CHAPTER 9

The System of "Turning Oneself In" in Qing and Contemporary China: Some Reflections on Legal Modernism

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Abstract

An examination of Qing and modern Chinese codified regulations on the system of "turning oneself in" reveals the system's continuity and indigenous characteristics. Judicial case records, however, shows how the system evolved toward legal modernism, namely, formal rationality, instrumental rationality, and individualism. Through a detailed discussion of these points, this article reflects on legal modernism and reexamines traditional elements that can strengthen the development of law.

Keywords

turning oneself in – judgments – tradition – legal modernism

According to Chinese criminal law today, " 'turning oneself in' (*zishou* 自首) refers to a criminal voluntarily surrendering and giving a truthful confession of his crime."[1] Current research on the system of turning oneself in within China's legal studies community can be divided along two lines: within the realm of criminal law, research has focused on the regulations and judicial application of the current system of turning oneself in and discussion of the essential features of this system and legislative proposals; within the realm of legal history, research has focused on detailed analysis of the different dynastic regulations (particularly the Tang) on the system of turning oneself in, while only a few

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1 中华人民共和国刑法 (Criminal law of the People's Republic of China), article 67.

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works have been based on judicial case records, which are especially rich for the Qing period.[2] Because the ever-increasing influence of Western law in

2 On the current regulations regarding turning oneself in and the application of those regulations, see Ma Kechang 马克昌, "论自首" (On the system of turning oneself in), 法学评论 (Legal Studies Commentary) no. 1, 1983; Sha Junjun 沙君俊, "自首制度比较研究" (A comparative study of the system of turning oneself in), 现代法学 (Modern Legal Studies) no. 1, 2003; Huang Jingping 黄京平 and Du Qiang 杜强, "余罪自首成立要件解析" (An analysis of the criteria for establishing turning oneself in for undiscovered crimes), 政法论坛 (Politics and Law Forum) no. 5, 2003; Zhou Jiahai 周加海, 自首制度研究 (Research on the system of turning oneself in) (Beijing: Zhongguo renmin gong'an daxue chubanshe, 2004); Cao Jian 曹坚, "自首和立功的司法适用问题研究" (Research on questions related to the judicial application of the system of turning oneself in and meritorious performance), 中国检察官 (China Procurator) no. 2, 2006; Yu Zhigang 于志刚 and Tian Gang 田刚, "交通肇事罪中 '自首'的存在空间辨析—对于'行政义务'和'双重评价'观点之否定" (Differentiating and analyzing the space for "turning oneself in" in a traffic offense disturbance—a rejection of "administrative duty" and "double evaluation"), 人民检察 (People's Procurator) no. 23, 2009; Pan Yonglu 潘庸鲁, "自首并非免死: 关于自首在中国当下死刑适用语境中的反思—以药家鑫案, 李昌奎为探究视角" (Turning oneself in does not exempt one from the death penalty: Reflections on the context for applying the death penalty in China's current system of turning oneself in—an exploration from the perspective of the Li Changkui and the Yao Jiaxin cases), 山东警察学院学报 (Journal of the Shandong Police Academy) no. 1, 2012. On the essential features of the system, see Wang Xuepei 王学沛, "论自首制度的本质及构成要件" (On the essence of the system of turning oneself in and its key components), 现代法学 (Modern Legal Studies) no. 2, 1986; Dong Bangjun 董邦俊 and Ding Xiangxiong 丁祥雄, "论自首制度的本质" (On the essence of the system of turning oneself in), 中国地质大学学报 (Journal of the Chinese University of Geosciences) no. 1, 2012. On legislative proposals, see Li Xihui 李希慧 and Xie Wangyuan 谢望原, "我国应建立完备的自首, 坦白, 立功制度" (China should establish a more comprehensive system of turning oneself in, confession, and meritorious performance), 法学研究 (Legal Studies Research) no. 2, 1997; Wang Shuo 王烁, "论我国的自首制度及其改革建议" (On China's system of turning oneself in and suggestions for reform), 四川师范大学学报 (社会科学版) (Journal of Sichuan Normal University [Social Science Edition]) no. 1, 2011. On the different dynastic regulations, see Luo Ping 罗平, "清代律例中的犯罪自首问题" (The problem of turning oneself in after a crime in the Qing code), 法学杂志 (Journal of Legal Studies) no. 6, 1987; Ming Tingqiang 明廷强 and Zhang Yuzhen 张玉珍, "唐律自首制度初探" (Introductory exploration of the Tang system of turning oneself in), 齐鲁学刊 (Qilu Journal) no. 5, 1990; Li Zhonghe 李中和 and Jin Wei 金伟, "中国古代自首制度考析" (Analysis of the system of turning oneself in in ancient China), 西部法学论坛 (Western Legal Studies Forum) no. 6, 2010. For studies based on case records, see Zhao Xiaogeng 赵晓耕, "自首原则在宋代的适用—阿云之狱" (The application of the principles of turning oneself in during the Song—the case of the imprisonment of A Yun), 中国审判 (China Judgment) no. 5, 2007; Li Zhonghe 李中和, "《唐律疏议》自首制度立法探析—以上官兴醉酒杀人自首案件为例" (Exploration and analysis of the "Tang Code Commentary" on the legislation and

China since the end of the Qing has resulted in a fundamental break between current Chinese law and China's legal tradition, few have sought to connect research on the Qing system of turning oneself in and its judicial practice with contemporary law. Yet, within the context of the break between traditional and contemporary Chinese law, the system of turning oneself in is an important exception. This system endured not only throughout the imperial period, but has continued to be in effect throughout the great changes that have taken place during the modern period. Thus, the system of turning oneself in provides at once an example for exploring the modern use of an ancient idea and a case study for analyzing the development and evolution of the law.

This article will undertake a comparative analysis of the codified law and judicial practice of the traditional (using the Qing as a representative example) and the modern systems of turning oneself in. By exploring codified law to reveal the continuities and discontinuities of the system of turning oneself in, parsing out the different value systems that undergird traditional and modern judicial practice in this area, and—through historical analysis—lifting out the key features of the evolution of this system, this article will present an evaluation of the system and its positive and negative aspects.

There are two reasons for choosing the Qing system of turning oneself in as the starting point for analysis. First, under the premise of following the legal code of previous dynasties, Qing codified law on turning oneself in remained stable and unchanged throughout the entire dynasty. Second, starting from the mid-Qing period, however, the system of turning oneself in began to experience gradual changes in the judicial realm. Therefore, incorporating judicial practice in the analysis is important because the discourse of the law perhaps reveals only one facet of reality. The operational realities of judicial practice may reveal an entirely different view. Regarding case selection, in comparison to records that feature simpler and more clear-cut incidents, ambiguous cases that raise doubts and unanswered questions are more effective in revealing a jurist's inner thoughts and leanings. For this reason, this article will highlight cases that raise lingering questions and involve unsettled disputes as the basis for comparison. But to ensure that the analysis is based on a representative and authoritative selection, the Qing portion of this article will draw on cases from *Compendium of Overruled Cases Sent Down for Retrial* (*Bo'an*

the system of turning oneself in—the case example of Shangguan Xing turning himself in after drunkenness and murder), 新疆大学学报 (哲学人文社会科学版) (Journal of Xinjiang University [Philosophy, Humanities, and Social Science Edition]) no. 5, 2010.

huibian 驳案汇编),[3] *Board of Punishment's Reassessments of Penalties for Cases* (*Xingbu bizhao jiajian cheng'an* 刑部比照加减成案),[4] and *Conspectus of Penal Cases* (*Xing'an huilan* 刑案汇览).[5] The modern portion of this article will draw on guiding cases published by the Supreme People's Court,[6] cases drawn from *Reference to Criminal Trials* (*Xingshi shenpan cankao* 刑事审判参考),[7] and cases that have aroused much attention in society at large. Through a comparative analysis of past and present codified law and legal practice of

3 Quan Shichao 全士潮 and Zhang Daoyuan 张道源, eds., 驳案汇编 (Compendium of overruled cases sent down for retrial), punctuated and edited by He Qinhua 何勤华 et al. (Beijing: Falü chubanshe, 2009). The edition used in this article includes the *Compendium of Overruled Cases Sent Down for Retrial*, first printed at the end of the Qianlong period of the Qing, and the *Continuation Compendium of Overruled Cases Sent Down for Retrial* (*Bo'an xubian* 驳案续编), first published during the Jiaqing period. The majority of case records in this collection belong in the Board of Punishment's category of "Draft revisions of judgments for overruled cases" (*feng shangyu zhibo gaini* 奉上谕指驳改拟). These cases included dissenting opinions (*boyi* 驳议) and could be used as precedents for ruling on similar cases. The goal of the compendium was to "thoroughly understand the standards of reason and law and to seek the origins of laws and decrees, to draw out the profound and subtle meanings of the law and cases, and, in accordance with the best thinking and in consideration of the people's sense of reason, to aim for a judgment that is both just and reasonable." A total of five cases from this collection involve the system of turning oneself in.

4 Xu Lian 许梿 and Xiong E 熊莪, eds., 刑部比照加减成案 (Board of Punishment's reassessments of penalties for cases), punctuated and edited by He Qinhua 何勤华 (Beijing: Falü chubanshe, 2009). This collection, published during the Daoguang period, was prompted by the problem that "even though the law is thorough, if there are no available case precedents to consult, then there is always the worry that there may be errors in judgment." Thus, for this reason, "consulting case precedents can help ensure new cases are handled and judged appropriately and reasonably." A total of fourteen cases from this collection involve the system of turning oneself in.

5 Zhu Qingqi 祝庆祺, ed., 刑案汇览, 全编 (Conspectus of penal cases, complete edition), punctuated and edited by You Shaohua 尤韶华 (Beijing: Falü chubanshe, 2007). This version contains: the 60 *juan* of the *Conspectus of Penal Cases*, the 16 *juan* of the *Additions to the Conspectus of Penal Cases* (*Xuzeng xing'an huilan* 续增刑案汇览), the 16 *juan* of the *New Additions to the Conspectus of Penal Cases* (*Xinzeng xing'an huilan* 新增刑案汇览), and the 32 *juan* (4 categories) of the *Conspectus of Penal Cases, Continuation* (*Xing'an huilan xubian* 刑案汇览续编). A total of 32 cases from this collection involve the system of turning oneself in.

