹² *Id.*

²¹³ Xinhua News Agency (新华社), *Gonganbu Jizhong Daji Wangluo Youzuzhi Zhizao Chuanbo Yaoyan deng Weifa Fanzui* (公安部集中打击网络有组织制造传播谣言等违法犯罪) [The Ministry of Public Security is Intensifying Efforts to Crack down on Illegal Activities such as Organized Creation and Dissemination of Rumors on the Internet],

Interpretation No. 21 bestowed significant authority upon officials to criminalize online activism and other objectionable speeches across the Chinese internet.²¹⁴ The excessive ambiguity inherent in the online Picking Quarrels rule, encompassing terms such as “abuse of other people,” “public order,” “misinformation,” and “making commotion online,” effectively provided the Party-State officials with unchecked power.²¹⁵ In the months leading up to the end of 2013, numerous Chinese key internet opinion leaders, outspoken lawyers, and NGO leaders were detained on charges of online Picking Quarrels.²¹⁶ Moreover, from 2013 onward, the Chinese authorities routinely launched campaigns to “cleanse the online environment,” with many individuals falling victim to this new political catchall.²¹⁷

C. *Punishment and Deterrence: Politically Motivated Prosecutions of Picking Quarrels*

The decline of legal rationality in the political realm under Xi Jinping’s leadership is starkly evident in how officials exploit politically motivated picking quarrels prosecutions. First, the verdicts of these prosecutions display distorted elements of crime, as officials tend to replace the ambiguous and vague legal term of the picking quarrels with authoritarian norms. Furthermore, authorities have transformed picking quarrels into a convenient gateway for charging individuals with other political crimes, often resulting in heavier sentences for defendants in some picking quarrels cases. As the following sections illustrate, verdicts in which officials abuse picking quarrels for political prosecutions are fraught with logical fallacies, lacking basic predictability, consistency, and transparency, making it extremely difficult to anticipate the legal consequences of one’s

THE CENT. PEOPLE’S GOV’T OF THE PEOPLE’S REPUBLIC CHINA, (Aug. 21, 2013), [<https://perma.cc/H9P9-RAMB>].

²¹⁴ Jonathan Kaiman, *China Cracks Down on Social Media with Threat of Jail for ‘Online Rumours’*, GUARDIAN (Sept. 10, 2013), [<https://perma.cc/4KJV-UR5Y>]; *China Threatens Tough Punishment for Online Rumor Spreading*, REUTERS (Sept. 9, 2013), [<https://www.reuters.com/article/idUSBRE9880CQ/>].

²¹⁵ *China: Draconian Legal Interpretation Threatens Online Freedom*, HUM. RTS. WATCH (Sept. 13, 2013), [<https://perma.cc/9AJT-NVN4>].

²¹⁶ See Wang Tao (王涛), *Wangluo Gonggong Yanlun de Fazhi Neihan yu Heli Guizhi* (网络公共言论的法治内涵与合理规制) [Legal Meaning and Reasonable Regulation of Online Public Speech] 9 Faxue (法学) [L. Sci.], 65 (2014) (China).

²¹⁷ While comprehensive studies of these campaigns are urgently needed, it’s widely reported by media that China has frequently initiated Internet “purification” campaigns under Xi’s leadership. See e.g., Eduardo Baptista, *China Launches Campaign Against Online Rumours Ahead of Party Congress*, REUTERS (Sept. 2, 2022), [<https://www.reuters.com/world/china/china-launches-campaign-against-online-rumours-ahead-party-congress-2022-09-02/>]; Laura He, *China Pledges ‘Purification’ of the Internet Ahead of the Beijing Winter Olympics and the Lunar New Year*, CCN, (Jan. 26, 2022), [<https://perma.cc/X7CC-2NSR>].

actions. Moreover, with the backing of the Party's propaganda departments, picking quarrels trials are frequently employed to publicly shame offenders for defying authoritarian orders and to deter Chinese citizens from engaging in public participation.

1. The Distorted Criminal Process

In principle, Chinese criminal law, akin to other civil law systems, stipulate that all convictions, including those for picking quarrels, must satisfy each crime element of the offense: the presence of a culpable mental state, a punishable act, demonstrable social harm, and a clear and direct causal link.²¹⁸ Moreover, according to the PRC Criminal Procedural Law, the burden of proof must be met, necessitating the establishment beyond any reasonable doubt that the suspect, guided by a culpable mental state, engaged in a punishable act, which directly resulted in legally proscribed social harm.²¹⁹

However, many politically motivated picking quarrel verdicts do not conform to criminal justice standards. Instead, these verdicts tend to follow a familiar template: the authorities manipulate the ambiguous legal definition of picking quarrels and capriciously substitute crime elements with authoritarian norms. This can involve discrediting citizens as rational and autonomous agents in public engagement or portraying petitioners as selfish and order destroyers to deny them their legal rights. The subsequent section will illustrate how this distorted criminal process works.

(1) *Mens Rea: Shaming Offenders for Violating Authoritarian Norms*

In the verdicts of politically motivated picking quarrels prosecutions, the first element frequently distorted is *mens rea*, or guilty mind, often replaced by political malice that presumes the offenders are challenging the authoritarian order imposed by the Party-State. In many of these verdicts, *mens rea* is used to shame the defendants whom the officials deem as disobeying the authoritarian order.

Take the case of Yang Desong as an example.²²⁰ Under Chinese law,

²¹⁸ Art. 14, 15 and 16 of the Criminal Code of the People's Republic of China. *Criminal Law (2021 Edition)*, CHINA LAW TRANSLATE (Dec. 28, 2020), [<https://perma.cc/UM8X-ZD2Y>].

²¹⁹ Art. 53 of Criminal Procedural Law of the People's Republic of China. *Criminal Procedure Law (2018)*, CHINA LAW TRANSLATE (Oct. 30, 2018), [<https://perma.cc/8VRX-YBB4>]; see e.g., Joshua Rosenzweig et al., *The 2012 Revision of the Chinese Criminal Procedure Law: (Mostly) Old Wine in New Bottles*, CRJ OCCASIONAL PAPER 1, 21-32 (May 17, 2012).

²²⁰ See Yang Desong Xunxinzishi Er'shen Xingshi Caidingshu (杨德松寻衅滋事二审刑事裁定书) [Second Instance Criminal Verdict of Yang Desong Picking Quarrels and Provoking Trouble], Gan 07 Xingzhong (Ganzhou Interim. People's Ct. No. 149, Apr. 22, 2019) (China).

individuals have the legal right to claim fair compensation from the government in cases of the closure of mining enterprises for land expropriation.²²¹ When the local government abruptly terminated the permits for Yang's quarries without prior notice, Yang pursued his grievance with higher levels of government, contending that the compensation offered was significantly below the market value.²²² Later, Yang was arrested by the local police and subsequently convicted of picking quarrels.²²³ His verdict depicted his intentions as an attempt to “improperly benefit from the government” and “an inability to express his claims constructively.”²²⁴ Despite the absence of legal wrongdoing in Yang's actions, the verdict distorted his motivations by imposing an authoritarian norm—that citizens should not challenge the government.²²⁵

Similarly, in cases where the charge of picking quarrels is used to punish protests and civil unrest, the element of *mens rea* is often distorted to undermine the rights-based rationale for public participation. Consider the case of Li Yanjun, for instance.²²⁶ Li was accused of picking quarrels for expressing his support for a series of protests across China.²²⁷ In his verdict, the judge wrote, “Li knows that he has no personal interest related to the matter, but in order to achieve his illegal purpose, Li has repeatedly supported many sensitive events.”²²⁸ From a legal perspective, having no personal interest in a protest is not a crime. Conversely, a protest is a powerful means of expressing support or objection to a public issue that may not be directly related to an individual's personal interests. Li's case demonstrates that the authorities arbitrarily denied a citizen's civil rights while distorting the meaning of *mens rea*. Underlying the judge's reference to an “illegal purpose” left unexplained is another classic authoritarian norm: citizens should accept their exclusion from decision-making in public

²²¹ Art. 36 of the Mineral Resources Law of the People's Republic of China. *Mineral Resources Law (2009 Edition)* CHINALAWINFO DATABASE, [https://www.lawinfochina.com/display.aspx?id=22748&lib=law#:~:text=Mineral%20Resources%20Law%20of%20the%20People%27s%20Republic%20of%20China%20\(2009%20Amendment\)](https://www.lawinfochina.com/display.aspx?id=22748&lib=law#:~:text=Mineral%20Resources%20Law%20of%20the%20People%27s%20Republic%20of%20China%20(2009%20Amendment).). (last visited Apr. 20, 2024).

²²² See Yang *supra* note 220.

²²³ See *id.*

²²⁴ See *id.*

²²⁵ Such an authoritarian norm has been identified and analyzed in detail by Cheesman in his study of criminal justice in contemporary Myanmar. See Cheesman, *supra* note 34.

²²⁶ See Li Yanjun Xunxinzhishi Yishen Xingshi Panjueshu (李燕君寻衅滋事一审刑事判决书) [First Instance Criminal Verdict of Li Yanjun Picking Quarrels and Provoking Trouble], Lu 0523 Xingchu (Guangrao Basic People's Ct. No. 215, Sep. 8, 2017) (China).

²²⁷ See *id.*

²²⁸ *Id.*

affairs.²²⁹

(2) *Arbitrary Distortion of Other Elements of Crime*

In addition to *mens rea*, Chinese authorities frequently distort other elements of the crime of Picking Quarrels, including criminal acts, social harms, and causation in political prosecutions. This practice aims to construct guilt for those seen as creating or increasing risks of challenging the authoritarian order, whether real or imagined.

