

THE CRIME OF WHORING WITH AN UNDERAGE GIRL IN CHINESE CRIMINAL LAW: TO BE OR NOT TO BE

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I. INTRODUCTION

Sexual exploitation of children is a serious crime and will not be tolerated.¹ The public focus is on prosecuting sex crimes against children.² As a state has a compelling interest in safeguarding children, the crime, especially by the use of underage girls as prostitutes throughout the world, must be universally condemned by the international community.³ Many States have explicitly criminalized a variety of sexual

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¹ Wang Huasheng, *Cong Bijiaofa Shijiao Zailun Piaosuyounvzui* (从比较法视角再论嫖宿幼女罪) [Rediscussing the Crime of Whoring with Infant Girl in the terms of Comparative Law], 6 SICHUAN JINGCHA XUEYUAN XUEBAO (四川警察学院学报) [JOURNAL OF SICHUAN POLICE COLLEGE] 52, 56 (2009). See also Law of the People's Republic of China on Protection of Minors (promulgated by Order No. 50 of the President of the People's Republic of China on Sept. 4, 1991, effective Sept. 4, 2011), art. 53, CHINA.ORG.CN (China) ("Whoever lures, instigates, or forces a minor to . . . engage in prostitution shall be given heavier punishment according to the law."), available at <http://www.china.org.cn/government/207410.htm>; *National Human Rights Action Plan of China (2012-2015)*, XINHUA (Anne Tang ed., Jun. 11, 2012) ("The state will protect children from all forms of sexual abuse, and provide physical and psychological services to rescued children"), available at http://english.gov.cn/2012-06/11/content_12.htm.

² See Zhang Yan & Cao Yin, Teach Children to Avoid Abuse: Experts, CHINA DAILY, Jun. 13, 2013, http://www.chinadaily.com.cn/cndy/2013-06/13/content_16613042.htm (addressing steps the public is taking to confront sex crimes against children).

³ Peng Wenhua, *Piaosuyounvzui zhi Zuixing Bianxi* (嫖宿幼女罪之罪刑辨析) [Study on Nature and Penalty of Crime of Whoring with a Girl under the Age of Fourteen], 33 HENANSHIFAN DAXUE XUEBAO (河南师范大学学报) [JOURNAL OF HENAN NORMAL UNIVERSITY] 152, 152 (2006);

offenses against underage girls and China is no exception.⁴ China has enacted laws specifically addressing the need for attempts to prevent and punish child sexual abuse.⁵ One of the most debatable offences in Chinese criminal law, the offence of Whoring with an Underage Girl (“WUG”)⁶, was contemplated to fight young girl prostitution. The criminal provisions pertaining to sex with underage girls are of particular concern.

In particular, public attention to the problem of underage girl prostitution was heightened after a series of notorious cases.⁷ Although the provisions of WUG have been at the heart of discussion and received a

see also Optional Protocols to the Convention on the Rights of the Child, G.A. Res. 54/263 (II), U.N. DOC. A/RES/54/263 (Mar. 16, 2001).

⁴ *Id.*

⁵ See Liu Yan, *Piaosuyounvzui Fenjie Guiru Qiangjianzui yu Weixieertongzui ji Lifa Xiuding Yanjiu* (嫖宿幼女罪分解归入强奸罪与猥亵儿童罪及立法修订研究) [Desegregating the Crime of Whoring with a Girl under the Age of Fourteen to Rape and Child Molestation and Amending the Relative Criminal Legislation], 5 FUNV YANJIULUNCONG (妇女研究论丛) [COLLECTION OF WOMEN’S STUDIES] 43, 43-45 (2012); *National Human Rights Action Plan of China (2012-2015)*, *supra* note 1.

⁶ See *ZhonghuaRenminGongheguoXingFa* (中华人民共和国刑法) [Criminal Law of the People’s Republic of China] (promulgated by Order No. 83 of the President of the Peoples Republic of China, Mar. 14, 1997, effective Oct. 1, 1997; revised for the eighth time on Feb 25, 2011) [hereinafter *Criminal Law (1997)*], translated in Wei Luo, *THE 1997 CRIMINAL CODE OF THE PEOPLE’S REPUBLIC OF CHINA* (1998). Article 360 of *Criminal Law (1997)* provides:

Anyone who engages in prostitution or visits prostitute with clear knowledge that offender is suffering from syphilis, gonorrhea or another serious sexually transmitted disease shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention, or public surveillance, and may in addition be subject to a fine.

Anyone who visits prostitutes and has sexual intercourse with a minor girl under the age of 14 shall be sentenced to a fixed-term imprisonment of not less than five years, and may in addition be subject to a fine.

Id. art. 360.

⁷ Mei Jin, *Cong Xishui Xingqinhai Younv an Tan Piaosuyounvzui de Shiyong* (从习水性侵害幼女案谈嫖宿幼女罪的适用) [On applying Crime of Whoring with a Girl under the Age of 14 from the case of infracting the sex of a Girl under the Age of 14 in Xishui County], 1 GUANGXI ZHENGFA GUANLI GANBU XUEYUANXUEBAO (广西政法管理干部学院学报) [JOURNAL OF GUANGXI ADMINISTRATIVE CADRE INSTITUTE OF POLITICS AND LAW] 54, 54-55 (2010). See also Laurie Burkitt, *A Loophole for Pedophiles in China’s Prostitution Laws*, WALL ST. J. CHINA REAL TIME (Mar. 13, 2012, 12:22 AM), <http://blogs.wsj.com/chinarealtime/2012/03/13/a-loophole-for-pedophiles-in-chinas-prostitution-laws/>.

wide range of academic attention from the date it became a law, it is those cases that have captured the public's imagination and have become the central concern of public outrage and policy reform.⁸ By far, the most sensational case took place in Xishui County, located southwest of China's Guizhou Province.⁹ Eleven schoolgirls were reportedly forced into the sex trade and raped for months.¹⁰ Six men, including four government officials, a teacher, and a taxi driver, were prosecuted and found guilty of WUG, instead of statutory rape.¹¹ According to Chinese criminal law, "rapists can be jailed from three to 10 years, while a death sentence can be handed out to those convicted of having sex with a girl under 14 years old."¹² In contrast, the punishment for [WUG] "is only three to 15 years in prison."¹³ As Wen Jie, vice-president of Guizhou Provincial Higher People's Court, viewed the issue, the prosecutors should identify the boundary between having sex with underage prostitutes and child rape very carefully.¹⁴ "The general public is watching closely whether the punishment meted out to these offenders are exemplary and such as to deter others from lay-

⁸ See Pan Xincheng & Chen Qin, "Zuixing" Guanxi zhi Fenxi Fanshi: Fanzui Pingjia Jiagou ("罪-刑" * 系之分析范式: 犯罪评价架构)[The Analytic Paradigm on "Crime-Punishment" Relation: Crime Evaluation Framework], 1 HUANAN SHIFANDAXUE XUEBAO (华南师范大学学报(社会科学版)) [JOURNAL OF SOUTH CHINA NORMAL UNIVERSITY (SOCIAL SCIENCE EDITION)] 87, 87 (2013). See also Burkitt, *supra* note 7.