6 In order to establish a system of guiding cases, up until January 31, 2013, the Supreme People's Court had published four collections of guiding cases (sixteen cases in total) and required that all judges consult these collections when ruling on cases involving similar issues.

7 *Reference to Criminal Trials* is edited by the services office of the Supreme People's Court and provides detailed explanations of judgments rendered in standard as well as complicated cases. This publication serves as a reference for judgment in similar cases.

the system of turning oneself in, this article will explain the system's indigenous features and continuity, its historical changes, and the wisdom revealed through practice.

Indigenous Characteristics and Continuity

The system of turning oneself in originated in China and has remained in effect, uninterrupted, to the present. Regarding the origin of turning oneself in, Chen Guyuan believes that "the system of turning oneself in and receiving reduced punishment is a unique precedent found in the Chinese legal system. It allows people to repent and change and is naturally the result of the Confucian emphasis on the cultivation of an inner sense of shame."[8] Japanese criminal law scholar Ōtsuka Hitoshi believes that "to provide for a reduction of punishment through the system of turning oneself in is a uniquely Eastern idea."[9] And according to historical records on legal reform from the end of the Qing, "the intention of the system of turning oneself in is to encourage criminals to repent and make a fresh start in society. Most countries only have specific legal provisions that deal with turning oneself in for specific crimes. The idea of the system of turning oneself in as a general legal principle most likely has its origins in the Chinese legal system."[10]

In terms of continuity, one can see the continuous development of specific laws on the system of turning oneself in throughout the dynastic legal codes. Even though "the form and substance of the laws of the New Qing Criminal Code (*Da Qing xin xinglü* 大清新刑律) were based on the blueprint of the modern Japanese criminal law,"[11] an examination of the history of Japanese criminal law shows that the system of turning oneself in did not experience any disruption. The new criminal law promulgated during the Japanese Meiji Restoration "from a substantive perspective, represents a compromise between the criminal laws of Tokugawa Japan and ancient China."[12] Japan's

8 Chen Guyuan 陈顾远, 中国法制史概要 (Brief history of China's legal system) (Beijing: Shangwu yinshuguan, 2011), 205.

9 Ōtsuka Hitoshi 大塚仁, 刑法概说 (Summary of criminal law), trans. Feng Jun 冯军译 (Beijing: Zhongguo renmin daxue chubanshe, 2009), 535.

10 Huai Xiaofeng 怀效锋 ed., 清末法制改革史料 (下卷) (Late Qing legal reform historical materials) vol. 2 (Beijing: Zhongguo zhengfa daxue chubanshe, 2010), 91–92.

11 Xu Dai 徐岱, 中国刑法近代化论纲 (Discussion and outline of the modernization of China's criminal law) (Beijing: Renmin fayuan chubanshe, 2003), 69.

12 Li Hong 黎洪, "日本近现代刑法学的发展历程及其借鉴意义" (Important lessons of the modern and contemporary development of Japan's criminal law studies), 法学评论 (Legal Studies Commentary) no. 5, 2004.

later Boissonade draft criminal law and, still later, the criminal law in current use also did not make any changes to the system of turning oneself in.[13] Yang Honglie states that regarding Meiji-era Japan's "double imitation of the Ming code during the establishment of its legal system," the system of turning oneself in "was the same as that in the Great Ming Code with only minor differences in wording."[14] Thus, we can see that the system of turning oneself in at the end of the Qing largely inherited the substantive content of the system of the past. Further into the twentieth century, the 1935 criminal code and the criminal law currently in force in Taiwan both have their basis in the 1928 criminal law. The 1928 criminal law continued the system of turning oneself in that was elaborated in the warlord-era New Criminal Code Temporarily in Force (*Zanxing xin xinglü* 暂行新刑律), which continued the system of turning oneself in found in the New Qing Criminal Code. Thus, one can trace an unbroken line of transmission throughout all these legal codes. Similarly, in contemporary mainland China, the system of turning oneself in in the 1997 criminal law and its predecessor, the 1979 criminal law, "is built on the foundation of the system of turning oneself in laid down during the revolutionary period and the post-1949 revolutionary legal system, as well as on the selective adoption of various appropriate and reasonable aspects from past dynasties."[15]

The Chinese system of extending leniency to those who turn themselves in has deep roots in Confucianism, which has long emphasized the importance of one's motives.[16] When the *Spring and Autumn Annals* states that "the key to adjudication is to determine the criminal's motives from the facts of the crime," it is declaring that one's motives are the most important factor for determining the appropriate punishment.[17] The *Analects* states that in order to understand a man, one must first "see the motives of his actions and words" (*shiqi suoyi* 视其所以);[18] the *Great Learning* declares that "having a sincere and upright heart" is an important step in the process of cultivating "inner sageliness and

13 Ibid.

14 Yang Honglie 杨鸿烈, 中国法律对东亚诸国之影响 (The influence of Chinese law on East Asia's many countries) (Beijing: Zhongguo zhengfa daxue chubanshe, 1999), 299, 354.

15 Zhou Jiahai, *Research on the System of Turning Oneself In*, 8–9.

16 Hu Shi 胡适, 中国哲学史大纲 (A historical outline of Chinese philosophy) (Beijing: Shangwu yinshuguan, 2011), 94–95.

17 Zeng Zhenyu 曾振宇 and Fu Yongju 傅永聚, 春秋繁露新注 (New commentary on the *Chunqiu fanlu*) (Beijing: Shangwu yinshuguan, 2010), 63.

18 Yang Shuda 杨树达, 论语疏证 (Commentary on the *Analects*) (Shanghai: Shanghai guji chubanshe, 2006), 47.

outer kingliness" (*neisheng waiwang* 内圣外王).[19] Similarly, Wang Yangming's well-known formula that "knowledge is the beginning of action and action is the completion of knowledge" also emphasizes the importance of motives.[20]

According to the Song penal code, "to commit a wrong and not make amends is to commit an offense. Those who can make amends and confess their criminal behavior should be pardoned."[21] Similarly, the *Zuozhuan* states that "nothing is better than when one is able to make amends for one's offenses."[22] Since turning oneself in and making amends are considered good behavior and fit with the ideal of ruling through virtue and ritual, there is no need to rely on punishment. Pardoning criminal behavior is made possible because of the strong emphasis on the individual actor and his will. The belief is that to a certain degree, the actor's criminal behavior is also an assault on his moral character. Viewed in this light, repentance brings healing to the harm done to one's moral character and allows the person to put his life back on the right moral path. And because the deviation from social order has already been rectified, there is no longer any need for the law to add further punishment. Thus, if, as the common saying goes, "a transgression of propriety results in punishment," then perhaps the system of turning oneself in presents a path of "self-punishment for the purpose of returning to propriety."[23]

To a certain extent, the logic of enlightenment through moral education is also found in the idea of "rehabilitation" (*ganhua* 感化) in the system of confession (*tanbai* 坦白). In theory, "from the broadest perspective, the system of confession encompasses the idea of turning oneself in."[24] Confession was one of the outstanding features of the Chinese revolutionary tradition. During the War of Resistance against Japan and the subsequent civil war, the official policy was to "extend lenient policies to those who are sincerely repentant in order

19 Chen Lifu 陈立夫, 四书道贯 (Systematic and unified exploration of the *Sishu*) (Beijing: Zhongguo youyi chuban gongsi, 2009), 6.

20 Wu Zhen 吴震, 《传习录》精读 (An intensive reading of the *Chuanxilu*) (Shanghai: Fudan daxue chubanshe, 2011), 91. The English translation here of Wang Yangming's 知是行之始, 行是知之成 follows Philip Ivanhoe's rendering in his *Confucian Moral Self Cultivation* (Indianapolis: Hackett Publishing, 2000), 64.

21 宋刑统 (Song penal code), compiled and edited by Xue Meiqing 薛梅卿 (Beijing: Falü chubanshe, 1999), 82.

22 Zhao Shengqun 赵生群, 春秋左传新注 (New commentary on the *Spring and Autumn Annals* and the *Zuozhuan*) (Xi'an: Shaanxi renmin chubanshe, 2008), 349.

23 *Chuli ruxing* 出礼入刑, *zixing fanli* 自刑返礼.

24 Yang Wen'ge 杨文革 and Deng Zibin 邓子滨, "关于坦白从宽, 抗拒从严的思想" (On the idea of leniency for those who confess, severity for those who resist), 公安大学学报 (Journal of the University of Public Security) no. 1, 2000.

to promote their rehabilitation, help them correct their faults, become new citizens, and change from being counter-revolutionaries to revolutionaries."[25] During the early period of the People's Republic of China, "leniency for those who confess, severity for those who resist" was the fundamental principle applied during the "Five Antis" (*wufan* 五反) movement to effectively divide and reform criminal elements and helped to consolidate the new political regime.[26] Throughout all the recent developments in China's criminal policy, from "combining punishment with leniency" (*chengban yu kuanda xiang jiehe* 惩办与宽大相结合) to the development of the idea of "tempering criminal policy with leniency" (*kuanyan xiangji* 宽严相济), "leniency for those who confess" has not only remained in place, but, in 2011, was formally written into the criminal law.[27]

The system of confession differs vastly from the idea of the "right to remain silent" (*chenmo quan* 沉默权). The original intent of confession, as the discussion above makes clear, was the state's desire to guide and instruct the people. The goal is to encourage the actor to repent and confess his crimes, and in return, receive reduced punishment to encourage him to turn over a new leaf. The right to remain silent, on the other hand, is accorded to the actor to protect his right to not say anything and to "give greater protection to the rights of criminal suspects and defendants against the possibility of judicial abuse of power."[28] Moreover, it operates on the presupposition of a dichotomous relationship between state and society, and that individuals who are weak require protection when facing the state's powerful apparatus.