A common scenario involves a police or other dominant official claiming that an act or speech of a citizen has heightened the political risk, often suggesting that the defendant has incited a pre-emptive response or even attention from the authorities. In such cases, the acts are often categorized as “criminal acts” under the picking quarrels scheme.²³⁰ The SPP has recently endorsed an arbitrary pre-emptive approach in Picking Quarrels cases, asserting that online Picking Quarrels do not require subjective malice as a condition.²³¹ Even with good intentions, those deemed “spreading misinformation” may still be held criminally responsible for picking quarrels.²³²

In some Picking Quarrels verdicts, such a hyper-preemptive logic was explicitly acknowledged. For instance, in the case of Wu Yongfu, a teenager was found dead under suspicious circumstances in Lu County where Wu resided.²³³ Wu published an article questioning the credibility of the government's autopsy report, which was secretly detected by Lu County authorities through mass surveillance.²³⁴ The officials covertly forwarded a report to their superiors, prompting the county propaganda department to

²²⁹ See Eva Pils, *Taking Yuan (冤) Seriously: Why the Chinese State Should Stop Suppressing Citizen Protests Against Injustice*, 25 TEMP. INT'L & COMP. L. J., 285 (2011).

²³⁰ See Jiang Tao (姜涛), *Wangluo Yaoyan de Xingfa Zhili: Cong Xianfa de Shijiao* (网络谣言的刑法治理: 从宪法的视角) [Criminal Law Governance of Internet Rumors: From a Constitutional Perspective], 3 *Zhongguo Faxue* (中国法学) [China Legal Sci.], 208 (2021) (China).

²³¹ Qin Wenpin, *Zhunque Rending Wangluo Xunxinzishi Fanzui* (准确认定网络寻衅滋事犯罪) [Accurately Identifying the Crime of Online Picking Quarrels and Provoking Trouble], RENMIN JIANCHA BAO (人民检察报) [PEOPLE'S PROCURATORATE DAILY], (Oct. 25, 2022), [<https://perma.cc/H525-VUB4>].

²³² See *id.*

²³³ The crime imposed on Wu had been changed into picking quarrels during his trial. See Wu Yongfu (巫永富), *Bianzao Guyi Chuanbo Xujia Xinxizui Yishen Xingshi Panjueshu* (巫永富编造、故意传播虚假信息罪一审刑事判决书) [First Instance Criminal Verdict of Wu Yongfu Fabricating and Deliberately Disseminating False Information], Chuan 0502 Xingchu (Jiangyang Dist. People's Ct., Luzhou, No. 487, May 8, 2018) (China).

²³⁴ See *id.*

contact the police to apprehend Wu directly.²³⁵ Despite the lack of any specific Chinese law, Wu's picking quarrels verdict deemed him guilty of escalating the risk of "stability maintenance" and the level of "media controlling measures."²³⁶

Similarly, the Chinese authorities frequently distort the crime element of "social harm" in Picking Quarrels cases, targeting any action that might exert pressure on the government. In the case of Shang Qiuzhi, Shang's veteran father was petitioning for his pension, which led to a physical conflict with government officials.²³⁷ Shang assisted his father by sharing his petition on social media, alleging that the local officials had assaulted his father.²³⁸ Shang was found guilty of Picking Quarrels, and the supposed "social harm" was that the local police department had "prepared an emergency plan" and had personnel standing by for any "potential social disorder," even though Shang's messages had not caused any civil unrest.²³⁹

The concept of "social harm" in political Picking Quarrels cases could be expanded to include anything that dominant officials deemed undesirable. For instance, in the case of Zou Maoshu and Yan Chunfeng, both petitioners were accused of Picking Quarrels.²⁴⁰ According to their verdict, Zou and Yan's alleged criminal act was being photographed by foreign reporters and the press, and their "social harm" was generating pressure on local government and officials.²⁴¹

Causation is another crucial crime element and theoretically implies that the social harm must be a direct result of the criminal act. In other words, no one should be found guilty if their actions are not directly responsible for the harm. However, in Picking Quarrels cases, causation has been

²³⁵ *See id.*

²³⁶ *See id.*

²³⁷ *See* Shang Qiuzhi Xunxinzhishi Zhapian Yishen Xingshi Panjueshu (尚秋枝寻衅滋事、诈骗一审刑事判决书) [First Instance Criminal Verdict of Shang Qiuzhi Picking Quarrels and Provoking Trouble and Fraud], Yu 0381 Xingchu (Yanshi Interm. People's Ct. No. 115, May 19, 2019) (China).

²³⁸ *See id.*

²³⁹ *See id.*

²⁴⁰ *See* Zou Maoshu Xunxinzhishizui Ershen Xingshi Caidingshu (邹茂淑寻衅滋事罪二审刑事裁定书) [Second Instance Criminal Verdict of Zou Maoshu Picking Quarrels and Provoking Trouble], Yu 01 Xingzhong (Chongqing No. 1 Interm. People's Ct. No. 102, Mar. 14, 2019) (China); Yan Chunfeng Xunxinzhishizui Ershen Xingshi Caidingshu (闫春风寻衅滋事罪二审刑事裁定书) [Second Instance Criminal Verdict of Yan Chunfeng Picking Quarrels and Provoking Trouble], Ji 24 Xingzhong, (Yanbian Interm. People's Ct. No. 135, Sept. 16, 2019) (China).

²⁴¹ In both cases, "losing faces" means their letter and visit has been reported by foreign media outlets. In the Chinese political system, this will likely cause officials to be sanctioned by their superiors for causing foreign pressure on China. *See, e.g.,* Yongshun Cai, *supra* note 186, at 35-38. In both Yan and Zou's verdicts, the prosecutors accused them, in separate cases, of "causing social harms" due to their being reported by foreign media outlets. *See* verdicts of Zou Maoshu and Yan Chunfeng, *id.*

intentionally disregarded for political prosecution. Take the case of Zhang Heng, for instance. Zhang was found guilty of Picking Quarrels for making disrespectful remarks about Chinese firefighters on social media.²⁴² Causation was deliberately overlooked in this case: Zhang deleted his comments immediately after posting, but they were screenshotted and reposted by his followers.²⁴³ Although Zhang had no control over the repost, all subsequent reposts and comments on the screenshots were counted against him to construct his guilt, even including those posted by netizens after Zhang was taken into custody.²⁴⁴

(3) *Proof with Obvious Doubt*

Finally, we found that the legal standard of proof was intentionally left unmet in political Picking Quarrels cases. The inherent vagueness of the picking quarrels charge provided ample opportunities for the selective manipulation of evidence, deviating from the established “proof beyond a reasonable doubt” principle in PRC Criminal Procedural Law.²⁴⁵ Kang Chengyu's case exemplifies this manipulation. Kang, a reporter, published two articles in 2017 discussing the failure of the real estate market in Panjin city, Liaoning Province, which garnered around 13,000 views.²⁴⁶ Kang was found guilty of Picking Quarrels based on the deliberate selection of “testimonies” from 28 anonymous viewers, who unanimously claimed they “felt a loss of confidence, doubt, and subsequently canceled their plans to purchase houses in Panjin city after reading Kang's articles.”²⁴⁷ This selective use of evidence illustrates the manipulation of the evidence process in such cases.²⁴⁸

2. A Gateway of Political Offenses and Harsher Penalties

Picking Quarrels serves as a crucial instrument for Party-State officials in carrying out political persecution, acting as a “gateway” through which more serious political offenses and harsher penalties can be imposed on defendants already in custody.

The Chinese authorities sometimes start by arresting individuals

²⁴² See Zhang Heng Xunxinzhishizui Yishen Xingshi Panjueshu (张恒寻衅滋事罪一审刑事判决书) [First Instance Criminal Verdict of Zhang Heng Picking Quarrels and Provoking Trouble], Shan 0802 Xingchu (Yuyang Dist. People's Ct., Yulin, No. 339, June 21, 2019) (China).

²⁴³ See *id.*

²⁴⁴ See *id.*

²⁴⁵ Article 55 of 2018 Criminal Procedural Law of PRC. *Criminal Procedure Law (2018)*, CHINA LAW TRANSLATE (Oct. 30, 2018), [<https://perma.cc/9UBR-F6AP>].

²⁴⁶ See reporter Kang's case verdict, *supra* note 198.

²⁴⁷ See *id.*

²⁴⁸ See *id.*

under the charge of Picking Quarrels before changing the charge to more serious political crimes on the defendants' indictments. This strategy is commonly employed to punish activists, petitioners, and other politically objectionable individuals initially taken into custody. For example, in May 2014, the police criminally detained the renowned Chinese lawyer, Tang Jingling.²⁴⁹ Initially, Tang's indictments listed "Picking Quarrels."²⁵⁰ A month later, the indictment was changed from "Picking Quarrels" to "Inciting Subversion."²⁵¹ In 2015, the Guangzhou court sentenced Tang to five years in prison for "inciting subversion of state power," a more severe political offense under the 1997 Chinese Criminal Code.²⁵²

Vice versa, if the police or prosecutors no longer wish to charge the defendants with a political crime, they will revert to punishing them for picking quarrels. One possible explanation is that the authorities will not miss the opportunity to criminally punish objectionable individuals even though they prefer not to use high-profile political charges to do so.²⁵³ For instance, Zhu Chengzhi, a senior activist, was arrested after publicly commemorating the victims of the Cultural Revolution²⁵⁴. The officials initially placed Zhu under surveillance for Picking Quarrels and then changed his charge to subversion.²⁵⁵ Zhu's charge was switched back to Picking Quarrels during the court proceedings.²⁵⁶ Thus, the prosecutors resorted to the vague catchall crime, accusing Zhu of engaging in online Picking Quarrels without specifying the nature of his actions.²⁵⁷ While the exact reason for this back-and-forth remains unknown, prosecuting someone for subversion could increase the workload for the officials.²⁵⁸

Moreover, Chinese authorities may simply use a charge of Picking Quarrels to add to the sentences imposed on defendants alongside other more specific crimes. This "add-on" technique is particularly useful in some high-profile political cases. Picking Quarrels was one of the eight charges against outspoken Chinese billionaire, Sun Dawu, and his family, serving

²⁴⁹ *Case History: Tang Jingling*, FRONT LINE DEF., [<https://perma.cc/UED7-FPKQ>] (last visited Feb. 22, 2024).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Tang Jingling*, HUM. RTS. IN CHINA, [<https://perma.cc/R57N-8BKU>] (last visited Feb. 24, 2024).