⁹ See generally Cui Jia, *Wrangle Over the Right Charge for Suspects*, CHINA DAILY (Aug. 25, 2013), http://www.chinadaily.com.cn/cndy/2009-05/19/content_7789121.htm; Li Xinran, *Child-Rape Case for Higher Court as Suspect Faces Death Penalty*, SHANGHAI DAILY (May 18, 2009), <http://www.shanghaidaily.com/national/Childrape-case-for-higher-court-as-suspect-faces-death-penalty>; Wang Xiangwei, *Under-Age Sex Trial Is a Test for a Shaky System*, SOUTH CHINA MORNING POST (Apr. 13, 2009), <http://www.scmp.com/article/676636/under-age-sex-trial-test-shaky-system>; Anne Wei, *Sexually Abused Children Find Little Protection*, BEIJING TODAY, Apr. 17, 2009, <http://beijingtoday.com.cn/2009/04/sexually-abused-children-find-little-protection/>; 7 *Stand Trial on Child Rape Charges*, SHANGHAI DAILY (Apr. 9, 2009), <http://www.shanghaidaily.com/national/7-stand-trial-on-child-rape-charges/>; 8 *Jailed in Vile Case of Kidnap and Child Sex*, SHANGHAI DAILY (Jul. 25, 2009), <http://www.shanghaidaily.com/national/8-jailed-in-vile-case-of-kidnap-and-child-sex>.

¹⁰ See *id.*

¹¹ Cui Jia, *supra* note 9.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

ing their hands on underage girls.”¹⁵ “Any leniency in dealing with such criminals will be seen as being unreasonable circumvention of the law, if not de facto connivance.”¹⁶

The discussion of the *Xishui* case illustrates the struggle between criminal justice and children’s rights. The objective of this Article is to assess whether WUG is the best way to protect the sexually abused girls, particularly from suffering any mental harm in criminal proceedings. As I will argue below, such an assessment requires reviews of both China’s domestic and international legal environments. This article begins by reviewing the current sex crimes against children in Chinese criminal law in Part II. It also examines the attitude of the Chinese legislature towards prostitution, realizing that prostitution is only an administrative offense rather than a crime in China. Part III explores the debate over WUG in some detail, outlining the major arguments. Next, Part IV turns to the U.N. Convention on the Rights of the Child, focusing on the principle of the best interests of children. Part V, an analysis of how factors such as historical, cultural and social attitudes, influence the manner will be provided. Part VI reaffirms the necessity of rethinking WUG, asking to what extent the current Chinese law is effective in preventing sexual abuse of children. Additionally, it advances a reform proposal, with the recommendation for abolishing WUG. Finally, Part VII concludes the analysis by discussing the difficulty of China’s cultural attitudes toward considering a child-centered approach.

II. UNDERSTANDING SEX CRIMES AGAINST CHILDREN IN THE CHINESE LEGAL SYSTEM

A. Overview

In order to explore sex crimes, it is first necessary to obtain some perspective on the Chinese criminal law as a whole as it functions in practice. “[I]t took thirty years for the [People’s Republic of China] [“China” or “PRC”] to promulgate its first criminal code and then another seventeen years to revise it.”¹⁷ The PRC enacted its first Criminal Law in 1979, which has been replaced by the more recent Criminal

¹⁵ *Abuse, most foul*, CHINA DAILY (May 20, 2009, 7:41 AM), http://www.chinadaily.com.cn/cndy/2009-05/20/content_7793582.htm.

¹⁶ *Id.*

¹⁷ Ian Dobinson, *The Criminal Law of the People's Republic of China (1997): Real Change or Rhetoric?*, 11 PAC. RIM L. & POL'Y J. 1, 2 (2002) (quoting Wei Luo, *supra* note 5, at 21).

Law (1997).¹⁸ The latter added 250 new criminal offenses, which were not included in the 1979 version.¹⁹ Since 1997, the process of revision has continued as the Standing Committee of the National People's Congress, the legislature in China, has passed new laws and amended the Criminal Law.²⁰ Since these laws have been written at a relatively high degree of abstraction, they are supplemented by an array of regulations, rules, interpretations, and other forms of legislative and administrative guidance.²¹

The laws in respect to criminal sexual activity and the criminality of sex with a minor have been enacted by mainly prohibiting a male from having sexual intercourse with a minor female.²² The Criminal Law, which was intended as the foundation for Chinese criminal law legislation, contains several provisions relating to sex crimes against children.²³ But the Criminal Law (1979) which mainly penalizes rape states, "Whoever has sexual relations with a girl under the age of 14 shall be deemed to have committed rape and shall be given a heavier punishment."²⁴ Sexually exploiting young girls by seducing, coercing,

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ For example, 1997 Criminal Law was revised recently by the Amendment VIII to the Criminal Law of the People's Republic of China promulgated by the Standing Committee of the National People's Congress on February 25, 2011 for the eighth time. *Zhonghua Renmin Gongheguo Xingfa Xijzheng an (Ba)* (中华人民共和国刑法修正案(八)) [Amendment VIII to the Criminal Law (1997)] (promulgated by Order No. 41 of the President of the PRC, Feb 25, 2011, effective Mar. 1, 2011) (China), available at http://www.npc.gov.cn/npc/xinwen/2011-02/25/content_1625679.htm. See also Laney Zhang, *China: Eighth Amendment to Criminal Law Passed*, *Global Legal Monitor*, LAW LIBRARY OF CONG. (Apr. 07, 2011), http://www.loc.gov/lawweb/servlet/lloc_news?disp3__text.

²¹ See generally The Legislation Law of People's Republic of China (promulgated by the Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000), available at http://www.novexc.com/legislat_law_00.html (detailing the hierarchy of laws, regulations, and rules at various levels of government).

²² For instance, in accordance with the definition of Article 236 of the Criminal Law (1997), only females could be raped. See Criminal Law (1997) art. 236, Wei Luo, *supra* note 5, at.136; see also Ye Liangfang, *Cun Yu Fei: Piaosuyounvzui Zuiming Sheli Zhi Shenshi* (存与废: 嫖宿幼女罪罪名设立之审视) [Reserve or Repeal: Critical Analysis of the Crime of Sleeping with Teenage Prostitutes], 6 FAXUE (法学) [L. SCI. MONTHLY] 118, 122 (2009).

²³ See Wei Luo, *supra* note 5.

²⁴ See Criminal Law of the PRC (promulgated by Order No. 5 of the Chairman of the Standing Comm. of the Nat'l People's Cong., July 6, 1979, effective Jan.

deceiving or other ways should be punished according to clauses concerning raping underage girls.²⁵ Therefore, the conduct of visiting underage girl prostitutes was also treated as rape. In addition, Regulations of the People's Republic of China on Administrative Penalties for Public Security (1986), provided, "Whoring with a girl under the age of fourteen shall be dealt with as rape according to the provisions of Article 139 of the Criminal Law."²⁶

Similar provisions can also be found in the decision of the Standing Committee of the National People's Congress on the Strict Prohibition Against Prostitution and Whoring (1991), which served as an amendment to Criminal Law (1979), "Whoever whores with a girl under the age of fourteen shall be punished in accordance with the provisions on the crime of rape as prescribed in the Criminal Law."²⁷

Rape is defined as penile penetration in a vagina, which is sufficient to constitute sexual intercourse.²⁸ Generally, a man is said to commit "rape" if he has sexual intercourse with a woman under circumstances that are against her will or without her consent.²⁹ But a young girl under the age of fourteen cannot consent to sexual conduct because of the developmental nature of adolescence. That is to say, she is unable to understand the nature and consequences of the act to

1, 1980) art. 139, available at http://www.novexc.cn/criminal_law.html [hereinafter Criminal Law (1979)].