Nevertheless, even if the two systems differ in the values they embody, there is not only no logical contradiction between the two, but in fact "the vigorous effort to find a perfect combination between the right to remain silent and the system of confession represents a worldwide trend."[29] The problem is, the regulation on "the obligation to give a statement according to the truth" still remains in the Criminal Procedural Law of the People's Republic of China

25 Wang Shirong, ed., 汪世荣, 新中国司法制度的基石 (The cornerstone of new China's judicial system) (Shanghai: Shangwu yinshuguan, 2011), 125.

26 Lu Jianping 卢建平, 刑事政策与刑法变革 (Criminal policies and changes in criminal law) (Beijing: Zhongguo renmin gong'an daxue chubanshe, 2011), 125.

27 Ma Kechang 马克昌, "论宽严相济刑事政策的定位" (On the position of tempering criminal policy with leniency), 中国法学 (China Legal Studies) no. 4, 2007.

28 Wang Yuzhan 王宇展 and Huang Boqing 黄伯青, "'坦白从宽'入律之法理研究与实践操作" (Research on the legal theory behind "leniency for those who confess" becoming a law and its practice and operation), 政治与法律 (Politics and Law) no. 2, 2012.

29 Fan Chongyi 樊崇义, "沉默权与我国的刑事政策" (The right to remain silent and China's criminal policies), 法学论坛 (Legal Studies Forum) no. 3, 2001.

(*Zhonghua renmin gonghe guo xingshi susong fa* 中华人民共和国刑事诉讼法), reflecting the current need to rely on confessions depending on the investigatory capacity of the state in any particular instance, and this represents a real obstacle to the right to remain silent.[30] Thus, one should "establish a clear historical understanding in combination with China's long-standing tradition of practical thinking" to better understand how to utilize these common achievements of human civilization.[31]

In addition, the continuity of the system of turning oneself in is also reflected in the similarity of legal regulations from the Qing to the present. First, the basic concept of turning oneself in has not changed. The Qing code states "if a person voluntarily confesses to crimes that have not yet been discovered by the authorities, then his punishment will be waived. If a person's lesser crimes have been discovered and he subsequently voluntarily confesses to his yet undiscovered serious offenses, then punishment for the serious offenses will be waived. If during the process of an interrogation a criminal confesses to additional crimes he committed, then the punishment for those additional crimes will be waived."[32] Similarly, Article 67 of the current Criminal Law of the People's Republic of China (*Zhonghua renmin gonghe guo xingfa* 中华人民共和国刑法) states that

> turning oneself in refers to a person who voluntarily gives himself up to the police after committing a crime and gives a truthful confession of his criminal actions. A criminal who has turned himself in can be either punished leniently or receive a reduction in punishment. If the criminal's offenses are not severe, then his punishment will be waived. A suspect under detention or state supervision, a defendant, or a criminal currently serving a sentence who gives a truthful confession of additional crimes he has committed that are unknown to judicial organs will also qualify for treatment under the provisions of the system of turning oneself in.[33]

30 Wang Li'na 王丽娜, "公检法全不赞成沉默权入法" (Judicial authority does not support the right to remain silent to become a law), 京华时报 (Beijing News), September 19, 2011: 17.

31 The quotation is from Huang Zongzhi 黄宗智 [Philip C. C. Huang], "中西法律如何融合? 道德, 权利与适用" (How to merge Chinese and Western law? Morality, rights and practical application), 中外法学 (Legal Studies in China and Abroad) no. 5, 2010.

32 Shen Zhiqi 沈之奇, 大清律辑注, 上 (Commentary on the great Qing code, volume 1), punctuated and edited by Huai Xiaofeng 怀效锋 and Li Jun 李俊 (Beijing: Falü chubanshe, 2000), 72.

33 Article 67 of the Criminal Law of the People's Republic of China.

As we can see, the Qing and current law on turning oneself in also share a similar conception of undiscovered crimes (*yuzui* 余罪).

Second, there are also few differences between the requirements of Qing and contemporary law on the content of confession. The Qing code required that when a person turned himself in, his confession had to be truthful and all ill-gotten gains had to be given up. As a concession, the code also stipulated that if one's confession did not represent the full seriousness of the crime, or if the extent of one's ill-gotten gains was not fully revealed, then the criminal would only have his punishment waived for the crimes he did confess. One would still receive punishment for the crimes left not confessed. If confession in instances of robbery and burglary resulted in the arrest of accomplices, not only would the confessor's punishment be waived, he would also receive a reward.[34] The current Criminal Law of the People's Republic of China requires one to confess the important details of the crime and also lays out specific requirements for different situations. For collectively committed crimes, the main criminal must confess all that he knows about the criminal actions of the other people in the group. Accomplices are required to confess their own crimes as well as any criminal behavior committed by others in the group of which they are aware. In ordinary crimes, one must confess, according to the facts, the important details of the crime. However, if one's confession only reveals part of the truth, then only that portion will qualify for treatment under the system of turning oneself in.[35] Both Qing and current law, in short, seek to maximize the scope of truthfulness revealed in a confession, but at the same time do not exclude partial confessions. Both also seek to utilize the system of turning oneself in to break up those involved in a collectively committed crime.

Changes in the System

Strong undercurrents can sometimes stir beneath the calm surface of a lake. The system of turning oneself in, which has enjoyed such stability and continuity, is currently in the midst of experiencing profound changes. Utilizing a legal studies approach to analyze the key components of the system along

34 Shen Zhiqi, *Commentary on the Great Qing Code*, vol. 1, 173.

35 "最高人民法院关于处理自首和立功具体应用法律若干问题的解释" (The Supreme People's Court's interpretation of questions related to the application of laws on the system of turning oneself in and meritorious performance), www.law-lib.com/lawhtm/1998/13925.htm (accessed on July 29, 2013).

with a diachronic comparative analysis can reveal important changes that have taken place from the past to the present. Furthermore, an understanding and evaluation of these changes must be undergirded by a view of the overall historical changes that have taken place as well as by analysis of each specific historical period.

Changes in the Conception of Legal Subject

There have been significant changes in the conception of legal subject from past to present. Qing law conceived of a person and his relatives as one entity whereas contemporary law emphasizes the unity of an independent subject's action and will.

According to Qing regulations, revelations and admissions of criminal activity by relatives in the offender's stead had the same effect as the criminal turning himself in.[36] Even if relatives engaged in mutual admissions of crime against each other out of anger and differing purposes, because of their status as relatives, in accordance with reason and the law on protecting relatives from having to report on each other's crimes (*rongyin* 容隐), their actions would have the same effect as if they had turned themselves in.[37] Thus, Qing law, in not wanting to have admissions of guilt produce even greater familial enmity, sought to utilize these instances of family dispute as an opportunity to allow each side to gain something, and ultimately to achieve the greater value of promoting the maintenance of the family. The case below illustrates how this provision was implemented.

> In 1773 (Qianlong 38), because of a dispute over a conditional land sale, the murderer beat the victim to death and then privately settled the matter by giving 50 pieces of silver to the victim's father. When the victim's younger brother found out about the murder, he confessed the crime committed by the father (privately settling a homicide) in the father's stead. In the original judgment, the murderer was charged with the crime of killing in an affray and sentenced to death by strangulation after the assizes. The victim's father was sentenced to three years of penal servitude and 100 blows of the heavy bamboo for privately settling a homicide and the victim's younger brother's punishment was waived because he gave a truthful account of the murder. However, this was not a typical

36 为首及相告言, 各听如罪人身自首法; 为首, 是本犯不知者. 相告言者, 是亲属平日各犯有罪, 偶因忿争,遂互相讦发. See Shen Zhiqi, *Commentary on the Great Qing Code*, vol. 1, 72–77.

37 Shen Zhiqi, *Commentary on the Great Qing Code*, vol. 1, 77.

> case of a person bringing a crime to light because it involved relatives, and thus required a balance between the law and reason and the integration of punishment with education. Thus, in the amended judgment, the victim's younger brother was charged with violating the law's provision against a son accusing his father and sentenced to three years of penal servitude and 100 blows of the heavy bamboo. And because the son had confessed in his stead, the father was now covered under the provisions of turning oneself in and had his punishment waived.[38]

From our contemporary perspective, a judgment of punishment for the younger brother though he committed no crime while waiving the father's punishment even though he committed a crime may seem a bit absurd. To be sure, the younger brother could have avoided committing the crime of violating morality and propriety in human relations by not confessing in his father's stead. However, by confessing in his father's stead in order to have the latter's punishment waived, the son did violate the Qing law which forbade junior members of a family to accuse their seniors (*ganming fanyi* 干名犯义). Thus, in this situation, the only way out was for the son to "save the father from having to suffer punishment by sacrificing oneself and committing the crime of accusing an elder."[39]

Nevertheless, the protection of one's relatives had limits. In order for it to be effective, two main conditions had to be met. First, one main exception to both the law on protecting relatives from having to report each other's crimes and the prohibition against accusing one's elders was when there was "a major crime that involved rebellion, treason, or a threat to the state." "Between family and the state, and loyalty (to the state) and filiality, when the two were in harmony and not in conflict, then both priorities were upheld. However, when the two were in conflict and it was impossible to fulfill both, then upholding the state and the imperial throne and maintaining loyalty to the state were the greater priorities. Thus, the prohibition against accusing elders and reporting a relative's crime would be applied to normal crimes; serious crimes that threatened the state and the imperial throne were exceptions not covered by these regulations."[40]

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38 父私和兄命首告父免罪依干名犯义. See Quan and Zhang, *Compendium of Overruled Cases Sent Down for Retrial*, 32–35.