²⁵³ Interview with an informed Chinese rights advocate Huang, in H.K. (Dec. 10, 2017).

²⁵⁴ Gao Feng, 'Back in the Big Prison': Dissident Zhu Chengzhi is Released from Jail, RADIO FREE ASIA (Feb. 1, 2022), [<https://perma.cc/C2YZ-MYP4>].

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Interview with an anonymous and informed Chinese rights advocate Li, in H.K. (May 1, 2019).

as additional punishment for their non-cooperation with the local government in business matters.²⁵⁹ In Sun's verdict, the offence of Picking Quarrels added several years to his 18-year imprisonment.²⁶⁰

3. Fostering Chilling Effects: Propagating High-Profile Picking Quarrel Cases

Under Xi's term, there is a growing trend of exploiting Picking Quarrels cases as propaganda material under the guise of "popularizing law." The real objective is to deter citizens from participating in public activities, such as protests and petitions. While some scholars may argue that this approach could increase the sociopolitical relevance of law and legal institutions within an authoritarian context like China, I contend that using law to create chilling effects ultimately diminishes the true significance of the legal system. This is because the authoritarian regime undermines the intrinsic rationality of law and promotes irrational fear through the legal framework. Essentially, individuals in such a system are not afraid of breaking the law but rather fear being labeled as a state enemy.²⁶¹

A notable political prosecution involving Picking Quarrels was the trial of Pu Zhiqiang, which was extensively publicized by the Chinese propaganda apparatus to serve as a warning to the public regarding the penal consequences of unauthorized online speech. Pu Zhiqiang was one of China's most prominent human rights lawyers and advocates.²⁶² In 2014, Pu was arrested on charges of Picking Quarrels and inciting ethnic hatred due to his online activism.²⁶³ His guilt in the verdict was determined based on a selection of seven posts, deliberately chosen from over 20,000 posts on Pu's social media account.²⁶⁴

The Chinese authorities used the ambiguity of the Picking Quarrels

²⁵⁹ Reuters, *Outspoken Chinese Billionaire Sun Dawu Jailed for 'Picking Quarrels and Provoking Trouble'*, NBC NEWS (July 29, 2021), [https://perma.cc/R9SM-Y8V3].

²⁶⁰ Xiaokan Huanyu (笑看寰宇), Sun Dawu An Qisushu, Jiuzong Zui de Shishi he Xijie (孙大午案起诉书, 九宗罪的事实和细节) [The indictment of the Sun Dawu case, facts, and details of the nine charges.], FREEWECHAT (July 28, 2021), [https://perma.cc/GQW9-JFZ4].

²⁶¹ Pils, *supra* note 93, at 105, 112-113.

²⁶² In 2013, six months before his arrest, Pu was even awarded the title of "Top figure promoting rule of law" by Chinanews, one of the largest state news agencies in China. See Ying Ni, *Zhongguo Xinwen Zhoukan 'Yingxiang Zhongguo 2013 Niandu Renwu' Jiexiao* (中国新闻周刊“影响中国 2013 年度人物”揭晓) [*China News Weekly's "People Influencing China in 2013" Announced*], CHINANNEWS, Dec. 20, 2013, [https://perma.cc/V2GR-AEJA].

²⁶³ Chris Buckley, *Chinese Rights Lawyer Detained in 2014 Will Stand Trial*, THE NEW YORK TIMES, (May 15, 2015), [https://perma.cc/XV47-Z9YU].

²⁶⁴ *Pu Zhiqiang An Yishen Bianhuci*, (浦志强案一审辩护词) [Defense Statement of Pu Zhiqiang Trial's First Instance], (浦志强案一审陈述), INDEPENDENT CHINESE PEN CENTER (Dec. 22, 2015) (China), [https://perma.cc/8JZ4-UEH7].

charge to discredit Pu's moral standing and advocacy work.²⁶⁵ Despite the argument put forth by Pu's defense counsels regarding the duty of public figures and officials to tolerate public criticism, the verdict depicted Pu's criticisms of officials as "abuse directed at other citizens."²⁶⁶ The notion of social harm was portrayed as "causing bad social influence."²⁶⁷ However, the indictment did not clarify what constituted "bad social influence" nor established a causal link between Pu's online speeches and the purported social harm.²⁶⁸

The case of Pu was exploited to instill an irrational fear in the public, discouraging them from criticizing the Chinese authorities and officials. The *Global Times*, which serves as the CCP's mouthpiece, cautioned the public by stating, "In China, freedom of speech is not absolute," and claimed that "the court's verdict is authoritative and sets the boundaries for freedom of expression."²⁶⁹ However, Pu's verdict failed to establish publicly accessible, clear, or consistent boundaries between lawful and unlawful speech. As a legal principle, not every controversial statement should be treated as a criminal offense. As Pu Zhiqiang himself said, "it's a constitutional right."²⁷⁰ Ironically, the use of "freedom of speech" and "Constitution" in this propaganda seems to be merely a pretext to deny Chinese citizens their constitutional rights²⁷¹.

²⁶⁵ *See id.*

²⁶⁶ A classic US jurisprudence reflecting such a tolerance would be *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964); As for how the verdict depicted Pu in this case, while the full verdict has never been made public, a brief summary released by the Chinese authorities can be found in: Xinhua News Agency (新华社), *Beijingshi Erzhongyuan dui Puzhiqiang An Yishen Gongkai Xuanpan* (北京市二中院对浦志强案一审公开宣判) [Beijing Second Intermediate People's Court Publicly Announced the First-instance Verdict of the Pu Zhiqiang Case], GOV.CN, (Dec. 22, 2015), [<https://perma.cc/5S5L-G2VD>].

²⁶⁷ *See id.*

²⁶⁸ *See Pu, supra* note 264.

²⁶⁹ *Global Times* (环球日报), *Puzhiqiang Pansanhuansan Tixian Zhongguo Falü Zunyan* (浦志强判三缓三体现中国法律尊严) [Sentencing Pu Zhiqiang for Three-year Imprisonment with Three-year Probation Demonstrates the Dignity of Chinese Law] GLOBAL TIME (Dec. 21, 2015) (China), [<https://perma.cc/ZGD5-HHB8>].

²⁷⁰ Pu Zhiqiang (浦志强), *Wo he zhe laoyezi, Meisha Keshuo de: dao Zhangsizhi* (浦志强: 我和这老爷子, 没啥可说的-悼张思之) [This Old Man and I Need not Say Anything to Understand Each Other -Mourning for Zhang Sizhi], CND (June 28, 2022) (China), <http://hx.cnd.org/2022/06/28/浦志强：我和这老爷子，没啥可说的-悼张思之/>.

²⁷¹ Art. 35 of the Constitution of the People's Republic of China guarantees the freedom of speech, assembly, association, procession, and demonstration. *Constitution (1982 Edition, Amended 2018)*, THE STATE COUNCIL, THE PEOPLE'S REPUBLIC OF CHINA (Nov. 20, 2019), [https://english.www.gov.cn/archive/lawsregulations/201911/20/content_WS5ed8856ec6d].

In essence, Pu's picking quarrels verdict conveyed a powerful message to Chinese society that the line between "speech rights" and "speech crime" is determined solely and arbitrarily by the authorities. In fact, the Party authorities did not even attempt to conceal their agenda. They claimed that Pu's acquittal was a political issue rather than a legal one, stating that "those advocating for Pu's acquittal are attempting to embarrass the Chinese judicial system."²⁷² Through state-owned media, they issued a veiled threat declaring, "we will not be afraid to deal with anyone who disobeys, picks new quarrels, or causes new troubles."²⁷³ This statement essentially meant that anyone advocating for Pu's acquittal and defending freedom of speech in China, a constitutional right, was seen as disobeying the authority of the Party-State and had committed the crime of Picking Quarrels in the dominant officials' eyes.

V. EXCESSIVE USE OF PICKING QUARRELS IN NON-POLITICAL CASES UNDER XI'S RULE

The abuse of Picking Quarrels under Xi's administration vividly reflects the growing ambiguity between China's political and non-political domains. Unfortunately, there is a dearth of systematic data on the use of Picking Quarrels charge in routine justice, and acquiring comprehensive picture has become more challenging due to systematic censorship of Picking Quarrels cases by Chinese authorities in recent years²⁷⁴. Nevertheless, empirical research conducted by Chinese legal scholars reveal that the majority of Picking Quarrels cases do not involve politically motivated prosecutions.²⁷⁵ Rather, they typically involve minor offenses and mundane infractions such as a light degree of affray.²⁷⁶ However, as the following section will illustrate, the increasing incidence of non-political Picking Quarrels cases and their arbitrary handling similar to political cases signifying a diminishing legal rationality in the non-political sphere.

Similar to the use of Picking Quarrels in political repression,

0b3f0e9499913.html.

²⁷² Shan Renping (單仁平), *Yifa Shenpan Puzhiqiang An, Faguan ke Wushi Qita* (依法审判浦志强案, 法官可无视其他) [Judging the Pu Zhiqiang Case According to law, Judges Can Ignore Other Things], GLOBAL TIMES (Dec. 16, 2015) (China), [<https://perma.cc/626Q-U8Y6>].

²⁷³ *Id.*

²⁷⁴ See *infra* discussion in this section.