²⁵ See *Child Rapists Shielded by Inadequate Laws*, CHINA DAILY (May 3, 2013), http://usa.chinadaily.com.cn/china/2013-05/30/content_16548915.htm.

²⁶ See Regulations of the PRC on Admin. Penalties for Public Sec. (promulgated by Order No. 43 of the President of the PRC, Sept. 5, 1986, effective Jan. 1, 1987), art. 30, available at http://www.novexc.cn/admin_penalty_pub_security.html [hereinafter Public Security Regulations (1986)]. A new version replaced Public Security Regulation (1986) in 2005. Law of the PRC on Penalties for Admin. of Public Sec. (promulgated by Order No. 38 of the President of the PRC, Aug. 28, 2005, effective March 1, 2006), available at http://www.china.org.cn/LegislationsForm2001-/2011-02//_21899252.htm [hereinafter Public Securities Regulations (2005)].

²⁷ See Decision of the Standing Comm. of the Nat'l People's Cong. on the Strict Prohibition Against Prostitution and Whoring (promulgated by the Standing Comm. of the Nat'l People's Cong., Sept. 4, 1991, effective Sept. 4, 1991) art. 5, CHINA LAW ONLINE DATABASE (China), available at http://209.200.107.14/english/law2_disp.asp?sublawcode=SUB50448101098131417&lawcode=LAW415109481311151315&country=China#.

²⁸ Ma Kechang, XINGFAXUE (刑法学)[CRIMINAL LAW] 487 (2003).

²⁹ Zhou Daoluan & Zhang Jun, XINGFA ZUIMING JINGSHI (刑法罪名精释)[EXACT EXPLANATION FOR ACCUSATIONS OF CRIMINAL LAW] 364 (2003).

which she gives consent.³⁰ Thus, if a man engages in sexual intercourse with an underage girl, it constitutes rape with or without her consent. Moreover, the criterion of sexual intercourse for raping underage girls involves only the touching of sex organs.³¹ Under current Chinese law, only females can be the victims of the crime of rape and no provisions exists which serves to protect male children from being raped.³²

Not surprisingly, the 1997 Criminal Law is believed to be one of the efforts to build a more mature legal system and develop a “rule of law” in China.³³ The 1997 Criminal Law drastically amended the 1979 Criminal Law and introduced a number of provisions through “the adaptation to principles such as equality before the law, ‘no crime, without law’ and ‘no punishment without crime.’”³⁴ It is “relatively complete, uniform and reasonable.”³⁵ In contrast, the 1979 Criminal Law contained analogy provisions which were designated to have a kind of flexibility.³⁶ Apart from this principle, “many provisions [that] related to specific offenses were very general and ambiguous in the old criminal code.”³⁷ The use of analogy in Article 79 of the 1979 Criminal Law was criticized to have undermined the basic spirit of the rule of law and subsequently conflicted with the 1982 state constitution’s commitment to the rule of law.³⁸ Therefore, a predominant change in the 1997 Criminal Law is the rejection of analogy through

³⁰ *Id.* at 364–65. See also Zhang Wen-juan, *Progress, Challenges, and Suggestions on Legislative Efforts of Combating Sexual Violence against Children in the Mainland China*, 33 LIVERPOOL L.R. 37, 38 (2012).

³¹ Zhou Daoluan & Zhang Jun, *supra* note 29, at 365. See also Zhang Wen juan, *supra* note 30, at 38.

³² Wei Dong & Jiang Chunlin, *Lun Jianyinyounv Fanzui Jisui de Rendeng Biaozhun* (论奸淫幼女犯罪既遂的认定标准) [On the Standard of Holding on the Accomplished Raping Immature Girls], 4 ZHENGFA LUNCONG (政法论丛) [Journal of Political Science and Law] 48, 48 (2007).

³³ Wei Luo, *supra* note 5, at 21.

³⁴ Lin Zhiqui & Ronald Keith, *The Changing Substantive Principles of Chinese Criminal Law*, 13 CHINA INFO. 76, 79 (1998).

³⁵ Wei Luo, *supra* note 5, at 21.

³⁶ For example, Article 79 of the Criminal Law (1979) provided:

Crime[s] that are not expressly defined in the Specific Provisions of this Law may be determined and punished in accord[ance] to whichever article in the Specific Provisions of this Law that covers *the most closely analogous crime*, but the judgment shall be submitted to the Supreme People’s Court for approval.

Criminal Law (1979), *supra* note 24 (emphasis added).

³⁷ Wei Luo, *supra* note 5, at 11.

³⁸ Dobinson, *supra* note 17, at 27.

the dropping of Article 79 and the inclusion of the principle of *nullem crimen sine lege* ("no crime without law").³⁹ Additionally, the Criminal Law (1997) distinguishes different culpable mental states and their relation to degrees of punishment.⁴⁰ Crimes committed with a purposeful or knowing state of mind are usually treated more severely than crimes of neglect or misunderstanding.⁴¹ Clarity was a rather significant concern.⁴² This is of great importance to today's legal development.

China has undergone a significant transformation of its sex crimes. Nonetheless, rape is still of major concern in the 1997 Criminal Law and the most stringent sexual offense penalties are reserved for the crime.⁴³ Rape is one of the crimes carrying a possible sentence of life imprisonment or the death penalty.⁴⁴ Article 236 of the Criminal Law (1997) provides:

Anyone who rapes a woman by violence, coercion or any other means shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years.

Anyone who has a sexual relations with a minor girl under the age of 14 shall be deemed to have committed rape and shall be given a heavier punishment.

³⁹ Article 3 may be one of the most significant articles of the 1997 Criminal Law. "Any act deemed by explicit stipulations of law as a crime shall be convicted and given punishment by law and any act that no explicit stipulations of law deem a crime shall not be convicted or given punishment." Wei Luo, *supra* note 5, at 34.

⁴⁰ Article 15 of the Criminal Law (1997) provides:

A negligent crime refers to a crime committed by a person who should have foreseen that his act would possibly produce socially dangerous consequences but who fails to do so because of carelessness or, having foreseen the consequences, readily believes that they can be avoided, the result being that these consequences do occur. Criminal responsibility shall be borne for negligent crimes only when the law so provides.

Wei Luo, *supra* note 5, at 37.

⁴¹ Article 14 of the Criminal Law (1997) provides: "An intentional crime refers to a crime committed by a person who clearly knows that his act will produce socially dangerous consequences but who desires or allows such consequences to occur. Criminal responsibility shall be borne for intentional crimes." Wei Luo, *supra* note 5.