39 Qu Tongzu 瞿同祖 [Ch'ü T'ung-tsu], 中国法律与中国社会 (Chinese law and Chinese society) (Beijing: Shangwu yinshuguan, 2010), 71.

40 Ibid., 71–72.

Second, regulations on the degree of leniency extended to a criminal took into consideration how much the solving of the case relied on the relative's confession. Qing regulations stipulated that reductions in punishment in instances of relatives confessing in the criminal's stead or mutual admissions of crime against each other depended on the degree of closeness of the relationship: if the relationship was close, then the punishment would be waived; if the relationship was distant, then the punishment would be reduced.[41] In 1750 (Qianlong 15), a revision of the law recognized that

> treasonous plots that have yet to be carried out, by nature, are extremely secretive and hard for officials to discover. Thus, the establishment of provisions for the reduction of punishment is meant to give conspirators the opportunity to turn each other in, or when they are caught, to receive a reduction in punishment even if they are already engaged in criminal activity, and to not have their relatives also be subject to punishment. Even though ordinary crimes are not as serious as treason, they are also easier for officials to find out about, so officials have less of a need to rely on relatives confessing in the criminal's stead. And because people are reluctant to flout the law, therefore, the degree of reduction of punishment or the waiving of punishment will be determined in accordance with degree of closeness of the familial relationship.[42]

In other words, cases involving crimes that were difficult to discover were extended a greater degree of leniency while other cases utilized a pragmatic approach of reducing the punishment depending on how helpful the confession was in solving the case.

Current law in China stipulates that the criminal must take responsibility for his own actions. The legal effect of a relative's actions is now completely dependent on the criminal's will. Furthermore, the law also no longer places itself in the position to mandate legal consequences for the behavior of family members toward each other. Rather, the law focuses on the true intentions of the parties involved in determining whether one receives a reduced punishment on the basis of the specific will of the criminal or the relatives.[43]

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41 Shen Zhiqi, *Commentary on the Great Qing Code*, vol. 1, 75.

42 Zhu Qingqi, *Conspectus of Penal Cases, Complete Edition*, 0326.

43 "《最高人民法院关于处理自首和立功若干具体问题的意见》的理解与适用" (How to understand and apply "The Supreme People's Court's opinion on specific questions related to the system of turning oneself in and meritorious performance"), www.court.gov.cn/spyw/xssp/201108/t20110815_159791.htm (accessed on July 29, 2013).

Legal regulations have been gradually changing in regard to the evaluation of actions taken by relatives. At first, even when the criminal did not voluntarily turn himself in, but was brought in by relatives or friends, as long as he gave a true confession of the crime and cooperated with the investigation and judgment, the confession would be handled under the provisions of the system of turning oneself in.[44] Later, in regard to a criminal who was forcibly brought to justice by his relatives, or when relatives or friends, without the knowledge of the criminal, led the authorities to arrest the criminal, even if he did not resist and subsequently gave a truthful confession, he still did not qualify for treatment under the system of turning oneself in. In addition to the importance of the objective result of securing a truthful confession, the law now also placed great importance on the subjective factor of the criminal's active willingness at the time he was brought to justice. Even though the law did not consider the criminal to have turned himself in, the regulations nevertheless allowed for the possibility of reduced punishment by taking different situations into consideration. Namely, because the criminal was not willing to be brought to justice, whether he qualified for reduced punishment depended on the will of the relatives or friends who turned him in. If they had requested the authorities to take in the criminal, then the latter qualified for reduced punishment. However, if the friends and relatives were bitter and angry about having to turn in the criminal, then the latter would not be given a reduced punishment.[45] One can see from the trajectory of legal change outlined above the gradual weakening of the importance of the relationship between the will of the relatives and the criminal's own will and the greater emphasis now placed on the independent will of the individual.

The impact of the will of relatives as a factor in the court's judgment of the criminal can be seen more concretely in the following case.

> On November 22, 2008, in Zibo city, Shandong province, Chen Bo had illicit sex with a minor female and then killed her, in effect committing the double crime of rape and intentional killing. After committing the crime, Chen heeded the urging of his friends and relatives and agreed

44 "《最高人民法院最高人民检察院公安部关于当前处理自首和有关问题具体应用法律的解答》" (The People's Supreme Court, People's Supreme Procurator's Office, and Public Security Ministry's explanation of the specific application of laws to handle questions related to the system of turning oneself in), www.law-lib.com/law/law_view.asp?id=2850 (accessed on July 29, 2013).

45 See "How to Understand and Apply 'The Supreme People's Court's Opinion on Specific Questions Related to the System of Turning Oneself In and Meritorious Performance.' "

> to let them accompany him when he turned himself in. In the end, even though Chen did turn himself in, nevertheless, because of the serious nature of his crime, he was denied a reduction in punishment and was sentenced to death. The court reasoned that after committing the crime, Chen did not have any intention to turn himself in. Had it not been for the persistent urging of his family and friends, and their constant control of him throughout the whole time so that he could not resist, Chen may not have turned himself in so promptly. Throughout the process of Chen Bo turning himself in, his situation was clearly not that of a person who demonstrated sincere repentance and an active willingness to turn himself over to the authorities. Rather, what stood out more was Chen's subjective evil nature. Thus, even though Chen turned himself in, his action was insufficient to merit a reduction of punishment.[46]

Although the role of friends and relatives in bringing Chen to justice was taken into consideration during the course of the trial, unlike in Qing law where confessions by family members qualified as turning oneself in, this contemporary case placed greater emphasis on the criminal's will. Even if the person was deemed to have turned himself in, the degree of seriousness of the case and the subjective will of the criminal were still evaluated carefully. In terms of accompanying or bringing the criminal to turn himself in,[47] the objective result of bringing the criminal to justice was not the only important factor. The criminal's subjective will was also of great importance.

Changes in the Evaluation of Motive

As this article's discussion of the Qing period has shown, relatives confessing in the criminal's stead and mutual admissions of crimes against each other did not take into consideration individual motive because the pursuit of upholding the moral principle of maintaining familial order was of greater value. However, in reality, motive often occupied a significant position in traditional

46 "陈波故意杀人, 强奸案" (Chen Bo intentional killing and rape case), www.china lawinfo.com (accessed on July 29, 2013).

47 According to the April 6, 1998, "Interpretation of Questions Related to the Application of Laws on the System of Turning Oneself In and Meritorious Performance": "When the criminal suspect has not acted on his own, but rather turned himself in only after the urging of relatives and friends, and under their accompaniment, or when family and friends bring the criminal suspect to justice either on their own or after being contacted by the authorities, all these instances qualify as turning oneself in." See www.law-lib.com/lawhtm/1998/13925.htm (accessed on July 29, 2013).

law's evaluation of a person's actions. After all, the original intention of the system of turning oneself in "was to give one the opportunity to repent and begin a new path."[48] Thus, Qing law utilized time as an important measure for judging whether the act of turning oneself in was truly motivated by a repentant heart or if it was merely the result of being forced by circumstances. Contemporary law, on the other hand, has gradually diminished the importance of the legal evaluation of motive. In terms of the codified law, the diminished importance of motive represents a loosening of time limits on when one turns oneself in. From a practical standpoint, the new emphasis of current law has also resulted in the policy of "motive not taken into account when turning oneself in."[49]

In Qing law, the timing of the act of turning oneself in was an important basis for judging the subjective motive of the criminal. Turning oneself in had to take place before the crime was discovered by the authorities. This was because at this stage, the crime could have easily remained concealed, but because the criminal, out of the sincerity of his repentance, willingly revealed his criminal offense to state authorities, his action demonstrated "the sprouts of a repentant heart and the ability to change for the better, which merited waiving the punishment."[50]

Of course, there were exceptions and amendments to the law. First, because of the serious nature of crimes involving treason and defection (*taopan* 逃叛) and the threat they represented to state power, the law treated these cases on a special basis. Consequently, under these circumstances, even after the crime had been discovered by the authorities, a criminal could still turn himself in and qualify for special treatment.[51] Second, a later substatute on "knowledge of another's intention to inform the authorities" (*zhiren yugao* 知人欲告) was added, which indicated that if the treasonous crime was about to take place, or even if it had not taken place, and the criminal—fearing punishment—turned himself in, he still qualified to have his punishment either reduced or waived. However, if the criminal did not have any remorse but turned himself in only because he was forced to do so, knowing that the crime had already been exposed and that others were about to inform the authorities, then under this circumstance the criminal only qualified to have his punishment reduced by two degrees.[52] Subsequently, in 1773 (Qianlong 38) the first-ever regulation

48 Quan and Zhang, *Compendium of Overruled Cases Sent Down for Retrial*, 30.

49 *Zishou buwen dongji* 自首不问动机.

50 Lei Menglin 雷梦麟, 读律琐言 (Trivial words while reading the law), punctuated and edited by Huai Xiaofeng 怀效锋 and Li Jun 李俊 (Beijing: Falü chubanshe, 2000), 41.

51 Shen Zhiqi, *Commentary on the Great Qing Code*, vol. 1, 79.

52 Ibid., 79.

on *wen'na toushou* (闻拿投首), or "turning oneself in because of the knowledge of another person's intention to inform the authorities," was established. The new regulation allowed a criminal who feared punishment to turn himself in, regardless of whether the crime had been discovered at that point.[53] As a result, many crimes that had already been discovered by authorities were now brought within the framework of this new regulation. An example is found in a case involving a criminal who in the process of burglary injured the victim with a knife. Though the criminal turned himself in only after the victim reported the crime, he was handled in accordance with the new *wen'na toushou* regulation.[54] In another case, which occurred in 1818 (Jiaqing 23), though Chen Yashou would have originally been sentenced to beheading, because he turned himself in and qualified under the regulation on *wen'na toushou*, he received a reduced sentence of military exile (*chongjun* 充军).[55] The establishment of the regulation on *wen'na toushou* to a certain extent changed the main criterion for granting a reduction of punishment from "repentance" to "fear of the law."

Current criminal law has extended this line of thinking. Though the current Criminal Law of the People's Republic of China also requires, in most situations, a criminal to turn himself in before the crime has been discovered by authorities to qualify for leniency, time, however, is not the only factor. According to judicial interpretation, even if a criminal is on the run and actively being pursued by the authorities, he can still turn himself in. Furthermore, a criminal

53 "The substatute on 'turning oneself in because of the knowledge of another person's intention to inform the authorities' established in 1773 (Qianlong 38) was unprecedented in Chinese law. A criminal qualified to turn himself in, regardless of whether the crime had been discovered at the time. . . . A crime of burglary and injuring a victim with a knife while resisting capture, which should be punished by beheading, is different from a crime of burglary and injuring a victim with a knife while resisting capture and then fleeing without the stolen goods, which should be punished by strangulation. Regardless of the difference, as long as the criminal fears the law and turns himself in, he qualifies for treatment under the substatute of 'turning oneself in because of the knowledge of another person's intention to inform the authorities.' " See Zhu Qingqi, *Conspectus of Penal Cases, Complete Edition*, 0328.