²⁷⁵ See Li Xiang (李想), Xunxinzhishizui 'Koudaihua' Xinsuo Yanjiu (寻衅滋事罪'口袋化'限缩研究) [Research on the Containing the 'Trend of Catchall' of the Crime of Picking Quarrels and Provoking Trouble] [ANHUI UNIV. OF FIN. & ECON.], 28-29 (June 10, 2021) (China).

²⁷⁶ See Zhao Lin (赵林), Xunxinzhishizui 'Koudaihua' Jiqi Duice Yanjiu (寻衅滋事罪'口袋化'及其对策研究) [Countermeasures of 'Pocketization' of Picking Quarrels and Provoking Trouble] [JIANGXI UNIV. OF FIN. & ECON.], 11-12 (June 1, 2021) (China).

Chinese authorities have implemented new regulations for picking quarrels to address everyday issues. And these regulations are often drafted in ambiguous, unclear, and inconsistent language as well. Moreover, the increasing moral imposition in non-political Picking Quarrels cases, the use of Picking Quarrels as a catchall for minor offenses, and the arbitrary escalation of penalties in the criminal process all undermine the integrity of China's routine criminal justice system.

A. *A Rapid Growth of Cases*

The problematic trend is first and foremost evidenced by the surge of Picking Quarrels cases during Xi's era. From 2008 to 2012, the yearly count of picking quarrels cases ranged from 15,000 to 20,000.²⁷⁷ According to SSP's official statistics, in 2019 alone, 93,834 individuals were arrested, and 113,850 were prosecuted for picking quarrels.²⁷⁸ Picking Quarrels ranked third among all arrests and fourth among all prosecutions, constituting at least 8.6 percent and 6.3 percent of all individuals arrested and prosecuted in China in 2019.²⁷⁹ The figures for 2019 were at least three to five times greater than those in 2012, while the total number of criminal cases in China per year only rose from around 1 million to 1.29 million between 2012 and 2019.²⁸⁰

Moreover, the actual number of Picking Quarrel cases is likely underestimated. This is primarily because the Chinese authorities, especially the SPC and the SPP, tend to selectively disclose information on picking quarrels cases.²⁸¹ Furthermore, it would not be surprising if Chinese

²⁷⁷ See Amnesty International, *Zhongguo: 'Koudaizui' Xunxinzhishizui Weihe Rang Meigeren dou Mianlin Weixian*, (中国: '口袋罪' 寻衅滋事罪为何让每个人都面临危险), [*China: Why the 'Catchall Crime' of Picking Quarrels and Provoking Trouble Puts Everyone at Risk*], Guoji teshe zuzhi (國際特赦組織) [AMNESTY INT'L], (Sept. 17, 2019), [<https://perma.cc/AY67-K9WH>].

²⁷⁸ 2019 nian Quanguo Jiancha Jiguan Zhuyao Ban'an Shuju (2019 年全国检察机关主要办案数据) [*The Main Case-handling Data of Nationwide Procuratorate Organs in 2019*], Zuigao Renmin Jianchayuan (最高人民法院) [SUP. PEOPLE'S PROC. GAZ.], (June 2, 2020), [<https://perma.cc/89BA-3Q4K>].

²⁷⁹ *Id.*

²⁸⁰ 2012 nian Quanguo Fayuan Sifa Tongji Gongbao (2012 年全国法院司法统计公报) [*2012 Annual Report on Judicial Statistics of National Courts*], ZUIGAO RENMIN JIANCHAYUAN (最高人民法院) [SUP. PEOPLE'S CT. GAZ.], [<https://perma.cc/8NMW-ZJHX>] (last visited Apr. 9, 2024); 2019 nian Quanguo Fayuan Sifa Tongji Gongbao (2019 年全国法院司法统计公报) [*2019 Annual Report on Judicial Statistics of National Courts*], ZUIGAO RENMIN JIANCHAYUAN (最高人民法院) [SUP. PEOPLE'S CT. GAZ.], [<https://perma.cc/6L86-PDYP>] (last visited Apr. 9, 2024).

²⁸¹ For example, The SPC 2021 annual report for the NPC also did not discourse anything regarding picking quarrels. See, e.g., *Zuigao Renmin Fayuan Gongzuo Baogao: 2021nian 3yue 8ri zai di Shisanjie Quanguo Renmin Daibiao Dahui Disici Huiyi Shang* (最高人民法院工作报告: 2021 年 3 月 8 日在第十三届全国人民代表大会第四次会议上) [*Work Report of the Supreme People's Court: On March 8, 2021 at the Fourth Session of*

authorities underreported the case numbers, given the chronic issues of data missing and intentional manipulation in official reporting and statistics in China.²⁸² In our case, Chinese courts openly reported 170,436 picking quarrel cases from the end of 2013 to October 2019.²⁸³ However, a commercial case database uncovered at least 320,000 results during roughly the same period.²⁸⁴

Further, similar arbitrariness is evident in the systematic removal of Picking Quarrel cases from China's key official platforms for various, including non-political reasons.²⁸⁵ Concerns have arisen about potentially embarrassing the government authorities and the fear that the verdicts may serve as a blueprint for committing similar crimes.²⁸⁶ Since late 2021, China

the Thirteenth National People's Congress], ZUIGAO RENMIN JIANCHAYUAN (最高人民法院) SUP. PEOPLE'S CT. GAZ., Mar. 8, 2021,

<http://gongbao.court.gov.cn/Details/342529c11d2af722964a6b1c961105.html>. For example, we could not find picking quarrels in newer SPP reports. See, e.g., *Zuigaojian jiu 2021nian zhi 9yue Quanguo Jiancha Jiguan Zhuyao Ban'an Shuju* (最高检就 2021 年 1 至 9 月全国检查机关主要办案数据) [*The Supreme People's Procuratorate on the Main Case-handling Data of the Nationwide Procuratorate Organs from January to September 2021*], ZUIGAO RENMIN JIANCHAYUAN (最高人民法院) SUP. PEOPLE'S PROC. GAZ. Oct. 18, 2021,

https://www.spp.gov.cn/spp/xwfbh/wsfbt/202110/t20211018_532387.shtml#1; see also, Supreme People's Procuratorate, *Zuigaojian jiu 2021nian zhi 9yue Quanguo Jiancha Jiguan Zhuyao Ban'an Shuju Dawen* (最高检就 2021 年 1 至 9 月全国检察机关主要办案数据答问) [*The Supreme People's Procuratorate Q&A on the Main Case-handling Data of the Nationwide Procuratorate Organs from January to September 2021*], Zhong xin wang (中新網) CHINANEWS, Oct. 18, 2021,

<https://www.chinanews.com.cn/gn/2021/10-18/9589140.shtml>.

²⁸² See Benjamin L. Liebman et al., *Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law*, J. L. & CTS. 177, 178 (2020); Yi Feifei (易霏霏) & Ma Chao (马超), *Tongji Shuju de Gongkai: Xianzhuang yu Jianyi* (我国司法统计数据的公开: 现状与建议) [*Disclosure of Judicial Statistics in China: Current Situation and Policy Suggestions*], 2 ZHONGGUO YINGYONG FAXUE (中国应用法学) [CHINA J. APPLIED JURIS.], 56 (2017) (China).

²⁸³ See Liu Zhiqiang (刘志强) & Song Haichao (宋海超), *Xunxingzishizui Sifajieshi 'Sanxing' Shenshi* (寻衅滋事罪司法解释'三性'审视) [*Three Characters" of Judicial Interpretation of the Crime of Picking Quarrels and Provoking Troubles*] 264 XUESHUJIE (学术界) [ACADEMICS], 5 (2020) (China).

²⁸⁴ Zhu Xiaoding (朱孝顶), *Xunxinzhishizui Panjue zi 2013qi Ranbaoshi Zengzhang Yi Chaoguo 32wan Jian, Zhejiang Henan Shanghai Xunxinzhishi Panjue Shuliang Quanguo Lingxian* (寻衅滋事罪判决自 2013 起燃爆式增长, 已超过 32 万件, 浙江河南上海寻衅滋事判决数量全国领先) [*The number of Picking Quarrels Verdicts has exploded to more than 320,000 since 2013, and the Number of Picking Quarrels Verdicts in Zhejiang, Henan, and Shanghai Leads the Country*] DUANDIANXING (端点星) TERMINUS 2049, May 11, 2019, [<https://perma.cc/C3DA-BUBU>].

²⁸⁵ Luo Jiajun & Thomas Kellogge, *Verdicts from China's Courts Used to Be Accessible Online. Now They're Disappearing*, CHINAFILE (Feb.1 2022), [<https://perma.cc/N5FZ-3JHV>].

²⁸⁶ *Id.*

Judgment Online, operated by the SPC and one of the most authoritative case databases, no longer provides meaningful results on Picking Quarrels.²⁸⁷ While a fraction of Picking Quarrel cases may still be visible in some government reports, these fragmented figures suggest that the actual number of cases is likely much higher.²⁸⁸

Additionally, smaller local samples show a similar exponential increase in Picking Quarrels cases under Xi's leadership. For example, an internal document of the YC Intermediate People's Court of Jiangsu Province revealed that from 2015 to April 2018, all the courts in YC City dealt with 708 Picking Quarrel cases, which made up 4.31 percent of their total criminal cases.²⁸⁹ Furthermore, in 2017, the court handled 50.93 percent more picking quarrel cases than in 2015.²⁹⁰

B. *More Laws, but More Arbitrariness*

Xi's administration has enacted more regulations on Picking Quarrels than previous administrations, many of which are not directly related to political matters. Nevertheless, these new regulations tend to provide officials with significant discretion in dealing with non-political cases rather than imposing more rule-based constraints to prevent arbitrary enforcement in daily governance.