⁴² Dobinson, *supra* note 17, at 57 ("Under the heading of clarity, vague provisions were elaborated and clarified.").

⁴³ See Wei Luo, *supra* note 5.

⁴⁴ *Id.*

Anyone who rapes a woman or has a sexual relation with a minor girl in any of the following circumstances, be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death:

- (1) raping a woman or having sexual relations with a minor girl in a disgusting way;
- (2) raping many women or having sexual relations with many minor girls;
- (3) raping a woman before many people in a public place;
- (4) raping a woman in turn with another man or other men; or
- (5) causing a severe injury or death or other serious consequence to the victim.⁴⁵

In comparison with its 1979 predecessor, the Criminal Law (1997) has provided for the criminalization of some new offences. For instance, one of the significant changes in sex crimes against children is the creation of WUG, which was separated from rape as an independent new offence. “Anyone who visits prostitutes and has sexual intercourse with a minor girl under the age of 14 shall be sentenced to fixed-term imprisonment of not less than five years, and may in addition be subject to a fine.”⁴⁶ This provision indicates that the lawmakers suggested the harm of the crime of sex with underage girls be altered to conform to the changes that contemporary society may undergo in relation to the prostitution of young girls.⁴⁷ Such legislation was prompted to plug the “loophole.”⁴⁸ If the Criminal Law does not make such an act a crime, punishment can no longer be meted out for conduct not specifically designated as a crime.⁴⁹ Article 3 of the Criminal Law (1997) states that only acts which are clearly defined as crimes by the law shall carry criminal liability.⁵⁰ In reality, however, there is a possible overlap between Article 236 Rape and Article 360

⁴⁵ *Id.*, at 136.

⁴⁶ *Id.* at 187.

⁴⁷ See Mei Jin, *supra* note 7, at 55.

⁴⁸ See *id.* See also Burkitt, *supra* note 7.

⁴⁹ See Niu Yan & Wei Dong, *Bo Piaosuyounvzui Quxiaolun* (驳嫖宿幼女罪取消论) [A Refutation against the Abolishment Argumentation concerning the Crime of Whoring with a Girl under the Age of Fourteen], 17 GUOJIA JIANCHAGUAN XUEYUANXUEBAO (国家检察官学院学报) [JOURNAL OF NATIONAL PROSECUTORS COLLEGE] 51, 54–56 (2009). See also Wei Luo, *supra* note 5, at 7–8.

⁵⁰ See Wei Luo, *supra* note 5, at 34.

WUG.⁵¹ For example, for sexual assault against underage girls, which cannot be prosecuted under rape and WUG, sexual touching with the use of any body part, except sex organs or an object, voyeurism, the punishment can be a maximum of five years imprisonment and criminal detention in accordance with Article 237.⁵²

Nevertheless, advocates for the principle of *nullem crimen sine lege* seem to have taken their goal to an absurd extreme. A controversial example is a judicial interpretation released in 2003 stipulated that having sex with a young girl without knowing that she is underage does not constitute the crime of rape.⁵³ This has caused much confusion in practice. The scope for discretion is considerable and the protection of children from sexual abuse has been weakened in light of

⁵¹ See Zhang Mingkai, *Piaosuyounvzui yu Jianyinyounvxing Qiangjianzui de Guanxi* (嫖宿幼女罪与的奸淫幼女型强奸罪的·系) [the Relationship between Whoring with Girls under 14 and Rape of Underage Girls], 17 RENMIN JIANCHA (人民检察) [PEOPLE'S PROCURATORIAL SEMIMONTHLY] 8, 11 (2009).

⁵² Article 237 of the Criminal Law(1997) provides:

Anyone who sexually molests or humiliates a woman by violence, coercion or other means shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention.

Anyone who commits the crimes mentioned in the preceding paragraph by gathering a group of men or conducting the crimes before many people in a public place shall be sentenced to fixed-term imprisonment of not less than five years.

Anyone who sexually molests a minor shall be sentenced according to the provisions of the p receding two paragraphs.

Wei Luo, *supra* note 5, at 136–37.

⁵³ The full name of the judicial interpretation is ZUIGAORENMIN FAYUANGUANYU XINGWEIREN BUMINGZHISHI BUMANSHISI ZHOUSUIDE YOUNVSHUANG FANGZIYUAN FASHENG XINGGUANXI SHIFOUGOUCHENG QIANGJIANZUI WENTI DEPIFU (最高人民法院·于行为人不明知是不满十四周岁的幼女双方自愿发生性关系是否构成强奸罪问题的批复) [*Supreme People's Court's Response to the Question on Whether Consensual Sex between an Actor and a Girl under the Age of 14 Constitutes Rape When the Actor Does Not Clearly Know the Girl to be Under the Age of 14*], issued by the Supreme People's Court (Jan. 17, 2003), <http://www.szxingshi.com/298w.html>. The judicial interpretation in China includes the Supreme Court Interpretation and the Supreme Procuratorate Interpretation. The former made by the Supreme Court is to deal with the issues in court trials and the latter made by the Supreme Procuratorate, the state prosecutor, is responsible for the issues in the procuratorial work. *Id.*

the judicial interpretation.⁵⁴ Finally, the judicial interpretation was abolished in 2013, because it contradicted the provisions of Rape and WUG in the Criminal Law (1997).⁵⁵

Rape and WUG are similar sex crimes, but provided in different chapters in the criminal law. The reason is that they reflect different attitudes of law makers and values in Chinese society. In the 1997 Criminal Law, rape is Article 236, which is stipulated in “Chapter IV: Crimes of infringing upon the rights of the person and the democratic rights of citizens,” while WUG is Article 360, which is provided in “Chapter VI: Crimes of disrupting the order of social administration.” Chapter IV mainly sets out the law relevant to serious crimes against the person, such as homicide, assault, rape, sexual molestation, kidnapping, and abduction. Among them, rape is classified as a grave sexual assault, which is clearly reflected by the use of severe punishment, including the death penalty. Chapter VI covers crimes relating to public order with which the government has been concerned, in particular crimes with respect to drug trafficking and prostitution.

B. Prostitution

In order to understand the new crime of WUG, it is necessary to explore prostitution in the context of China’s legal system. Although prostitution is not lawful in China, interestingly no law stipulates that it is a crime.⁵⁶ Crimes are enumerated in the specific provisions of the

⁵⁴ See Chen Qihua, *Piaosuyounvan zhong Weichengnian Shouhairren Hefaquanyi Baohu Yanjiu* (嫖宿幼女案中未成年受害人合法权益保护研究) [Study of the Protection of Minor Victims’ Rights and Interests in the Case of Whoring with underage Girls], 5 QINGSHAONIANFANZUIWENTI (青少年犯罪问题) [ISSUES ON JUVENILE CRIMES AND DELINQUENCY] 64, 66 (2012).