54 "Xie Wusan committed burglary and injured the victim, Tang Chaofan, with a knife. Tang immediately reported the crime and the government set out to arrest Xie. . . . The criminal turned himself in and was sentenced to strangulation after the assizes for committing the offense of robbery but fleeing without the stolen goods, and injuring the robbery victim, who gave chase with a knife, while resisting capture. Xie was handled in accordance with the regulation on *wen'na toushou* and received penalties reduced by one degree, 100 blows of the heavy bamboo and exile at a distance of 3,000 *li*." See Zhu Qingqi, *Conspectus of Penal Cases, Complete Edition*, 0328.

55 Xu and Xiong, *Board of Punishment's Reassessments of Penalties for Cases*, 12.

who is arrested as he is attempting to give himself up to the police also qualifies as having turned himself in. Likewise, a criminal who turns himself in, then retracts his confession, and then gives a truthful confession before the decision of the first trial is issued also qualifies as having turned himself in.[56] From this, we can see that in terms of the span of time, from before an investigation has begun, to during the investigation process, and finally, to before the decision of the first trial is issued, the current law has just about embraced all possible scenarios that qualify as turning oneself in. However, along with the extension of the span of time, the requirement of having a repentant heart no longer exists and fear of the law has diminished as a factor important in qualifying for turning oneself in. Instead, there is now the greater tendency for the criminal to seek personal gain through using the system of turning oneself in. In this way, rather than viewing the current law as giving criminals more opportunities to repent, perhaps it is more appropriate to view the expanded time span for turning oneself in as an extension of the period for a criminal to mull over how best to maximize his long-term interests.

The following two cases present a good reflection of the court's attitude toward one's motive.

> Case 1: On December 30, 1998, in Shanghai, Yao Weilin provided Liu Zongpei with counterfeit shampoo bottles along with trademarked brand labels. However, because of a dispute over printing fees, Yao reported Liu to the authorities. The decision of the first trial took into consideration Yao's voluntary reporting of the matter and the valuable information he provided to help authorities capture Zhuang Xiaohua, an accomplice in the crime, and declared that even though Yao's actions did not qualify as "providing assistance in another case," nevertheless, in accordance with the situation, he deserved to receive reduced punishment. However, the court in the second trial ruled that the original decision was wrong to not recognize the actions of Yao (the appellant in the second trial) as qualifying as turning oneself in, and therefore should be amended. To be sure, Yao Weilin's financial dispute with Liu Zongpei, which led Yao to report Liu to the authorities and provide information for the arrest of a criminal accomplice, still did not qualify as "providing assistance in another case." Nevertheless, Yao did voluntarily and truthfully confess to his own participation in the crime before public security officials began pursuing the case and did not, at any point during the first trial, deny his own

56 See "The Supreme People's Court's Interpretation of Questions Related to the Application of Laws on the System of Turning Oneself In and Meritorious Performance."

criminal activity. Thus, even though Yao's basic motivation in reporting the case was to vent his personal anger against Liu, from the perspective of contributing to quickly striking down crime and diminishing the dangerous consequences of criminal activity, Yao can be viewed as having voluntarily given himself up and presenting a truthful confession, and therefore he qualified for reduced punishment under the system of turning oneself in.[57]

Case 2: On September 1, 2003, in Beijing, Dong Shuguang, along with others, took part in a burglary. However, because of a dispute over how the spoils should be split, Dong, having also heard that one could receive a reward for reporting a crime, reported to the personnel of the burglarized office all the things that he and the others had stolen and allowed one of the office personnel to accompany him to report the case. In the end, the court stated that because the main intention and spirit of the system of turning oneself in was to break up and divide criminals, increase the efficiency of processing criminal cases, and lower costs for the judiciary, motive would not be a factor in determining whether one's actions qualified as turning oneself in.[58]

In the first case, Yao's motive for reporting the crime was to vent his anger; in the second case, Dong's motive was to receive a reward. In neither of the two cases was the act of turning oneself in the result of remorse over the crime. Yet, because the court's position on the system of turning oneself in placed a premium on the effective administration of the law, this meant—regardless of the purity of motive—a criminal qualified as having turned himself in as long as he voluntarily surrendered to the police and gave a truthful confession. All that mattered was the objective utilitarian effect.

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57 See "姚伟林, 刘宗培, 庄晓华非法制造注册商标标识案—举报同案犯并如实交代自己参与共同犯罪的事实的应否认定为自首" (Case involving Yao Weilin, Liu Zongpei, and Zhuang Xiaohua illegally producing counterfeit trademarked products—whether the reporting of an accomplice and truthfully confessing to one's involvement in the crime qualifies as turning oneself in) (no. 66), Criminal Court of the People's Supreme Court 最高人民法院刑事审判庭, 刑事审判参考 (Reference to criminal cases, 9, 2000), 8–15.

58 See "董保卫, 李志林等盗窃, 收购赃物案 (第381号)—投案动机和目的是否影响自首成立" (Dong Baowei and Lin Zhilin, et al., burglary and purchase of stolen goods case [no. 381]—should motive and objective influence qualification as turning oneself in?), Criminal Court of the People's Supreme Court (Reference to criminal cases, 48, 2006), 23–29.

This type of understanding is not only seen in the way the judiciary carries out its work, but is also reflected among certain scholars who view the system of turning oneself in as a "utilitarian exchange" (*gongli zhihuan* 功利置换),[59] or as a transaction where "the state exchanges its authority to punish for information from the criminal, and similarly, the criminal uses the benefit of having information related to the case as a chip to exchange for a more lenient punishment."[60] "Under the state and criminal's traditional relationship of opposition, the two sides are engaged in a 'zero-sum game'—one side's gain necessarily implies the other side's loss. But in a transaction involving turning oneself in, the state and the criminal are no longer in a completely antagonistic relationship and the two can in fact realize a win-win situation: the state can succeed in solving the case; the criminal can receive reduced punishment."[61]

The above view, however, is too one-sided, for it ignores the fact that "legal norms are informed by cultural and ethical presuppositions."[62] An examination of the system of turning oneself shows that, from its origins, turning oneself in was never conceived of as merely a transaction, but rather aimed to guide a criminal to repentance and change and, in addition to punishment, acted as an important education and crime-prevention mechanism. Leniency and the forgiveness of crime were extended to those who had shown repentance and were the reward for the criminal's efforts to help restore the order of things.

Although repentance is a kind of subjective inner disposition not easily confirmed by outward behavior, nevertheless it does not mean repentance can never been demonstrated or made known, or that it should not be given any consideration in a case. Blindly granting leniency without establishing any bottom line or threshold to serve as a guideline can easily cause the weak-

59 Pan Yonglu 潘庸鲁, "自首并非死刑: 关于自首在中国当下死刑适用语境中的反思—以药家鑫案, 李昌奎案, 为探究视角" (Turning oneself in is not the death penalty: A reflection on turning oneself in in the linguistic context of China's current application of the death penalty—exploration through the perspective of the Yao Jiaxin and Li Changkui cases), 山东警察学院学报 (Journal of the Shandong Police Academy) no. 1, 2012.

60 Chen Xiaofeng 陈小凤 and Chen Jinlong 陈进龙, "交易视野下看自首的异化" (Looking at the weakening of the system of turning oneself in from the viewpoint of transactions), 鸡西大学学报 (Journal of Jixi University) no. 4, 2009.

61 Chen Xiaofeng 陈小凤 and Chen Jinlong 陈进龙, "自首的本质: 交易性" (The essence of turning oneself in: Transaction), 信阳农业高等专科大学学报 (Journal of the Xinyang Advanced Agricultural Technical College) no. 3, 2009.

62 Franz Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany*, trans. Chen Ai'e 陈爱娥 and Huang Jianhui 黄建辉 (Shanghai: Shanghai sanlian shuju, 2006), 128.

ening of the system of turning oneself in. Under the premise that grades of punishment are set scientifically, granting reduced punishment when there is no evidence of repentance is tantamount to assigning punishments that lack proportionality. And once this happens, the expectation that punishments set by the law will be effectively implemented becomes difficult to ensure, which, in the end, will threaten the overall effective implementation of criminal law. If a transaction does represent the essence of the system, then there becomes no need to utilize "can reduce" instead of "must reduce" to limit ill-intentioned attempts to turn oneself in. Also, the law states, "a criminal who wishes to evade the law and avoid punishment, and thus turns himself in and provides assistance with another case, does not have to be given leniency,"[63] which indicates a clear need to evaluate the criminal's subjective motive for turning himself in. In short, a completely utilitarian interpretation of turning oneself in also violates the original intention of current legislation.

Changes in Terms of to Whom One Could Turn Oneself In

One of the biggest changes in terms of to whom one could turn oneself in was the shift in attitude away from the system of the criminal confessing or revealing the truth directly to the victim (*shoufu* 首服). Current law stipulates that one can only turn oneself in to a representative of the state.

Qing regulations, for the most part, stipulated that one should turn oneself in to the government. Moreover, in order to prevent malfeasance, the law stipulated that a person "must voluntarily come before an official in order to qualify as turning himself in." "If a person is brought in by a constable, because there is possibility that he is not repentant, or that he is being dishonest or purposefully fabricating a confession, he does not qualify for a reduction of punishment."[64] However, for crimes such as official involvement in the giving and taking of bribes, as well as the theft, burglary, and the swindling of another's material possessions, one could also confess directly to the victim to right the wrong and settle the matter privately.[65] The confessor could reveal the truth of the crime to the victim, apologize for his wrongdoing and ask for forgiveness, and return whatever he had stolen or swindled. Even though all

63 "《最高人民法院关于处理自首和立功若干具体问题的意见》" (The Supreme People's Court's opinion on specific questions related to the system of turning oneself in and meritorious performance), http://rmfyb.chinacourt.org/paper/html/2010-12/29/content_20747.htm (accessed on July 29, 2013).