From 2013 to 2021, more than eleven regulations related to Picking Quarrels were promulgated, granting officials the authority to use this charge to address a wide range of offenses.²⁹¹ These new Picking Quarrels

²⁸⁷ *See id.*

²⁸⁸ For instance, in July 2022, the SPP disclosed that 17208 individuals were charged with picking quarrels from January to June 2022. “*Zuigaojian ‘Anguanban Fuzeren jiu 2022nian 1zhi6yue Quanguo Jiancha jiguan Zhuyao Ban’an Shuju Dajizhewen’* (最高检‘案管办负责人’就 2022 年 1 至 6 月全国检察机关主要办案数据答记者问) [*The head of the Supreme Prosecutorial Office Answered News Reporters’ questions on Main Case-handling Data of the Nationwide Procuratorate organs from January to June 2022*], ZUIGAO RENMIN JIANCHAYUAN (最高人民法院) [SUP. PEOPLE’S PROC. GAZ.], July 20, 2022, [<https://perma.cc/FNQ4-HAYE>].

²⁸⁹ Internal court documents from a local court in Jiangsu Province, dated March 20, 2019. To safeguard the identity of those revealing the information, I use "YC" to maintain the anonymity of the specific court. (on file with author).

²⁹⁰ *See id.*

²⁹¹ These Judicial Interpretations include: *Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Guanyu Banli Liyong Xinxin Wangluo Shishi Feibang Deng Xingshi An’jian de Sifa Jieshi, Fashi* [2013] Er’shiyi Hao (最高人民法院、最高人民检察院关于办理利用信息网络实施诽谤等刑事案件的司法解释, 法释[2013] 21 号) [Interpretation of the Several Issues concerning the Specific Application of Law in the Handling of Defamation through Internet and Other Criminal Cases, Judicial Interpretation] Sup. People’s Ct. Gaz. No. 21, Sept. 6, 2013 (China); *Guanyu Yifa Chengchu Sheyi Weifa Fanzui Weihu Zhengchang Yiliao Zhixu de Yijian, Fafa* [2014] Wuhao (关于依法惩处涉医违法犯罪维护正常医疗秩序的意见, 法发[2014] 5 号) [Opinions on punishing medical crimes in accordance with the law and maintaining normal medical order, Judicial Issue] (promulgated by the Sup. People's Ct., the Sup.

rules are often drafted in vague terms, giving officials considerable discretionary power to initiate enforcement actions at the expense of citizens' rights. These new rules typically state ambitious and vague goals or slogans that are often unenforceable and subject to interpretation by officials during enforcement. Furthermore, in these regulations, there is often a lack of proportionality between the punishment and the offense, with consequences for non-compliance determined by various non-legal exigencies and the degree of defiance against officials' orders.

This section uses the “Covid Interpretation,” a Judicial Interpretation issued during the Covid-19 pandemic, as an example to illustrate how new rules pre-authorize the abuse of Picking Quarrels in non-political cases at the expense of legal rationality.²⁹²

People's Proc., effective Apr. 22, 2014) Sup. People's Proc. No. 5, Apr. 28, 2014 (China); Guanyu Shishi Xiudinghou de 'Guanyu Changjian Fanzui de Liangxing Yijian' de tongzhi, Fafa [2017] Qihao (关于实施修订后的《关于常见犯罪的量刑意见》的通知, 法发[2017]7号) [Notice on Implementation of Revised 'Guiding Opinions Concerning the Sentence of Common Crimes'] (promulgated by Sup. People's Ct. effective Mar. 9, 2017) (China); Guanyu Banli Hei'e Shili Fanzui Anjian Ruogan Wenti de Zhidao Yijian, Fafa [2018] Yihao (关于办理黑恶势力犯罪案件若干问题的指导意见, 法发[2018]1号) [Several Guiding Opinions on Issues Concerning Handling Criminal Cases of “black and evil forces, Judicial Issue No.1 [2018]] (promulgated by the Sup. People's Ct., the Sup. People's Proc., effective Jan. 16, 2018) (China); Guanyu Yifa Chengzhi Gonggong Jiaotong Gongju Anquan Jiashi Weifa Fanzui Xingwei de Zhidao Yijian Gongtongzi [2019] Yihao (关于依法惩治公共交通工具安全驾驶违法犯罪行为的指导意见, 公通字[2019]1号) [Guiding Opinions on Punishing Illegal and Criminal Acts that Obstruct Safe Driving on Public Transportation According to the Law, Ministry of Public Security and Ministry of Transportation Joint Release] (promulgated by the Sup. People's Ct., the Sup. People's Proc., effective Jan. 8, 2019) (China); Guanyu Banli E'shili Xingshi Anjian Ruogan Wenti de Yijian, Fafa [2019] Shiyihao (关于办理恶势力刑事案件若干问题的意见, 法发[2019]11号) [Opinions on Several Issues Related to Handling Cases of Crimes by Malign Forces] (promulgated by the Sup. People's Ct., the Sup. People's Proc., effective Apr. 9, 2019) (China); Guanyu Banli “Taoludai” Xingshi Anjian Ruogan Wenti de Yijian, fafa [2019] Shiyihao (关于办理“套路贷”刑事案件若干问题的意见, 法发[2019]11号) [Opinions regarding Several Issues on Handling Criminal Cases involving "Trap Loan"] (promulgated by the Sup. People's Ct., the Sup. People's Proc., effective Apr. 9, 2019) (China); Guanyu Yifa chengzhi Xijing Weifa Fanzui Xingwei de Zhidao Yijian, Gongtongzi [2019] Sanshierhao (关于依法惩治袭警违法犯罪行为的指导意见, 公通字[2019]32号) [Guiding Opinions on Punishing Violators Assaulting Police Officers according to the Law, Ministry of Public Security and Ministry of Transportation Joint Release No.32 [2019]] (promulgated by the Sup. People's Ct., the Sup. People's Proc., effective Apr. 9, 2019) (China). In addition, the 2020 revision of the Criminal Code of the PRC added Article 293 (1) alongside the original Picking Quarrels article, expanding the catch-all crime to include those who "conduct usury or collect other illegal debts" using violence and other coercive methods. *P.R.C. Criminal Law Amendment 11*, CHINA LAW TRANSLATE (Dec. 26, 2020), <https://www.chinalawtranslate.com/en/criminal-law-amendment-11/>.

²⁹² See Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Gong'anbu Sifabu Yinfa Guanyu Yifa Chengzhi Fanghai Xinxing Guanzhuang Bingdu Ganran Feiyan Yiqing Fangkong Weifa Fanzui de Yijian, fafa [2020] Qihao (最高人民法院、最高人民

In essence, the Covid Interpretation grants officials considerable discretion to criminalize and punish a wide range of behaviors considered to be disobedient of pandemic control measures significantly, irrespective of the legal standards for criminalization, including *Nullum crimen sine lege*. The Covid Interpretation effectively turns Picking Quarrels into a far-reaching crime that serves China's pandemic control mechanism.²⁹³

The Covid Interpretation claims its primary objective is to address the Party's imperative to control the pandemic efficiently and effectively, which is partially true. It is important to note that China was among the first countries to experience the outbreak and took swift actions, such as declaring an emergency, imposing lockdowns, and mandating face masks to contain the virus.²⁹⁴ However, Chinese officials also unjustifiably arrested doctors and whistleblowers who shared information not approved by the authorities right from the beginning of the pandemic.²⁹⁵

In this context, the Covid Interpretation employs Picking Quarrels to address these two arbitrary imperatives simultaneously. First, the new rule allows Picking Quarrels to be used to criminalize anyone perceived as “insulting” the duties of medical officers and other state personnel responsible for pandemic control.²⁹⁶ Significantly, the rule’s drafters treated Picking Quarrels as a fallback mechanism for prosecuting individuals when the standard legal provisions related to obstructing public officials were insufficient. This approach was explicitly articulated by Sun Qian, the Vice-President of SPP, who stated that the provision was designed to serve as a catchall offense for punishing anyone obstructing state officials but not meeting the legal criteria for the more clearly defined Crime of Obstructing Public Officials.²⁹⁷ Jiang Qibo, a vice-president of SPC, supported this

检察院、公安部、司法部印发《关于依法惩治妨害新型冠状病毒肺炎疫情防控违法犯罪的意见》的通知,法发[2020]七号) [Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Public Security and Ministry of Justice Issued Notice on ‘Opinions on Punishing Crimes Obstructing the Prevention and Control of the Novel Coronavirus Pneumonia Epidemic Situation according to the Law’, Judicial Issue No.7] (promulgated by the Sup. People’s Ct., the Sup. People’s Proc., effective 2020).

²⁹³ China's pandemic control mechanism is often characterized, and criticized, for being penalty-driven and excessive. See, e.g. Qian Liu, ‘Kill the chicken to scare the monkey’: Heavy penalties, excessive COVID-19 control mechanisms, and legal consciousness in China, 45 L. & POL’Y 292, 292-95.

²⁹⁴ Jason Lee, *Wuhan Lockdown ‘Unprecedented’, Shows Commitment to Contain Virus: WHO Representative in China*, REUTERS (Jan. 23, 2020), <https://www.reuters.com/article/us-china-health-who-idUSKBN1ZM1G9>; Hualing Fu, *Pandemic Control in China’s Gated Communities*, in HOW COVID-19 TOOK OVER THE WORLD: LESSONS FOR THE FUTURE 170-71 (Christine Loh ed., 2023).

²⁹⁵ See Li Wenliang: ‘Wuhan Whistleblower’ Remembered One Year on, BBC (Feb. 6, 2021), [<https://perma.cc/UMV2-SXFM>].

²⁹⁶ *Supra* note 292.