⁵⁵ The 2003 judicial interpretation has been abolished by another Supreme Court Interpretation, issued on Feb. 26, 2013. ZUIGAO RENMINFAYUAN GUANYU FEIZHI 1997NIAN7YUE1RI ZHI2011NIAN 12YUE31RI FABU DE BUFEN SIFAJIESHI HE SIFAJIESHI XINGZHI WENJIAN (DISHIPI) DE JUEDING (最高人民法院·于废止1997年7月1日至2011年12月31日期间发布的部分司法解释和司法解释性质文件(第十批)的决定) [Decision of the Supreme Court on Abolishment (the Tenth) of Some Judicial Interpretations and Documents Equivalent to Judicial Interpretations Promulgated During the Period from July 1, 1997 to Dec. 31, 2011].

⁵⁶ Prostitution itself is not a crime provided in the Criminal Law (1997). See Wei Luo, *supra* note 5, at 187. (Crimes of Organizing, Forcing, Inducing, Sheltering and Introducing Prostitution) only those engaging in prostitution or visiting a whorehouse knowing that they are suffering from syphilis, clap, or other serious venereal diseases are to be convicted of the Crime of Spreading Venereal Diseases.

criminal law, while non-criminal minor “offenses” are included under the administrative penalty laws. An act will not be considered a crime “if the circumstances are obviously minor and the harm done is not serious.”⁵⁷ China has enacted numerous rules and regulations that are applied administratively. The most prominent of the administrative laws is the 2005 Law of the People’s Republic of China on Penalties for Administration of Public Security (“Public Security Law”).⁵⁸ According to this law, both prostitution and visiting prostitutes are merely administrative offenses, but not crimes and the law breakers in such circumstances are subject to an administrative sanction instead of criminal responsibility:

A prostitute or a person who goes whoring shall be detained for not less than 10 days but not more than 15 days and may, in addition, be fined not more than 5,000 yuan; and if the circumstances are relatively minor, she or he shall be detained for not more than five days or be fined not more than 500 yuan.

A person who, at a public place, touts for prostitution or invites another person for whoring shall be detained for not more than five days or be fined not more than 500 yuan.⁵⁹

Clearly, one of the important aspects of the Chinese legal system is the dichotomy drawn between criminal crimes and administrative offences.⁶⁰ “The distinction . . . could be compared to the felo-

⁵⁷ Article 13 of the Criminal Law (1997) provides:

A crime refers to an act that endangers the sovereignty, territorial integrity and security of the State, splits the State, subverts the State power of the people's democratic dictatorship and overthrows the socialist system, undermines public and economic order, violates State-owned property, property collectively owned by the working people, or property privately owned by citizens, infringes on the citizens' rights of the person, their democratic or other rights, and any other act that endangers society and is subject to punishment according to law. However, if the circumstances are obviously minor and the harm done is not serious, the act shall not be considered a crime.

Wei Luo, *supra* note 5.

⁵⁸ This Law is formulated in order to maintain the order of public security, safeguard public safety, protect the lawful rights and interests of citizens, legal persons and other organizations, and regularize and guarantee performance of the duties for administration of public security by public security organs and people's police according to law. See Public Securities Regulations (2005) art. 1, *supra* note 26.

⁵⁹ See Public Securities Regulations (2005) art. 66, *supra* note 26.

⁶⁰ Article 2 of the Public Securities Regulations (2005) states:

ny/misdemeanor or indictable/summary dichotomies in common law.”⁶¹ “This so-called crime/non-crime category has, in effect, created two separate systems of liability and punishment/penalty.”⁶² The criminal law remains the principal instrument of state policy and strict social control. Criminals are brought before the court and punished in accordance with the criminal law. The minor offenses are under the authority of the Public Security Bureau to make a decision to impose an administrative penalty.⁶³ In most of the penalties, the person may be punished with fines or administrative detention up to twenty days.⁶⁴ This approach is conceived to avoid inappropriate penalties by using different criteria, which take into consideration the damage done to society. Though “[t]he distinction between acts that are treated as crimes and those that trigger administrative sanctions, however, is arbitrary.”⁶⁵

When considering the distinction between crimes and administrative offences in cases of public order, particularly in prostitution, the legal age limit of consent for sexual activity seems to play a crucial role. Although many crimes pertaining to prostitution have been provided in the criminal law,⁶⁶ prostitution is believed to be “minor” by the designation of such an offense as non-crime, and by the fact that the administrative penalties are not criminal punishments. However, whether visiting prostitutes is just an administrative offense under the

A person who disturbs public order, endangers public safety, infringes on the rights of person and property or hampers social administration, which is harmful to the society and which, according to the provisions of the Criminal Law of the People's Republic of China, constitutes a crime, shall be investigated for criminal responsibility according to law; and if such an act is not serious enough for criminal punishment, the public security organ shall impose on him a penalty for administration of public security according to this Law.

Public Securities Regulations (2005) art. 2, *supra* note 26.

⁶¹ Dobinson, *supra* note 17, at 51.

⁶² *Id.*

⁶³ See Public Securities Regulations (2005) art. 2 § 10, *supra* note 26.

⁶⁴ “Penalties for acts against the administration of public security are divided into the following types: (1) warning; (2) fine; (3) administrative detention; and (4) revocation of licenses issued by public security organs.” See *id.* “Where a person commits two or more acts against the administration of public security, decisions shall be made separately but executed concurrently. Where penalties of administrative detention are concurrently executed, the maximum term of such detention shall not exceed 20 days.” *Id.* at § 16.

⁶⁵ Dobinson, *supra* note 17, at 53.

⁶⁶ Wei Luo, *supra* note 5, at 186-88. (Crimes relating to prostitution, which range from Article 358 to Article 362).

Public Security Law (2005) or charged as a crime is simply determined by the age of the girls involved. The bottom line is that the age of the prostitutes must be over fourteen. Otherwise, men who are willing to pay to engage in sexual intercourse with underage girls are faced with severe criminal sanctions.

III. PLIGHT OF WUG

A. Criticism of WUG

It was not until the past ten years that whoring with an underage girl in China was perceived as a social problem requiring immediate attention.⁶⁷ The criminal provisions of WUG reflect the legislature's effort to balance the offence of Rape and non-crime prostitution when underage girls are victims.⁶⁸ However, the approach is not without flaws. It has triggered a sharp debate. The limitation of the current approach stems from the inherent conflict of separating underage girl prostitutes from other underage girls.⁶⁹ Although officially enacted, the legislation has been scrutinized for poor drafting and lack of legal insight.⁷⁰

Some researchers have focused on young girls' competency issues. Lawmakers have designed the traditional doctrine of minority legal status to protect children.⁷¹ Age limits are a legal manifestation of a community's beliefs regarding the development of a child's capacities and responsibilities, which vary from activity to activity and country to country.⁷² One may claim that children should be able to consent to certain conduct, but are young girls old enough to make a mature decision relating to sex? When it comes to the criminal provisions of

⁶⁷ Liu Yan, *supra* note 5, at 43.

⁶⁸ See Liu Mingxiang, *Piaosuyounv Xingwei Shiyong Fatiao Xinlun* (嫖宿幼女行为适用法条新论) [A New Thought On the Application of Law for the Conduct of Whoring with Girls under 14], 12 FAXUE (法学) [LAW SCIENCE] 134, 135-36 (2012).