64 Zhu Qingqi, *Conspectus of Penal Cases, Complete Edition*, 0334.

65 首者, 自言强窃, 诈欺之情, 服者, 谢过请罪之意也. See Shen Zhiqi, *Commentary on the Great Qing Code*, vol. 1, 76.

this took place without the involvement of the state, the result was practically the same as what would have happened under the system of turning oneself in: the stolen goods were returned, the truth was revealed, and the criminal had demonstrated his subjective remorse over the crime.[66] Worth noting here is the especially strong emphasis in the legal explanation of the criminal's repentance, which was, by design, one of the crucial factors that qualified one for leniency under the system of turning oneself in.

Regulations on confessing directly to the victim reveal most clearly the Qing orientation toward the essence of property-related crimes and turning oneself in. In terms of the violation of one's property, the return of the goods and the revealing of the truth to the victim had the effect of restoring to right the social relationship that had been broken. At the same time, the recognition of one's wrongdoing demonstrated the criminal's sincere repentance and willingness to change. One could use the system of confessing directly to the victim only in crimes related to violations of property, which were considered "minor matters." Here, refraining from direct intervention, the state limited its power to the issuance of guiding rules to allow society to heal itself. Regarding matters that society could handle on its own, the state adopted a "some things are better left not done" (*you suo bu wei* 有所不为) attitude, which fit well with the minimalist local bureaucratic apparatus, or what can also be viewed as the institutionalization of a "minimalist approach to governance."[67]

According to the current Criminal Law of the People's Republic of China, a person can turn himself in to a judicial organ, the place where he works, a township-village-level government office, or any other relevant agency.[68] Thus, while the law has broadened the number of channels for a person to turn himself in, direct confession to the victim has not been included.

> In August 2005 in Jiangyin city, Jiangsu province, Zhou Jianlong burglarized his neighbor four times and stole roughly 7,000 RMB. Then, on August 25 and 26, Zhou Jianlong confessed his crime to the victim and presented the latter with an IOU promising to use his salary to return the stolen money. On August 29, the victim reported the case to the pub-

66 悔过回付还主, 悔自己之过, 还他人之物也. 虽不经官首告, 而赃既还主, 罪亦发露,其悔罪之心, 与自首一也. Ibid.

67 Huang Zongzhi 黄宗智 [Philip C. C. Huang], 过去和现在: 中国民事法律实践的探索 (The past and the present: Chinese civil justice in practice) (Beijing: Falü chubanshe, 2009), 78.

68 See "The Supreme People's Court's Interpretation of Questions Related to the Application of Laws on the System of Turning Oneself In and Meritorious Performance."

> lic security office. On October 23, Zhou Jianlong repaid the victim 800 RMB. On November 19, Zhou Jianlong was summoned to the Jiangyin city Yuecheng police station for questioning, during which he gave a truthful confession of his crime. In the end, the court believed that Zhou Jianlong's actions did not reflect a subjective willingness to accept the ruling on the case lodged by the victim. Rather, Zhou opted to privately settle with the victim, refusing to "accept state investigation and judgment."[69]

In the case described above, Zhou Jianlong's confession of his crime and his repayment of the stolen money fits perfectly the standard description of a criminal confessing to the victim directly. Nevertheless, Zhou's case was categorized as a private settlement and was not handled through the system of turning oneself in because he did not make his confession to the state. The rejection of direct confessions made to the victim is perhaps a way for the state to maintain control over criminal cases, to prevent the two parties from privately settling a case, to counter the practice of using money to avoid punishment, and especially to thwart situations where the offender uses threats and coerces the victim into silence. Hence, all criminal cases must go through state judicial investigation to ensure fairness and justice.

Changes in the Outcome of Turning Oneself In

The outcome of turning oneself in has undergone a change from the operating principle of reduction of punishment in all instances during the Qing to the current principle of reduction of punishment if warranted by the circumstances. One reason for this change is the broadening of the scope for applying the system of turning oneself in. The Qing code placed strict limitations on the types of crimes that the system of turning oneself in could be applied to. In contrast, the scope of the current system has been increased to the largest extent possible, allowing turning oneself in to be applied to any crime.

Qing judicial practice firmly established the rule of denying repeat offenders the right to turn themselves in, stating, "receiving a pardon from a death sentence for turning oneself in is a granting of humaneness outside the boundaries of the law and can only happen once. If after receiving this treatment one still does not repent and change, but dares to commit a crime and escape, even if relatives confess in one's stead, leniency will not be granted again. One will be dealt with through the law as befitting the circumstances of his crime."[70]

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69 "周建龙盗窃案" (第437号) (Zhou Jianlong burglary case), no. 437, Criminal Court of the People's Supreme Court (Reference to criminal cases, 55, 2007), 41–49.

70 Quan and Zhang, *Compendium of Overruled Cases Sent Down for Retrial*, 28.

In addition, certain crimes did not qualify for the system of turning oneself in.[71] First, homicide and the destruction of an official seal, document, or state object were crimes that did not qualify because they involved the destruction of things that could not be compensated. Consequently, in these situations, turning oneself in would have no meaning because it would not help to restore the original order of things. However, if the crime involved a combination of offenses, then it was possible to have the originating offense waived. For example, in 1818 (Jiaqing 23), Zhang Xun, while carrying out a burglary, was discovered by the victim. In the process of fleeing, Zhang killed the victim, which according to the Qing code, was a crime that carried the punishment of beheading. However, "because Zhang turned himself in before the victim's corpse was discovered by his relatives, the court waived his burglary offense and only charged him of the crime of homicide. An investigation revealed that because Zhang's main motivation was to escape and he had no intention to murder, he was charged according to the substatute on 'killing in an affray' and sentenced to strangulation after the assizes."[72] The second category involved criminals who fled after their crime was discovered. In these cases, the timing of the discovery of the crime, and not whether one flees, is the crux of the matter. Since the possibility of turning oneself in had already been eliminated because of the discovery of the crime, by fleeing, the criminal revealed his wickedness and therefore did not qualify to turn himself in. The third category involved illegally stealing through border checkpoints and leaving the country. Turning oneself in was not possible here because the consequences of this action could not be reversed and no restoration could be made. Fourth, illicit sex offenses were similar to offenses that involved damage that could not be restored. And last, ordinary people were prohibited from engaging in private astronomical studies because such matters could give one insight into the fate of the dynasty.[73] Those engaged in this illegal act did not qualify to turn themselves in because there was no way to undo or erase the knowledge they now possessed.

But, with the production of new case precedents, adjustments were made to previous restrictions against crimes involving bodily injury and homicide. In 1827 (Daoguang 7), a case occurred involving an offender who injured a person with a knife, and then also injured a local *dibao* who was trying to get him to

71 Shen Zhiqi, *Commentary on the Great Qing Code*, vol. 1, 73.

72 Xu and Xiong, *Board of Punishment's Reassessments of Penalties for Cases*, 12.

73 The law prohibiting the "private learning of astronomy" (*sixi tianwen* 私习天文) was abolished in 1725 (Yongzheng 3). See Wu Tan 吴坛, 大清律例通考校注 (Comprehensive commentary of the Qing code), punctuated and edited by Ma Jianshi 马建石 and Yang Yutang 杨育堂 (Beijing: Zhongguo zhengfa daxue chubanshe, 1992), 278.

stop. Thereafter, the offender turned himself in because of his knowledge of another person's intention to inform the authorities. The original judgment declared that the system of turning oneself in did not apply to crimes involving injury to other people. As a result, the offender was charged with a "second degree crime of injuring a person with a knife and resisting arrest" (*renshang ren jia jubu zui erdeng* 刃伤人加拘捕罪二等) and sentenced to one hundred blows of the heavy bamboo and three years of penal servitude. However, in a review of the case, the Board of Punishment ruled that the offender did qualify as having turned himself in under *wen'na toushou.* The new sentence "decreased by one degree the original punishment given for the crime of injuring a person with a knife and resisting arrest," meaning the punishment would now be ninety blows of the heavy bamboo and two years of penal servitude.[74]

The current system of turning oneself in does not have any restrictions and can be applied to any crime. As we have already seen, the Qing system of turning oneself in excluded crimes that resulted in consequences that were impossible to restore. But whereas the Qing system's main goal was to restore the right order of things, the current legal system's focus is to punish crimes already committed, utilize the system of turning oneself in as a means to gain information about criminal activity, control criminals, and exercise the state's authority to punish.

The broadening of the scope of the system of turning oneself in has created a more complicated situation. Because the Qing system's insistence on reduction of punishment in all instances was difficult to manage and presented many challenges in terms of determining the proper punishment, the current system adopted a new principle of reducing punishments if warranted by the circumstances. In Qing law, whether it was an ordinary case that should result in the punishment being waived or a reduction of punishment given under special circumstances,[75] every scenario and its appropriate measure of leniency was clearly stipulated in the code. The current system's adoption of reduction of punishment if warranted by the circumstances has expanded a judge's independent discretionary authority, which also means "after resolving the problem of whether the system of turning oneself in is applicable, one then has to deal with the problem of whether to extend leniency, and if so, how much."[76]

Qing codified law was able to categorically waive punishment for those who qualified to turn themselves in because, according to the design of the system,

74 Ibid., 364.

75 Shen Zhiqi, *Commentary on the Great Qing Code*, vol. 1, 72–73.

76 Zhou Jiahai, *Research on the System of Turning Oneself In*, 310.

the worst crimes were already excluded. Yet, the actual situations faced by the judiciary were often complex and not as easily handled as the clear-cut legislation would suggest.