²⁹⁷ *Zuigao Renmin Jianchayuan Sunqian Fujianchazhang Tan Sheyiqing Xingshi’anjian Falü Shiyong Wenti*(最高人民法院孙谦副检察长谈涉疫情刑事案件

perspective by explaining that anyone obstructing non-government personnel involved in pandemic measures, such as villagers and private estate security personnel, should also be subject to prosecution for Picking Quarrels.²⁹⁸ In sum, under this new regulation, authorities have the power to penalize individuals who refuse to adhere to broadly defined "COVID-related necessary measures," which were arbitrarily enforced in China during the pandemic. Picking Quarrels serves as one of the convenient legal tools for this purpose.²⁹⁹

The second function of Picking Quarrels in the Covid Interpretation is to clamp down on individuals spreading unapproved speeches or so-called "COVID-related rumors or misinformation." This provision strengthens the broad scope of the "online Picking Quarrels" regime established by Judicial Interpretation No. 21, imposing more severe penalties for those engaging in "online Picking Quarrels" during the pandemic.³⁰⁰ Moreover, the provision emphasizes the use of picking quarrels to punish individuals whom the authorities perceive as "using COVID-related rumors to subvert state power."³⁰¹ This not only allows for the potential politicization of picking quarrels but also leverages political imperatives to expand discretionary power in non-political realms.

In sum, by blurring the lines between political and non-political cases, the Covid Interpretation issues multiple new mandates that enable officials to target almost any type of behavior or speech that obstructs COVID-related management without the necessity of amending the PRC Criminal Code.³⁰² This indicates a growing trend of merging political

法律适用问题) [Deputy Chief Prosecutor Sun Qian of the Supreme People's Procuratorate talks about the application of law in criminal cases involving the epidemic] NANCHANGXIAN RENMIN ZHENGFU (南昌县人民政府) The Nanchang County People's Government, May 7, 2022, <http://ncx.nc.gov.cn/ncxrmzf/bmlzyjprnehgnhubbgpreqhcgcdqnm/202205/b26d3a221a1142c9a23914a279d49965.shtml>.

²⁹⁸ *Zuigao Renmin Fayuan Yanjiushi Zhuren Jiang Qibo, Zuigao Renmin Jianchayuan Falv Zhengce Yanjiushi Zhuren Gaojingfeng Lianhe Dajizhewen* (最高人民法院研究室主任姜启波, 最高人民检察院法律政策研究室主任高景峰联合答记者问 (二)) [Jiang Qibo, Director of the Research Office of the SPC, and Gao Jingfeng, Director of the Legal Policy Research Office of the SPP, Jointly Answered Questions from MEDIA Reporters], *Zuigao Renmin Fayuan* (最高人民法院) Sup. People's Ct. Feb. 27, 2020, https://www.spp.gov.cn/xwfbh/wsfbt/202002/t20200227_455391.shtml.

²⁹⁹ *Supra* note 299.

³⁰⁰ *Id.*

³⁰¹ In addition to these articles, the Covid Interpretation also states that "Anyone using the pandemic to spread rumors, incite splitting the country, undermining national unity, or incite subversion of the government or overthrowing the socialist system should be criminally punished for the crime of inciting secession or inciting subversion of state power." *See id.*

³⁰² According to Art. 8 of the 2015 Legislation Law of the People's Republic of China, a constitutional law, only the National People's Congress and the Standing

control with routine governance under Xi's administration.

Indeed, the Covid Interpretation effectively serves as a catchall solution for China's public health management, enabling the authorities to subject anyone who disobeys their arbitrary orders pertaining to COVID measures and other related exigencies to harsher punishments. In essence, as one of the new rules expands the arbitrariness of picking quarrels charges, it significantly undermines the rationality of Chinese law as a whole.

C. *Imposing Morality*

Another notable phenomenon indicating the erosion of routine justice from the prerogative power under Xi's administration is the increasing use of Picking Quarrels to target "inappropriate" speeches and behaviors, regardless of their political nature, that the authorities consider morally questionable. This shift highlights the revival of the traditional role of law as an agent of moral imposition in Xi's era, promoting increasingly conservative, socialist, and illiberal social norms.³⁰³ This trend is exemplified by court judgments that have been utilized to enforce "socialist core values" within the judicial process.³⁰⁴ In this context, Picking Quarrels serves as another example of using criminal law as a tool for moral imposition under Xi's administration.

This newly defined role of Picking Quarrels is evident in cases involving the "insulting heroes," where certain online users were deemed morally reprehensible and were arbitrarily subjected to criminal punishment. In 2019, a series of cases surfaced in China where defendants were accused of insulting deceased firefighters who perished in a blaze in the Liangshan region.³⁰⁵ Following the tragic incident on April 4, 2019, the Chinese

Committee of the National People's Congress have the authority to enact laws related to criminal penalties. Clearly, the COVID Interpretation, made by the SPC, SPP, Ministry of Public Security, and Ministry of Justice, exceeds their authority under the Chinese law and is thus *ultra vires*. See *Legislation Law (2015 Revised Edition)*, CHINA LAW TRANSLATE (Mar. 16, 2015), <https://www.chinalawtranslate.com/en/2015lawlaw/> [<https://perma.cc/J76W-84TG>].

³⁰³ See, e.g., QU TONGZU, *LAW AND SOCIETY IN TRADITIONAL CHINA* (1965) (Discussing the Confucianization of ancient Chinese law); Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CAL. L. REV. 1284 (1967) (Exploring how moral standards influenced mediation, the primary form of dispute resolution during Mao's era); *Law-Morality Ideology in the Xi Jinping Era*, in *LAW AND THE PARTY IN CHINA: IDEOLOGY AND ORGANISATION* 121 (Rogier Creemers & Susan Trevaskes eds., 2021); Delia Lin & Susan Trevaskes, *Creating a Virtuous Leviathan: The Party, Law, and Socialist Core Values*, 6 ASIAN J. OF L. & SOC'Y 41 (2019). Both articles discuss the revival of the traditional role of Chinese law as a vehicle for moral imposition during Xi's era.

³⁰⁴ See Bjorn Ahl, *Why Do Judges Cite the Party? References to Party Ideology in Chinese Court Decisions*, 18 CHINA: AN INT'L J. 175 (2020).

³⁰⁵ Song Jiangxuan (宋蒋萱) & He Xiaorong (何晓蓉), *Siren Wuru Liangshanzhou Xisheng Xiaofangyuan Beiju, Wuru Yinglie Gaidan Heze? (4人侮辱凉山州牺牲消防员被拘, 侮辱英烈该担何责?)* [Four Individuals Who Insulted Liangshan

authorities posthumously recognized the fallen firefighters as martyrs.³⁰⁶ Between April 2 and April 4, at least thirteen individuals on social media were arrested for picking quarrels, accused of “spreading derogatory language against the fallen firefighters,” and at least seven ultimately faced criminal prosecution.³⁰⁷ Jiang Rongsheng was one of the seven individuals prosecuted for insulting heroes.³⁰⁸ Following the Liangshan fire, Jiang posted disrespectful remarks about the deceased firefighters on his social media account.³⁰⁹ Although he quickly regretted his words and deleted the comment, it had already been screenshotted and reposted by others.³¹⁰ Jiang was subsequently placed under house arrest for Picking Quarrels after several state media outlets reported his comment.³¹¹ He was accused of “creating a detrimental social impact” and disrupting social order, resulting in a nine-month prison sentence.³¹² The court explicitly stated that “the heroic spirit embodies socialist core values and the spirit of patriotism.”³¹³ “All members of society are responsible for preserving the reputation and

Prefecture Sacrificed Firefighters Detained, What Responsibility Should They Bear for Insulting Heroes?] Pengpai (澎湃) THE PAPER (Apr. 4, 2019), https://www.thepaper.cn/newsDetail_forward_3252567 [<https://perma.cc/JVT4-SP6P>].

³⁰⁶ Ye Haoming (叶昊鸣), *Yingjiguanlibu, Sichuansheng Renmin Zhengfu Pizhun Zhao Wankun deng 30ming Tongzhi wei Lieshi* (应急管理部、四川省人民政府批准赵万昆等 30 名同志为烈士) [The Ministry of Emergency Management and the Sichuan Provincial People's Government approved 30 comrades including Zhao Wankun as martyrs], XINHUA WANG (新华网) XINHUA NET, (Apr. 4, 2019), http://www.xinhuanet.com/politics/2019-04/04/c_1124327469.htm [<https://perma.cc/X9K5-3AHJ>].

³⁰⁷ Guo Yuehua (郭跃华), Zhang Jie (张杰) & Shang Di (尚迪), *Yifazhiming Hanwei Yinglie Quanyi* (以法之名捍卫英烈权益) [*Defending the Rights and Interests of Heroes in the Name of Law*], HENAN FAZHI BAO (河南法制报) HENAN LEGAL DAILY (Apr. 10, 2019), <https://mp.weixin.qq.com/s/azGzvGh4T4F2yatVlzDgNQ>; Zhong Xiaomei (钟笑玫), Song Jiangxuan (宋蒋萱) & Fang Ge (方舸), *Shaoshu Wangmin Wuru Liangshan Huozai Xisheng Yinglie, Gedi Gong'an Tongbao Juliu Shiyuren* (少数网民侮辱凉山火灾牺牲英烈, 各地公安通报拘留十余人) [A Few Netizens Insulted the Liangshan Fire to Sacrifice the Heroes, Local Police Notified and Detained More Than Ten People], PENGPAI (澎湃), THE PAPER (Apr. 4, 2019), [<https://perma.cc/GL8M-27U3>].

³⁰⁸ Jiangrongsheng Xunxinzhishi Ershen Xingshi Panjueshu (姜荣生寻衅滋事二审刑事判决书) [Second Instance Criminal Verdict of Jiang Rongsheng Picking Quarrels and Provoking Trouble] Gan11xingzhong (Shangrao Interim. People's Ct. No. 380, Mar. 14, 2019) (China).