⁶⁹ See Ye Liangfang, *supra* note 22, at 122.

⁷⁰ See Xiao Benshan & Zhao Yin, *Piaosuyounvzui Quxiaolun* (嫖宿幼女罪取消论) [On Abolishment of the Crime of Whoring with a Girl under the Age of 14], 1 XINGZHENG YUFA (行政与法) [PUBLIC ADMINISTRATION & LAW] 117, 117-19 (2008). See also Burkitt, *supra* note 7.

⁷¹ Lynne Marie Kohm & Maria E. Lawrence, *Sex and Six: The Victimization of Innocence and Other Concerns over Children's "Rights,"* 36 BRANDEIS J. FAM. L. (Summer 1997-1998).

⁷² E.g., Asha Bajpai, CHILD RIGHTS IN INDIA: LAW, POLICY, AND PRACTICE 2 (2003).

WUG, the principal problem is not whether the conduct of visiting young girl prostitutes under fourteen should be criminalized and punished. Rather, the focus must be on the erroneous vesting of underage girl prostitutes with capacity to “consent” to her sexual activity, which is completely inconsistent with the criminal principle that a fourteen-year-old girl cannot “consent” to sex.⁷³ This conceptual mode is one with which criminal law is ill-prepared to deal with concerning underage girl prostitution.⁷⁴

It seems that one of the prominent distinctions between Rape and WUG is that the latter is occurring without the consent of anyone but the underage girl herself.⁷⁵ WUG appears to be a logical contradiction to rape of underage girls.⁷⁶ The controversy focuses on whether a female minor under fourteen has the capacity to “consent” to sexual activity.⁷⁷ As previously outlined, it does not matter for a man convicted of raping an underage girl with or without her consent. Under this reasoning, if a young girl under fourteen is deemed not to be mature enough to make her own decision regarding sexual activity, she lacks the capacity necessary to consent to these activities in any circumstance even when she may be classified as an underage girl prostitute.⁷⁸ There is no reason why the underage girl, when labeled as a prostitute, is able to make such a decision regardless of her age or ma-

⁷³ An Ao, *Jianyinyounvzui Xiangguanwenti Tanta* (奸淫幼女罪相关问题探讨) [On the Sex Crimes against Girls under 14], 4 FAXUEPINGLUN (法学评论) [LAW REVIEW] 91, 95 (2002).

⁷⁴ Zhang Yonghong & Wu Yin, *Lun Piaosuyounv Xingwei de Xingfa Guizhi* (论嫖宿幼女行为的刑法规制) [On the Criminal Law Regulation of Whoring with Girls under 14], 11 ZHONGGUO XING SHIFAZAZHI (中国刑事法杂志) [CRIMINAL SCIENCE] 46, 46-48 (2010); see also Burkitt, *supra* note 7.

⁷⁵ Che Hao, *Qiangjianzui yu Piaosuyounvzui de Guanxi* (强奸罪与嫖宿幼女罪的关系) [The Relationship between the Rape Offence and Whoring with Girls under 14], 2 FAXUEYANJIU (法学研究) [CHINESE JOURNAL OF LAW] 136, 137 (2010).

⁷⁶ Liu Shiping, *Cong Xishui 8.15 an Kan Feizhi Piaosuyounvzui de Biyaoxing* (从习水8.15案看废止“嫖宿幼女罪”的必要性) [The Necessity of Abolishing the “Crime of Prostituting Girls under the Age of 14” in View of the “8.15 Case in Xishui”], 5 GUIZHOU DAXUE XUEBAO (贵州大学学报(社会科学版)) [JOURNAL OF GUIZHOU UNIVERSITY (SOCIAL SCIENCE EDITION)] 46, 47 (2009).

⁷⁷ See Che Hao, *supra* note 75; Jennifer Ann Drobac, “Developing Capacity”: Adolescent “Consent” at Work, at Law, and in the Sciences of the Mind, 10 UC DAVIS J. JUV. L. & POL’Y 1, 14-18 (2006).

⁷⁸ Zhang Yonghong & Wu Yin, *supra* note 74, at 49. See also Burkitt, *supra* note 7.

turity.⁷⁹ If underage girls could be regarded as prostitutes, like adult women, because of their consent and payment, can their voluntary sexual activity without payment be seen as adultery and not a crime?⁸⁰

The concept of WUG vests underage girl prostitutes with the capacity to consent to sex, yet discards the possibility that the exact same young girl not only deserves, but possibly even needs, protection from the necessity to make these choices and decisions.⁸¹ Indeed, it is reasonable to conclude that children should be treated as children. They should not be called “prostitutes” or “sex workers” as they do not have the necessary capacity to make decisions regarding sexual activity.⁸² WUG has also been blamed as discriminating against “underage girl prostitutes” in that it violates the principle that everyone must be equal before the law, regardless of his/her status.⁸³ By any measure, underage girls do not have the necessary capacity to make decisions regarding sexual activity. There is no special citizen in the eyes of the law. Since the “consent” of underage girls does not make sense, others argue that there is no need to enact two crimes for the same kind of conduct.⁸⁴

One aspect of the ongoing debate is whether it is in violation of the U.N. Convention on the Rights of the Child (CRC).⁸⁵ As will be dis-

⁷⁹ Lao Dongyan, *Qiangjianzui yu Piaosuyounvzui de Guanxi Xinlun* (强奸罪与嫖宿幼女罪的关系新论) [New Thoughts on the Relationship between the Rape Offence and Whoring with Girls under 14], 2 QINGHUA FAXUE (清华法学) [Tsinghua Law Journal] 33, 40 (2011). See also *Children's Rights: China*, LIBRARY OF CONG., <http://www.loc.gov/law/help/child-rights/china/php> (last visited Feb. 6, 2014).

⁸⁰ Wang Huasheng, *supra* note 1, at 55. See also *National Human Rights Action Plan of China (2012-2015)*, XINHUA (June 11, 2012), http://english.gov.cn/2012-06/11/content_2158183_12.htm.

⁸¹ See Lao Dongyan, *supra* note 79, at 44. See also *National Human Rights Action Plan of China*, *supra* note 80.

⁸² *Id.*

⁸³ Ye Liangfang, *supra* note 22, at 122.

⁸⁴ Xiao Benshan & Zhao Yin, *supra* note 70, at 119.

⁸⁵ Zhao Hejun, *Piaosuyounvzui Zaisikao* (嫖宿幼女罪再思考) [Rethinking of Crime in Whoring with an Underage Girl: From a Perspective of Applying International Covenants], 5 FUNV YANJIULUNCONG (妇女研究论丛) [COLLECTION OF WOMEN'S STUDIES] 5, 6 (2011).