> In 1817 (Jiaqing 22), Luo Yangcai was involved as an accessory to the crime of murdering thirteen people, three of whom belonged to one family. Luo then turned himself in after finding out about another person's intention to inform the authorities (*wen'na toushou*). Though beheading would be the expected sentence for this crime, the judicial official handling the case believed Luo had demonstrated a fear of the law, and thus sentenced him to beheading after the assizes. Upon review, the Board of Punishment ruled that because Luo was involved in the murder of many people, even if he did turn himself after finding out that another person was going to inform the authorities, it was not appropriate to reduce his punishment. Therefore, in accordance with the law for this crime, Luo should be beheaded.[77]

Though in Qing codified law, murder did not originally fall within the scope of the system of turning oneself in, through the course of judicial practice, the law was amended to include this crime.[78] Nevertheless, even though the Board of Punishment acknowledged that Luo had turned himself in under the *wen'na toushou* provision, it did not rule in accordance with the principle of either waiving or reducing punishments in all instances. The judiciary's expansion of the scope of crimes that qualified for the system of turning oneself in caused officials to wonder if for some cases the principle of always reducing punishment was a bit too lenient. The fear was that an overly lenient punishment would result in a loss of proportional balance between crime and punishment and a loss of ability to instill fear in criminals, which would then encourage the proliferation of more crime in the future. As a result, in trying certain cases, officials made adjustments that violated the law; in accordance with the needs of the situation, they would acknowledge the criminal had turned himself in but not reduce the punishment. According to the *Conspectus of Penal Crimes*, "recently, in handling cases, officials in various provinces often want to demonstrate their forbearance and broadmindedness by not adjudicating a crime in accordance with the appropriate law, but instead apply a different law in order to lighten the punishment. This kind of behavior is excessively tolerant. If one

77 Xu and Xiong, *Board of Punishment's Reassessments of Penalties for Cases*, 364.

78 Ibid.

is too lenient, then people will have no fear and crimes will increase. This may, perhaps, have something to do with the rise in criminal cases in recent years."[79]

Because the current system of turning oneself in no longer excludes any crime, three grades of punishments have been put in place: lenient punishment (*congqing* 从轻), reduced punishment (*jianqing* 减轻), and waiving the punishment (*mianchu* 免除).[80] At the same time, the adoption of the principle of relative leniency has again created a space for independent discretion and added a measure of flexibility in dealing with specific situations. In judicial practice, this space for discretion, coupled with the lack of a uniform standard for evaluating the circumstances under which one turns oneself in, has led to the phenomenon of the assignment of different sentences for similar cases. Particularly with cases involving the death penalty, because the circumstances surrounding turning oneself in may be the difference between life or death, the structural defect of potentially "issuing an excessively harsh punishment with the death penalty or being too lenient by not giving the death penalty" (*sixing guoqing, shengxing guoqing* 死刑过重, 生刑过轻) could make the situation even worse.

> Case 1: On October 20, 2010, in the city of Xi'an, Shaanxi province, Yao Jiaxin hit Zhang Miao while driving his car. Afraid that Zhang had seen his license plate and would cause him problems later, Yao stabbed the victim to death with a knife. After the murder, Yao drove off and subsequently hit and injured two other pedestrians. Four days later, under no coercion from public security officials, who at that point had not yet issued any arrest warrant, Yao, accompanied by his father and mother, surrendered himself to the public security office and confessed and gave a truthful account of his crimes. Even though, in essence, Yao had turned himself in, nevertheless "because his subjective will was particularly evil and the circumstances of his criminal action—which endangered many people—was especially pernicious, he deserves no leniency and should be punished severely. Yao was sentenced to the death penalty."[81] The second trial upheld the original ruling.
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> Case 2: On May 16, 2009, in Qiaojia county, Yunnan province, Li Changkui struck a fellow village girl named Wang Jiafei unconscious, raped her,

79 Zhu Qingqi, *Conspectus of Penal Cases, Complete Edition*, 0333.

80 Article 67, *Criminal Law of the People's Republic of China*.

81 See "药家鑫故意杀人案一审判决书" (First trial judgment for Yao Jiaxin intentional manslaughter case), www.66law.cn/lawwrit/7321.aspx (accessed on August 23, 2013).

and then killed her along with her three-year-old brother, Wang Jiahong. Afterward, Li Changkui turned himself in. On July 15, 2010, the first trial gave the following judgment: for the crime of intentional manslaughter, political rights stripped for life and the death penalty; for the crime of rape, a five-year prison term. Under the principle of combined punishments for several crimes (*shuzui bingfa* 数罪并罚), the court decided to implement the death penalty. On March 4, 2011, after considering Li's demonstration of remorse when he turned himself in and his positive efforts to compensate the victim, the second trial court ruled Li guilty of intentional manslaughter and rape, and sentenced him to the death penalty with a two-year reprieve.[82] On August 22, 2011, a third review of the case overruled the second trial's granting of reprieve and sentenced Li Changkui to death.

Though both Yao Jiaxin's and Li Changkui's cases shared similar circumstances related to turning oneself in, the judgment in the two cases was widely different. The reversals of judgment between the different trials in Li Changkui's case are also a cause for worry. How to maintain judicial predictability and a consistent and standardized application of the system of turning oneself in, therefore, is an urgent problem that awaits a solution.

Judicial interpretation mandates that "even when one's actions contain elements of turning oneself in or providing assistance in another case, when a criminal's subjective will is particularly evil and the circumstances of his criminal action are especially pernicious and endanger many people, then he cannot receive a lenient punishment."[83] At the same time, through the two cases discussed above, one can just about establish the principle that for serious crimes involving the death penalty, even if the criminal turns himself in, no leniency will be granted. With such serious crimes, perhaps any attempt to grant leniency would be tantamount to trying to use one blade of grass to tip a balance that has been stacked with a ton of bricks on the other side. However, if this principle is used as a reference for all other similar cases, it can also produce the negative suggestion that criminals will not receive leniency for turning themselves in. In this situation, then, the ability of the system of turning oneself in to influence criminals as they struggle over whether to flee or surrender is greatly diminished. Nevertheless, there still remains space for the

82 See "李昌奎故意杀人, 强奸案二审刑事判决书" (Second trial criminal judgment for Li Changkui intentional manslaughter and rape case), www.124aj.cn/news/flwh/2011/8/23/63JB73AEBF8C5GJ06.html (accessed on August 23, 2013).

83 See "The Supreme People's Court's Opinion on Specific Questions Related to the System of Turning Oneself In and Meritorious Performance."

effective application of the system of turning oneself in. In particular, criminals seeking to redeem themselves and to clear their conscience can effectively draw on this system. In addition, greater effort has to be made to develop the role of the victim's forgiveness of the offender in the private settlement of criminal cases and for turning oneself in to be given a positive legal evaluation in related civil cases.

From the perspective of Qing and contemporary legislative and judicial process, one can see a historical trend toward the principle of reducing punishment if warranted by the circumstances. The Qing dynasty's principle of reducing punishment in all instances worked well within the context of the limited scope of the application of the system of turning oneself in. But even though Qing legislation mandated leniency across the board, over time judicial case records exhibited a measure of adaptability to changing conditions. Subsequently, late Qing, Republican, and the revolutionary base area legislation all adopted the principle of relative leniency.[84] Republican law continued the Qing code's principle of "mandatory reduction of punishment."[85] But adherence to this principle did not mean the judge overseeing the case did not have any independent discretion because he could "decide on a range of punishments, either severe or light, that fell within the scope of the definition of reduced punishment."[86] However, "people have different motivations

84 New Qing Criminal Code, Article 51: "A person who turns himself in to an official and submits to the court's judgment before a crime is discovered by the authorities qualifies to have punishment decreased by one degree. The same treatment will be granted to a person who commits a crime prosecuted only upon complaint by the victim and confesses directly to the victim and is willing to submit himself to the court's judgment." Article 334 of the 1934 "中华苏维埃共和国惩治反革命条例" (Chinese Soviet Republic regulations on punishments for counterrevolutionaries) states: "Any person who commits any of the crimes listed in this article and turns himself in to a base area government (自首分子), and any person whose crime has already been discovered, but who, having a repentant heart, truthfully confesses to the facts of his criminal activity and assists the office for the elimination of counterrevolutionaries to capture other criminal accomplices (自新分子), qualify for a reduced punishment." Article 38 of the 1928 中华民国刑法 (Criminal law of the Republic of China) states: "Regarding crimes that have not yet been discovered by the authorities, if a person turns himself in to a public official and submits to the court's judgment, the penalty for his most serious crime will be reduced by one third."

85 The 1935 中华民国刑法 (Criminal law of the Republic of China), Article 62: "Regarding crimes that have not yet been discovered by authorities, if a person turns himself in and submits to the court's judgment, his punishment will be reduced except in cases where other special regulations apply."

86 The 1966 Taiwan region Supreme Court ruling for case 2853 included reference to "a deep discussion related to 'criminal cases' in the Taiwan region that involve either an addition

for turning themselves in. Some do so out of heartfelt repentance and a desire to change. Some turn themselves in because circumstances force them to while others do so because of the expectation of a reduced punishment. The granting of leniency across the board to all who turn themselves in not only makes it difficult to achieve fairness, it also creates the concern of encouraging more to commit crimes."[87] Because these types of cases are numerous and often lead to chaos and bewilderment as to how to properly handle them, in 2005 the Taiwan regional criminal law made a change to allow the judge "to decide whether to reduce the punishment."[88] "The judge was also given much flexibility to decide whether to reduce punishment based on the specific circumstances of the case. Genuinely repentant criminals were given a reduced punishment and an opportunity to start anew. Those who hope to cover up their violence through their cunning will be given no escape and be dealt with fairly."[89]

While the emphasis of "permitting leniency and reduction of punishment" is on lighter sentences for criminals, room is still left for the jurist to decide to deny leniency. The advantage of adopting the flexible approach of reducing punishment if warranted by the circumstances is that it gives the jurist, to the largest extent possible, the authority to consider the specific details of each case in order to render a judgment that fits best with practical realities. Yet, the uncertainty of how a case will be decided also represents a great threat to judicial fairness and justice, as evidenced by the uproar of public opinion over Yao Jiaxin's and Li Changkui's cases. Based on the experience highlighted by the cases discussed in this article, in order to play to the strengths of the system and avoid its weaknesses, a system of representative cases chosen from judicial practice should be established to demarcate a smaller range of possible punishments and to provide a reference for future similar cases so that the legal consequences of one's actions will become more predictable.

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to or a reduction of punishment." See Zhao Bingzhi 赵秉志, ed., 刑法评论(总19卷) (Criminal law commentary), 19 volumes (Beijing: Falü chubanshe, 2011), vol. 19, 264.