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

honor of heroes and martyrs.”³¹⁴

Jiang’s case illustrates how picking quarrels has been employed for moral imposition by criminalizing speech that officials disapprove of. In Jiang’s case, the prosecutors and court deliberately conflate moral obligation with legal responsibility and disregard the rationality of the legal procedure.³¹⁵ While one may not morally agree with Jiang’s disrespectful remarks, it is evident that using Picking Quarrels for moral imposition further blurs the line between morality and rational law within an authoritarian legal system’s non-political realm.

Just as politically motivated Picking Quarrels charges are used in propaganda, many non-political picking quarrels cases are selected to “educate” the public that the Party-State is the sole authority in determining what is right and wrong. This underscores one of the main objectives of using Picking Quarrels to impose moral standards in these cases. For instance, in the case of Chang Renrao, the defendant was found guilty of spreading a video where he bragged about slapping his high school teacher.³¹⁶ Rather than charging him with affray or other specific crimes, the verdict highlighted Chang’s challenge to the traditional Chinese virtue of respecting teachers, citing the negative social impact and disruption to social order.³¹⁷ Shortly after the verdict, the SPC openly stated the use of the case for moral imposition: “Ancient China’s legal culture honored ‘the penal code punishes those who violate etiquette’ (出礼则入刑). Chang’s case sends a significant message - teachers bear the important historical mission of spreading knowledge, ideas, and truth and deserve respect from society. Students should always be grateful to their teachers and not be unjust individuals who ‘cut down the tree that provides them shade.’”³¹⁸ This SPC commentary suggested that the criteria for criminalizing actions in these non-political Picking Quarrels cases are not based on legal logic but on the moral preferences of Chinese authorities.

Moreover, in certain Picking Quarrels cases, conservative Chinese

³¹⁴ *See id.*

³¹⁵ In Jiang’s case, he deleted his posts but was subsequently detained, rendering him unable to foresee events that transpired after his custody. Nonetheless, in Jiang’s verdict, occurrences following his detention were still taken into account and used to determine his culpability. *See id.*

³¹⁶ Chang Renyao Xunxinzhishi Yishen Xingshi Panjueshu (常仁尧寻衅滋事一审刑事判决书) [First Instance Criminal Verdict of Chang Renyao Picking Quarrels and Provoking Trouble] Yu0324xingchu No.43 (Luanchuan Cnty. People’s Ct. No. 43, 2019) (China).

³¹⁷ *Id.*

³¹⁸ *See* Renmin Fayuan Bao (人民法院报), “Ouda 20 Nianqian Banzhuren An” (殴打 20 年前班主任案) [The Case of Assaulting a Class Teacher from 20 Years Ago] ZHONGGUO FAYUAN WANG (中国法院网) CHINACOURT.ORG Jan. 12, 2020, <https://www.chinacourt.org/article/detail/2020/01/id/4769104.shtml> [<https://perma.cc/GH5N-ZDP5>].

officials have abused their power by classifying and penalizing behaviors or speeches they personally deem unacceptable as “morally fraught,” including lifestyles and arts that deviate from the approved norm(s). This practice seems to be reminiscent of the abuse of hooliganism during the 1980s.³¹⁹ In a well-known graffiti case in 2018, both defendants were teenagers charged with Picking Quarrels for covering a wall with graffiti at midnight.³²⁰ Some dominant officials may consider graffiti to have a “bad influence” on other teenagers but may not meet the criteria for criminalization under the current PRC Criminal Code.³²¹ In this graffiti case, both teenagers were found guilty of Picking Quarrels, illustrating how this charge serves as a tool for penalizing unorthodox artists.³²²

Similarly, in the case of Wen Changhu, the defendant and his friends, who were all in their early 20s, challenged another gang to a fight in a public square, but their opponents never appeared.³²³ Wen and his friends shot and uploaded a video to *Kuaishou*, a Chinese short-video platform, bragging that they “defeated” the other gang.³²⁴ While shooting and uploading such a video would not typically meet the criminal standards for affray, local police changed the charge to Picking Quarrels, accusing the video of “corrupting social morality” without further clarification.³²⁵ Wen was then sentenced to eighteen months in jail based on the arbitrary moral judgment of the officials.³²⁶

These cases illustrate how the charge of Picking Quarrels is employed to enforce arbitrary moral standards, indicating a significant regression in the rationality of law in areas with lower political sensitivity. Similar levels of arbitrariness, typically associated with more politically sensitive cases, have been observed in cases like Wen Changhu's.

D. *Undermining the Foundations of Criminal Law*

For Chinese law enforcement today, Picking Quarrels has evolved into a panacea for criminalizing minor offenses and misconduct. The vague and catchall nature of this charge conveniently allows dominant officials to exploit it in routine governance. As Chinese legal scholar Jiang Su points out, the excessive use of Picking Quarrels runs counter to core legal

³¹⁹ See the section “The Era of Hooliganism” of this Article.

³²⁰ Liao Moukuan & Lin Mou Xunxinzishi Yishenpanjueshu (廖某宽&李某寻衅滋事一审判决书) [First Instance Criminal Verdict of Liao Moukuan and Lin Mou Picking Quarrels and Provoking Trouble] Yue1202xingchu (Duanzhou Dist. People’s Ct., Zhaoqing, No. 314, Feb. 3, 2019) (China).

³²¹ Interview with two senior Chinese judges, in Shenzhen, China (Oct. 5, 2022).

³²² See, Liao Moukuan & Lin Mou Xunxinzishi Yishenpanjueshu, *supra* note 320.

³²³ See *supra* note 11.

³²⁴ See *id.*

³²⁵ See *id.*

³²⁶ See *id.*

principles established by the PRC 1997 Criminal Code, including *nullum crimen sine lege* and the prohibition on crime by analogy.³²⁷

“Convenience” is a pivotal reason for the abuse of Picking Quarrels in non-political cases. An empirical study revealed that while charging defendants with specific crimes typically demands more time and effort, Picking Quarrels could be easier for procurators and judges to build a case.³²⁸ Ironically, this seemingly “rational choice” by dominant officials has led to the erosion of legal rationality in China's routine criminal justice system.

The Chinese authorities tend to arbitrarily assign behaviors that challenge dominant social norms or cause minor damage yet do not meet the criminal standards of other specific crimes to the catchall of Picking Quarrels.³²⁹ Moreover, Picking Quarrels is arbitrarily used to criminalize offenses that should have been addressed through administrative or civil penalties or resolved as disputes.³³⁰ These issues tend to worsen during anti-crime campaigns. For example, the 2019 anti-crime campaign, dubbed “Sweeping away the Black and Eliminating the Evil,” accounted for 21,546 Picking Quarrels cases nationwide, approximately 20% of all such cases in 2019.³³¹ According to scholars’ estimates, many of these cases involve officials abusing Picking Quarrels to fulfill campaign objectives.³³² Two defense attorneys revealed they represented over fifty Picking Quarrels clients during the campaign.³³³ They estimated that around 70-80% of these clients would likely not have been charged with Picking Quarrels outside of

³²⁷ Jiang Su (江溯), *Zuixing Fading Yuanze de Xiandai Tiaozhan jiqi Yingdui* (罪刑法定原则的现代挑战及其应对) [*The Contemporary Challenges and Countermeasures of the Principle of Nulla poena sine lege*], 3 ZHENGFA LUNCONG (政法论丛) J. POL. SCI. & L. 103 (2021).

³²⁸ See Liang Hongxia (梁洪霞) & Wang Fang (王芳), *Renquan Baozhang Shijiao xia Xunxingzishi Doudi Tiaokuan de Hexianxing Jiexi* (人权保障视角下寻衅滋事兜底条款的合宪性解析) [*Analysis on the Constitutionality of the Provisions of Picking Quarrels and Provoking Troubles from the Perspective of Human Rights Protection*], 25 NANHAI FAXUE (南海法学) S. CHINA SEA L. J. 37, 46 (2021).

³²⁹ See Liu, *supra* note 15 at 164-65.

³³⁰ Tong Dehua (童德华), *Xunxin zishizui de jiangou Lixing yu Sifajingyan* (寻衅滋事罪的建构理性与司法经验) [*The Constructive Rationality and Judicial Experience of the Crime of Picking Quarrels and Provoking Troubles*] 270:7 JINAN XUEBAO (ZHEXU SHEHUIKEEXUE BAN) (暨南学报哲学社会科学版) JINAN J. PHIL. SOC. SCI. 61, 70 (2021).

³³¹ See *supra* note 278.

³³² See Zhang Mingkai (张明楷), *Xingfa Xiuzheng'an (Shiyi) dui Koudaizui de Xiansuo Jiqi Yiyi* (<刑法修正案(十一)>对口袋罪的限缩及其意义) [*Criminal Law Amendment (Eleventh)'s Restrictions on Catchall Crimes and Their Significances*], 4 DANGDAI FAXUE (当代法学) [CONTEMP. L. REV.], 3 (2020).