States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

cussed in greater depth below, the Convention states that children are the recipients of the states' care and security in their sense of well-being.⁸⁶ State Parties shall undertake to protect the child from all forms of sexual exploitation and sexual abuse.⁸⁷ Children need and deserve the utmost protection from states without discrimination.⁸⁸ The criminal provisions of WUG reflect the trend that the public is not only intended to punish the sex offenders, but also to condemn the underage girls, as prostitution is deemed an infringement and damage to social morality.⁸⁹ It must be kept in mind that young girl prostitution is a form of sexual exploitation of children, though it has never been so termed in Chinese laws.⁹⁰ Although there seems to be a deal and payment between the sex offender and the underage girl, all forms of child prostitution are forced prostitution.⁹¹ When underage girls are forced into prostitution, they are victims instead of profit gainers in exchange for their sex rights, despite being called "prostitutes."⁹² The demand for female minors' bodies and the grotesque exploitation of the innocent show the likelihood that intervention, under the current system, may fail or even harm the real protection of children.⁹³

⁸⁶ Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES.44/25 (Sept. 2, 1990) [hereinafter CRC].

⁸⁷ *Id.*

⁸⁸ "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind. . . ." *Id.*

⁸⁹ He Junpeng, *Piaosuyounvzui yu Qiangjianzui zhi Falifenxi* (嫖宿幼女罪与强奸罪之法理分析) [Legal Analysis of Girl Sex Crimes and Rape Crimes], 5 GUANGXIZHENGFA GUANLI GANBU XUEYUAN XUEBAO (广西政法管理干部学院学报) [JOURNAL OF GUANGXI ADMINISTRATIVE CADRE INSTITUTE OF POLITICS AND LAW] 94, 96 (2009); see also Yang Fan, *Underage Sex Scandals in China Spark Anger of 'Weak' Law*, DEMOCRATIC CHINA (May 24, 2013), <http://www.democraticchina.org/ArtShow.aspx?AID=34524>.

⁹⁰ Zhao Hejun, *supra* note 85, at 7. See also *Commercial Sexual Exploitation of Children*, INTERNATIONAL LABOR ORGANIZATION, <http://www.ilo.org/ipecc/areas/CSEC/lang--en/index.htm>.

⁹¹ *Id.* at 9; see also Malika Saada Saar, *There is No Such Thing as a Child Prostitute*, WASH. POST (Feb. 17, 2014), available at http://www.washingtonpost.com/opinions/there-is-no-such-thing-as-a-child-prostitute/2014/02/14/631ebd26-8ec7-11e3-b227-12a45d109e03_story.html.

⁹² Qi Wenyuan & Zhou Xiang, *Xishui Piaosuyounvan Zhong Xingweiren de Fanzui Xingzhi* (习水嫖宿幼女案中行为人的犯罪性质) [The Criminality of the Suspects of Xishui Case], 6 FAXUE (法学) [L. SCI. MONTHLY] 124, 126 (2009). See also Saar, *supra* note 91.

⁹³ See Liu Shiping, *supra* note 76, at 46.

Critics have also raised a concern that the provision of WUG might hinder societal understanding of raping an underage girl.⁹⁴ WUG, coupled with misinformed public perceptions, place emphasis on prostitution instead of children's rights.⁹⁵ This focus leads to the public perception that the problem does not run deeper and wider than prostitution.⁹⁶ It is unlikely that an explicit law criminalizing WUG will deter such a behavior, though this is misleading because the Criminal Law makes it a crime punishable up to a maximum of fifteen years imprisonment for anyone who violates the law.⁹⁷ As outlined before, it is important to bear in mind that prostitution and visiting prostitutes are not crimes in China, thus difficulties arise in understanding WUG as a felony.⁹⁸ The controversy revolves around the popular non-crime notion of prostitution. Since the government does not make such an act a crime, many seem to believe that a man who visits a young girl prostitute may still face only an administrative sanction.⁹⁹ If a good number of people in the local community are under the belief that sex with prostitutes is voluntary and customary, or just part of life, the society ought not do anything to protect anyone from themselves, from each other, or from someone else, even though the prostitute is an underage girl.¹⁰⁰

It should be recognized that the suffering of underage girl prostitutes is, if anything, even more invisible in children's rights terms than

⁹⁴ See Qi Wenyuan & Zhou Xiang, *supra* note 92.

⁹⁵ Xiao Benshan & Zhao Yin, *supra* note 70, at 118. See also Paxcelly Marquez, *Rape in China*, USC US -CHINA INSTITUTE (May 07, 2009), <http://uschina.usc.edu>.

⁹⁶ See Ye Liangfang, *supra* note 22, at 123. See also Elleka Watts, *Prostitution is Key to Reducing Corruption in China*, THE DIPLOMAT (Aug. 22, 2013), <http://thediplomat.com/2013/08/prostitution-is-key-to-reducing-corruption-in-china/>.

⁹⁷ See Liu Yan, *supra* note 5, at 44; see also *Why 98.5% of Chinese Want to Abolish the Crime of 'Whoring Underage Girls'*, CHINA WATCH (July 2, 2012), <http://www.thechinawatch.com/2012/07/why-98-5-of-chinese-want-to-abolish-the-crime-of-whoring-underage-girls/> (hereinafter *Why 98.5%*).

⁹⁸ Peng Wenhua, *supra* note 3, at 155. See also Gregory Mavrides *Prostitution in China*, FOREIGN TEACHERS GUIDE TO LIVING AND WORKING IN CHINA, middlekingdomlife.com/guide/prostitution-in-china.htm (last updated Nov. 24, 2011).

⁹⁹ Xu Chen, *Xishui Piaosuyounvan de Shencha yu Rending* (习水嫖宿幼女案的审查与认定) [*The Examination and Decision of Xishui Case of Whoring with a Girl under the Age of Fourteen*], 6 RENMIN SIFA (人民司法) [THE PEOPLE'S JUDICATURE] 9, 11 (2010). See also Dobinson, *supra* note 17, at 1, 15.

¹⁰⁰ See Lao Dongyan, *supra* note 79, at 41. See also Erin Fuchs, *7 Reasons Why America Should Legalize Prostitution*, BUS. INSIDER (Nov. 13, 2013), <http://www.businessinsider.com/why-america-should-legalize-prostitution-2013-11>.

that of other underage girl victims.¹⁰¹ “As the exploited girls are under the age of consent, it would be both cruel and perverse to slander them as ‘prostitutes.’”¹⁰² They are childish, immature, naive, indefensible, and generally in need of guidance. It must not be loaded onto the shoulders of young girls incapable of bearing such a stigma.¹⁰³ “The stigma and the trauma of the victims can probably never be healed.”¹⁰⁴ The personal value, dignity, and freedom of individuals are ignored, and, “it is quite likely that the future of these girls will be ruined.”¹⁰⁵

The crime has been heavily criticized for stressing the idea of “social order” at the expense of the idea of “individual rights.”¹⁰⁶ This is clearly reflected by the fact that WUG is provided in “Chapter VI: Crimes of disrupting the order of social administration,” though it is done under the guise of protecting children from the consequences of their sexual activity.¹⁰⁷ Indeed, the efforts to promote virginity of young girls overshadow the efforts to promote individual girl victims’ rights.¹⁰⁸ The primary underlying principle and policy of WUG is not the protection of young girls’ rights, but the concern of disorder in society resulting from the immorality.¹⁰⁹ While it is true that WUG is an attempt to fight acts disrupting the social order such as underage girl prostitution, there is no reason why concern over prostitution does not make it a crime.¹¹⁰ Underage girls are victimized every day by

¹⁰¹ See Chen Qihua, *supra* note 54, at 65-66. See also *Abuse, most foul, supra* note 15.