87 Chen Ziping 陈子平, 刑法总论 (General introduction to criminal law) (Beijing: Zhongguo renmin daxue chubanshe, 2009), 708.

88 任意之减轻. The 2005 Taiwan criminal code revision stated: "Regarding crimes that have not yet been discovered by the authorities, if a person turns himself in and submits to the court's judgment, his punishment can be reduced except in cases where other special regulations apply."

89 Chen Ziping, *General Introduction to Criminal Law*, 708.

Reflections on Modernism

The system of turning oneself in has inherited the core of the late imperial tradition, incorporated the modern Chinese revolutionary tradition's concept of "confession," and absorbed the principles and methods transplanted from the Western tradition. But the recent trajectory of development reveals an ongoing diminishing of the distinctive Chinese characteristics of the law accompanied by the ever-increasing influence of legal modernism. Under the weight of legal modernism's strong emphasis on the need for logical consistency, it is possible that China's legal system may one day go to the extreme of completely abandoning its traditional roots. The trend of legal modernism's ever-increasing influence can be examined and reflected upon critically from the following perspectives.

Rational Formalism

The increasing formalization of contemporary law has brought about greater emphasis on the internal logical consistency of the law. Traditional law was not so concerned with this problem, and thus it was possible for mutually contradictory laws to exist within the same legal code. For example, Qing law on the one hand allowed relatives to not report each other's crime and strictly forbade accusing one's elders; on the other hand, it also stipulated those who turned themselves in would have their punishment waived. Consequently, those who obeyed the latter regulation would violate the former one. Yet, despite the contradiction, the law maintained these regulations because

> if relatives are not protected from having to report each other's crimes, then it may lead to a loss of familial love; if one is not allowed to confess in the criminal's stead, then there may be no way to rescue that relative. If one can accuse one's elders easily, it will violate the rule that relatives should not report each other's crime and make it possible for one to do harm to his elders. The substatutes on protecting relatives from reporting each other's crimes and confessing in one's stead and the statute prohibiting accusing one's relatives are reflections of the highest principles of heaven and human relations.[90]

In the case discussed earlier in the article involving the son confessing in the father's stead, the judge at once applied two contradictory laws. Even though the victim's younger brother was punished though having committed

90 Shen Zhiqi, *Commentary on the Great Qing Code*, vol. 1, 834.

no crime, he was still able to both fulfill the goal of avenging the wrong suffered by his brother and fulfill his moral duty by bearing his father's punishment. At the same time, the state was also able to punish the murderer and maintain social order. The state was able to pursue justice, uphold familial relations, and achieve a balance between the law and moral principles. Here, we can also see a new explanation of the deeper nuances of the meaning of justice, that is, a decision that seems unjust at the surface level actually brings about the fulfillment, to the greatest extent possible, of the satisfaction of justice for all parties involved.

Here, I cannot help but express my admiration for the wisdom of Qing legislation of conforming to the principles of heaven and human relations by prohibiting the accusation of one's elders and demonstrating a deep concern for humanity through waiving the punishment for turning oneself in. The combination of the two is ingenious because the contradiction produced by the two laws that aimed to uphold the interests of the family was actually resolved in a way that also realized the interests of the state.

The mechanism that brought about the productive outcome of the interaction between the two mutually contradicting laws is a powerful example that should be cause for reflection on the strong emphasis on formalization in legal modernism and to at least recognize that legal formal rationality is not the only correct point of view. The logical self-consistency of the law does not necessarily translate to success in responding to the needs of reality because reality does not necessarily conform neatly to the demands of logic. If the demand of logical consistency is forced upon the two laws discussed above, then by necessity one of the values embodied by the law would have to be sacrificed. An overly instrumental approach can easily result in the sacrifice of the overall goal and cause a system to become entangled in misguided methods. Traditional law can make effective adjustments to societal relations that will also promote the values it embodies. It also provides another way to think about evaluating the law.

Instrumental Rationality

Contemporary law has essentially abandoned the values that have long undergirded the system of turning oneself in and replaced them with a strictly utilitarian approach. The current system has discarded the consideration of motive, which had been an important requirement that previously limited the use of turning oneself in in order to maximize the state's effective administration of the law. By not limiting the types of crimes that qualify for turning oneself in, the state increases its chances of gaining valuable information about criminal activity. On the other hand, in order to minimize the possibility of criminals

using the system to escape punishment, the state has also given discretion to the court to judge if reducing a punishment is warranted. Although the current system does facilitate the exercise of the state's penal authority, it also creates an ethical dilemma in which the state does not honor its commitment to provide consistent legal judgments.

The intrinsic value of turning oneself in is that it is a mechanism for the state to interact with a criminal's conscience after an offense has been committed in order to guide him to the self-realization of the need for repentance and change. By ignoring the criminal's motive, what remains of the system is just a cold transaction devoid of compassion and benevolence. More importantly, the simplified system has thrown away the ability to persuade the criminal to change, provide a type of moral education, and prevent future crime.

Although eliminating motive as a factor allows for greater application of the system of turning oneself in and spares the court the difficulty of having to peer inside the disposition of one's heart, the short-term effects produced come at the cost of the loss of long-term benefits. After all, if a criminal is not repentant, even if the present case is resolved, one has no guarantee that tragedy will not recur in the future. If the one-time application of the system is ineffective in preventing future criminal activity, then regardless of its usefulness in helping the state to effectively administer the law, it can only be viewed as providing temporary relief. In short, the system of turning oneself in will be fully effective only when motive is reincorporated as a central factor.

Individualism

Another difference between Qing and contemporary law is that between familism (*jiazu zhuyi* 家族主义) and individualism. To be sure, "the state depends on the family system to protect the state and public security. This long-held spirit has been the foundation of the state's policy for maintaining social order and peace."[91] However, the "dependence on the familial system was due to the limited capacity of the state. There was simply no other choice."[92] In the contemporary period, the expansion of state power has dislodged the influence of the family system, and more recently promoted the rise of individualism.

First, the reach of state power extends past the family and down to the level of the individual, as evidenced, for example, in the current legal system's

91 Li Qicheng 李启成, ed., 资政院议场会议速记录—晚晴预备过会论辩实录 (High council assembly meeting minutes—A record of late Qing preparatory discussions on a national parliament) (Shanghai: Shanghai sanlian shudian, 2011), 305.

92 Ibid., 304.

emphasis on the individual as an independent subject. We can also see the expansion of state power through the adoption of the principle of reducing punishment if warranted by the circumstances and the regulation that criminals can only turn themselves in to a state organ or official. While the principle of reducing punishment if warranted by the circumstances has loosened some restrictions (all crimes now qualify), it has also given the state extra control over the meting out of punishment, thus resulting in an unequal standing between the state and the criminal. For a criminal weighing his options, even though there is certainty that, regardless of the type of crime, he will be able to turn himself in, yet there is no way for him to know how the judge will use his discretion. By design, then, this system gives greater agency to the state while the criminal remains in an inferior position. Even if a direct confession to the victim is in fact a type of repentance, the current legal system will not recognize it because the state is now the sole arbiter of the standard of repentance. In order to uphold its vision of justice, the state's judicial apparatus is the only entity that can grant a reduction of punishment. In the management of society's general affairs, state power now has broader reach and greater penetration.

Second, contemporary law now evaluates the actions of relatives through the interpretive lens of individualism. Qing law took the will of relatives to be the will of the individual because it viewed the family as the most basic unit. Conversely, because contemporary law takes now the individual as the most basic unit and places great emphasis on the individual's independent will, the ability of familial relations and actions to influence a case has greatly diminished.

In terms of the Qing's views on criminal behavior, even though "from the standpoint of the law and the state, people should be encouraged to report on each other's crimes," yet, because traditional legislation "was influenced by Confucianism and because the government subscribed to the ideal of governing through filial piety, the demands of the law could be made to yield to the higher demands of filiality. That is why the law of successive dynasties acknowledged the principle of the right of family members to conceal each other's crimes."[93] At the same time, the family is the basic cell of society and its most stable collective entity. Only by maintaining the stability of each cell can the organic whole of society operate smoothly. Because the goal of Qing law was to realize and maintain social order, it protected the family system and upheld the collective interests of the family unit. It did not look to further distinguish between the different interests of those within the collective family

93 Qu Tongzu, *Chinese Law and Chinese Society*, 67–68.

unit. Moreover, regardless of the subjective will of the relative who reported on the crime of the family member, the law unequivocally interpreted that action as if the criminal had turned himself in.

Through several phases of judicial interpretation, contemporary law has undergone a significant shift in its evaluation of the actions of relatives. However, there is the question of whether the various phases of judicial interpretation reflect different phases of social reality. Here, the latest judicial interpretation provides a few important clues. The influence of a relative's actions on the criminal's punishment is now determined by an emphasis on evaluating the subjective will of both parties together. A relative must have good intentions when he or she brings or accompanies a criminal to surrender to the authorities,[94] and the action cannot violate the will of the criminal. In this way, the relative's action and will can make up for the criminal's lack of "initiative" and result in a reduced punishment for the latter. This complicated and elaborate reasoning is the result of using the lens of individualism to reinterpret a law originally undergirded by a family-centric logic. However, to have the consequences of an independent individual's action be dependent on another person, especially when that person is a relative, shows clearly that this type of legal reasoning still rests on the importance of familial relations. Thus, since it is clear that the importance of the family to the functioning of society has not been eliminated, it is not appropriate to emphasize an overly individualistic approach to the law. The same problem also exists with regard to the obligation of witnesses to testify.[95] Legislation that disregards the natural affections that family members have for one another and insists that they testify against each other will only exacerbate the law's ineffectiveness.

In the midst of the current rush toward legal modernism, we would do well to stop and reflect on the past, respond to the present, and plan for the future.

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94 "How to Understand and Apply 'The Supreme People's Court's Opinion on Specific Questions Related to the System of Turning Oneself In and Meritorious Performance.' "

95 中华人民共和国刑事诉讼法 (Criminal procedural code of the People's Republic of China), Article 60.