³³³ Interview with two Chinese right advocates, in Guangzhou, China (Nov. 1, 2019).

the campaign period.³³⁴

Moreover, replacing a specific criminal charge with Picking Quarrels in cases such as battery and sexual harassment is equally problematic.³³⁵ When Chinese prosecutors choose Picking Quarrels over more specific crimes in indictments due to the former's flexibility and convenience for constructing guilt, legal rationality is undermined in the routine criminal justice system. For example, between January 1, 2018, and December 31, 2020, Chinese courts uploaded 59,762 first-instance verdicts of "random beating-type" Picking Quarrels.³³⁶ The majority of these cases, approximately 46,000, overlap with the crime of battery, as the choice of crime is subject to the arbitrary discretion of the police and prosecutors.³³⁷ Doctrinally, in Chinese criminal law, a crucial difference between battery and "random beating-type" Picking Quarrels lies in the latter's emphasis on "seriously disturbing social order" as the crime element of social harm. However, officials may opt for Picking Quarrels instead of battery for the sake of convenience. With the definition of "seriously disturbing social order" remaining vague, in a Picking Quarrels indictment and verdict, officials can simply assert that the targeted act or speech has "seriously disturbed public/social order" without the need to provide an explanation or present legal reasoning and evidence to prove the guilt, as they would need to do in a charge of battery.³³⁸

In addition, Chinese officials have been known to abuse the charge of Picking Quarrels to serve their own illegitimate self-interest. In a recent case, Wang Haiyan, a grassroots village official, was sentenced to two years for Picking Quarrels after assisting villagers in obtaining compensation from a local company.³³⁹ Local officials detained Wang for over 700 days and then accused her of "extorting" the company, despite the lack of evidence to support the accusation. Wang's case garnered media attention and eventually led to her release in 2020.³⁴⁰ Nonetheless, the case of Wang

³³⁴ *Id.*

³³⁵ Li Shiyang (李世阳), *Xunxinzishizui Goucheng Yaojian de Fenhua* (寻衅滋事罪构成要件的分化) [*Differentiation of the Elements of the Crime of Picking Quarrels and Provoking Troubles*] 226: 2 FAXUE PINGLUN (法学评论) [L. REV.] 176, 176-177 (2021).

³³⁶ Li, *supra* note 275 at 20-21.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ Qingyuan (陈卿媛), Yin Xunxinzishizui Bei Jiya 730tianhou Bubei Qisu, Shandong Yi Cunzhuren Huo Guopei (因寻衅滋事罪被羁押 730 天后不被起诉, 山东一村主任获国赔) [After being Detained for 730 Day the Crime of Picking Quarrels and Provoking Trouble without Prosecution, A Director of Village Committee in Shandong was Awarded State Compensation], PENGPAI (澎湃) THE PAPER.CN, (Feb. 5, 2023), https://m.thepaper.cn/newsDetail_forward_21809212 [<https://perma.cc/WZ9D-598Q>].

³⁴⁰ *See id.*

demonstrates how the accusation of Picking Quarrels can be manipulated in non-political cases to serve the illegitimate self-interest of local officials.

E. *Arbitrarily Enhancing Criminal Penalty*

Finally, like some political prosecutions, Picking Quarrels also serves as an instrument to increase the offenders' criminal penalties in non-political cases. Notably, this practice is entirely "lawful" because new rules issued under Xi's administration authorize officials to impose harsher penalties in Picking Quarrels cases, much like the hooliganism rule permitted the application of heavier penalties in the 1980s.

For example, the "Guiding Opinion of the People's Court regarding Criminal Penalty" (人民法院量刑指导意见) is a rule aimed at standardizing judicial decision-making regarding criminal penalties in Chinese courts.³⁴¹ The old 2010 version, under Article 13, provided that the threshold of Picking Quarrels sentences ranged from three months of penal servitude to one year of imprisonment.³⁴² It allowed for an increase in the penalty in aggravated circumstances, considering factors such as the number of quarrels, the extent of harm caused, and other relevant factors. Article 4(18) of the current 2021 version has substantially elevated both the threshold of Picking Quarrels sentences and the penalties for aggravated picking quarrels cases. The 2021 version first raised the threshold from one year to three years imprisonment.³⁴³ It also introduced the provision that individuals who commit Picking Quarrels three times and seriously disturb public or social order should be sentenced to at least five to seven years, a heavy penalty comparable to hooliganism under the 1979 Criminal Code.³⁴⁴ The comparison between the 2010 version and the 2023 version is illustrated by the following table:

³⁴¹ This sentence serves as the opening statement in both the 2010 version and the 2021 version.

³⁴² Art. 13, Guiding Opinion of the People's Court regarding Criminal Penalty, 2010 Version.

³⁴³ Section "四 (十八) 1 (1)" [Section 4(18)1(1)], *Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Guanyu Changjian Fanzui de Liangxing Zhidao Yijian(Shixing) Fafa*[2021] 21 hao " (最高人民法院最高人民检察院关于常见犯罪的量刑指导意见 (试行), 法发【2021】21号) [Guiding Opinions of the Supreme People's Court and the Supreme People's Procuratorate on Sentencing for Common Crimes (Trial Implementation), Fafa [2021] No.21].

³⁴⁴ Art. 160 of 1979 PRC Criminal Code. *See supra* note 119.

	2010 Version, Art.4 (13)	2021 Version, Art.4(18)
Threshold of Sentence	Three months of penal servitude to one-year imprisonment	Three-year imprisonment
Aggravated Circumstances	Not specific.	“At least five to seven years imprisonment” to those committing picking quarrels three times and seriously disturbing social order.

Among other problematic tactics used to increase penalties, the prevalence of employing double jeopardy to impose additional punishment is a particularly serious issue in non-political Picking Quarrels cases. One empirical study found that in nearly 70% of the Picking Quarrels verdicts they examined, the catchall crime served as a “supplementary role.”³⁴⁵ This means that the accused individuals were often punished for other specific crimes, and then the same conduct was penalized again for Picking Quarrels solely to increase the defendants' sentences.³⁴⁶ This general trend was also confirmed by various other local samples. For instance, the same study conducted in Shanghai revealed that the city's courts handled 6041 Picking Quarrels cases between 2018 and 2020.³⁴⁷ Shockingly, at least one-fifth of these cases involved double jeopardy, resulting in defendants receiving sentences that exceeded the maximum criminal penalties outlined in the specific crime provisions of the PRC Criminal Code.³⁴⁸

VI. CONCLUSION

In 2014, a renowned Chinese law expert, Stanley Lubman, commented that the larger significance of Picking Quarrels prosecutions is “the shadow that they cast over public expression of views deemed to be offensive, especially because they coincide with campaigns to limit public debate by lawyers and journalists.”³⁴⁹

Nine years later, that shadow has only grown larger. Today, not only are lawyers, journalists, or other individuals who are deemed as a threat to authoritarian rule by the Party, but ordinary citizens uninvolved in politics also find themselves living under the shadow of arbitrary measures from Chinese authorities, all in the name of Picking Quarrels.

Picking Quarrels, once considered a tool of reform, has evolved under Xi Jinping’s administration into an arbitrary punitive regime, allowing for the arrest and prosecution of almost anyone deemed objectionable by the authorities.

³⁴⁵ Li, *supra* note 275 at 24.

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 18.

³⁴⁸ *Id.* at 18-19.

³⁴⁹ Stanley Lubman, ‘Picking Quarrels’ Casts Shadow over Chinese Law, THE WALL STREET JOURNAL (June 29, 2014), <https://www.wsj.com/amp/articles/picking-quarrels-casts-shadow-over-chinese-law-1404090688>.

There are indeed voices inside China advocating for reforming Picking Quarrels, yet they seem to have limited impact to halt the downward spiral. For example, in May 2023, Zhu Zhengfu, a Chinese lawyer and delegate to the National People's Congress, China's top legislature, advocated for the abolition of the offense due to its extensive abuse.³⁵⁰ Despite these efforts, however, such voices have been disregarded thus far, leading to no tangible reforms. In August 2023, an internal research group reported to the SPC that Picking Quarrels has been abused by local government to crackdown petitioners.³⁵¹ Nevertheless, similar to Zhu's proposal, there has been no constructive response from the legislature, SPC leadership, or any high-ranking officials indicating that meaningful reform of this catch-all crime is on the horizon.

The saga of Picking Quarrels exemplifies that a decline in legal rationality is not limited to the political sphere; it has also affected China's routine criminal justice and everyday governance system³⁵². In Xi's China, the line between the political and non-political realms is becoming increasingly blurred. On one hand, we are witnessing a surge in arbitrariness in political prosecutions under Xi. With the introduction of the overarching framework of "Comprehensive National Security," political suppression is expanding beyond targeting large protests, collective petitions, and other "mass incidents" that might pose threats to political and social stability. It now extends to severely curb almost all forms of public participation and free speech. On the other hand, the arbitrariness stemming from the prerogative powers of the state is steadily corroding the routine governance system that is supposed to be based on established legal principles.

In summary, this article argues that the decline of legal rationality in authoritarian legal system not only increases arbitrariness within the political domain but may also permeate routine legal order. In other words, the preoperative nature of authoritarian law, is not strictly confined to the political sphere. Thus, this article encourages a reevaluation of our understanding of authoritarian legal systems, advocating for a nuanced

³⁵⁰ Cao Yin, *Legislator Proposes Revision of Vague 'Picking Quarrels' Law*, THE CHINA DAILY (March 21, 2023), <https://www.chinadaily.com.cn/a/202303/21/WS64190f5ea31057c47ebb59f9.html>

³⁵¹ SPC (最高人民法院), Guanyu 'Xinshidai Nongcun Xingshi Fanzui dui Xiangcun Zhenxing Zhanlüe' ji 'Xunxinzhishi Xingwei de Xingshi Guizhi' (关于 '新时代农村刑事犯罪对乡村振兴战略的影响'暨'寻衅滋事行为的刑事规制'课题在浙江、福建的调研报告) Research Report on 'the Impact of Criminal Offenses in Rural Areas on the Strategy of Rural Revitalization in the New Era', and 'the Criminal Regulation of Picking Quarrels and Provoking Trouble' in Zhejiang and Fujian, WECHAT (Aug. 16, 2023), https://mp.weixin.qq.com/s/11tUo7X_LIqpnIQ3AdYLnw.

³⁵² 'Overreach' is a notable concept put forward by Susan Shirk explaining how the declining rationality of CCP leadership makes China's foreign and domestic policies more autocratic. See generally, *supra* note 90.

reconsideration of the simplistic binary view often applied to authoritarian law. Ultimately, the conclusion drawn is that authoritarian legality is more accurately defined by the (ir)rationality of the law rather than solely its political dimensions.