¹⁰² *Abuse, most foul, supra* note 15.

¹⁰³ See Liu Shiping, *supra* note 76, at 49. See also *Weakest Suffer Twice: US Jails Child Victims of Sex Trafficking*, RT NETWORK (April 16, 2011 4:40 AM), <http://rt.com/news/underage-prostitution-trafficking-us/>; *Why 98.5%*, *supra* note 97.

¹⁰⁴ *Abuse, most foul, supra* note 15.

¹⁰⁵ *Id.*

¹⁰⁶ Zhang Yonghong & Wu Yin, *supra* note 74, at 46-47.

¹⁰⁷ Xia Bing, *Dui Piao suyounvzui de Foudingxing Pingjia* (对嫖宿幼女罪的否定性评价) [A Negative Evaluation of the Crime of Whoring and Lodging with a Girl under Age], 16 TIEDAOJINGGUAN GAODENG ZHUANKE XUEXIAOXUEBAO (铁道警官高等专科学校学报) [JOURNAL OF RAILWAY POLICE COLLEGE] 27, 28 (2006).

¹⁰⁸ See Tong Dehua, *Piao suyounv Xingwei de Fatiao Jinghe Wenti* (嫖宿幼女行为的法条竞合问题) [The Overlap of the Crimes for the Conduct of Whoring with Girls under 14], 6 FAXUE (法学) [L. SCI. MONTHLY] 132, 133 (2009).

¹⁰⁹ Liu Shiping, *supra* note 76, at 46. See also Yang Fan, *supra* note 89.

¹¹⁰ Zhang Yonghong & Wu Yin, *supra* note 74, at 47. See also Didi Tang, *Chinese Against Sex Abuse: Sleep with Me, not Kids*, YAHOO NEWS (June 3, 2013), <http://news.yahoo.com/chinese-against-sex-abuse-sleep-not-kids-063856968.html>.

others who sexually desire them, but the government rarely recognizes that they are individuals with their own rights.¹¹¹

Another serious problem in this arena cannot be ignored, vagueness in defining WUG and Rape in some difficult circumstances.¹¹² Conflicts between the criminal provisions of the two crimes have also raised some other concerns over the definition, which have not been immune from criticism either. It is perfectly possible to accept that the practice is far more complicated and the behaviors of WUG and rape are frequently linked.¹¹³ From a practical perspective, the distinction between the definitions of WUG and Rape is vague and at the level of principle, perhaps unsustainable.¹¹⁴ For example, it is unclear whether a man having sexual intercourse with an underage girl by means of seduction by pecuniary payment, which is far from rare, should be convicted as WUG or Rape.¹¹⁵ Without a clear definition, the criminal provisions of WUG cannot be carefully implemented.¹¹⁶ Different crimes reflect the seriousness of harm attached to them. Yet the distinction between the degrees of harm of the two crimes is extremely arbitrary.¹¹⁷ This controversial approach has been criticized in that it has produced, as well as expressed, dysfunctional social conflict.¹¹⁸

The public is also concerned that WUG may be used for child sex offenders to escape severe punishment through payouts to victims and guanxi (connections).¹¹⁹ In today's China, as "wealthy people violat-

¹¹¹ Zhao Hejun, *supra* note 85, at 6. See also *Abuse, most foul*, *supra* note 15.

¹¹² See Peng Wenhua, *supra* note 3, at 153. See also Harold Tanner, *Chinese Rape Law in Comparative Perspective*, 31 AUSTL. J. CHINESE AFF., 1, 3 (1994); Eve Vawter, *Two Men Raped Six Little Girls in China Because 'Child Rape Isn't Rape'*, MOMMYISH (May 14, 2013 9:00 AM), <http://www.mommyish.com/2013/05/14/child-rape-china/>.

¹¹³ Ye Liangfang, *supra* note 22, at 123. See also *The Crime of Soliciting Underage Prostitutes may be Abolished*, WOMEN OF CHINA (Jan. 8, 2014), <http://www.womenofchina.cn/html/womenofchina/report/168765-1.htm>.

¹¹⁴ See An Ao, *supra* note 73, at 96. See also Tanner, *supra* note 159; Vawter *supra* note 159.

¹¹⁵ See Liu Shiping, *supra* note 76, at 46.

¹¹⁶ Zhang Yonghong & Wu Yin, *supra* note 74, at 48. See also Xinhua, *Experts Call for Child Abuse Crime after Kindergarten Scandals*, CHINA.ORG.CN (Oct. 29, 2012), http://www.china.org.cn/china/2012-10/29/content_26939324.htm.

¹¹⁷ See An Ao, *supra* note 73, at 96.

¹¹⁸ See Ye, *supra* note 22, at 122. See also Oiwan Lam, *China: Outrage as "Underage Prostitution" Law Protects Child Rapists*, GLOBAL VOICES (Dec. 8, 2011 14:20 PM), <http://globalvoicesonline.org/2011/12/08/china-outrage-as-underage-prostitution-law-protects-child-rapists>.

¹¹⁹ See Peng Wenhua, *supra* note 3, at 153. See also *On the China's "Second-generation Rich"*, PEOPLE'S DAILY ONLINE (Aug. 27, 2009, 2:01PM),

ing laws and escaping punishment by spending money has become quite common in many places[,] [t]he public [is angry and] strongly resent[s] dirty deals between power and wealth” which results in imposing light punishment for serious crimes.¹²⁰ Because a complex web of informal personal *guanxi* runs throughout a society, “it is precisely those people [of high socioeconomic and political status] who are best situated to pay the victims and push for a settlement that might lead to a reduced sentence.”¹²¹ Another notorious case that happened recently is the *Yibing* case.¹²² In that case, two steps successfully helped a local government official who was charged of underage girl Rape avoid punishment. First, to label the underage girl victim as a “prostitute” because of her “consent” and payment; second, the accused claimed that he did not know the “prostitute” was an underage girl, and then he was acquitted of the crime.¹²³ It seems that the answer to the question of when underage girls have the capacity or when they do not have the capacity to “consent” to sex is dependent particularly on the status of the underage girl.¹²⁴ However, the determination of the status of prostitutes is arbitrary, as prostitution is not legally recognized in China. The *Yibing* case has led to a public awareness of the problem and reported the public’s dissatisfaction with the outcome. Online, tens of thousands of people said that the excuse of the sex offender “is an insult to the intelligence of all Chinese people”.¹²⁵ The public hopes to charge the suspect with a severe crime instead of using back-door

<http://english.peopledaily.com.cn/90001/90782/90872/6741171.html> [hereinafter *Second-generation Rich*]; *Why 98.5%*, *supra* note 97.

¹²⁰ *Second-generation Rich*, *supra* note 119.

¹²¹ Margaret K. Lewis, *Leniency and Severity in China’s Death Penalty Debate*, 24 COLUM. J. ASIAN L. 303, 329 (Spring 2011).

¹²² See *Underage Sex Official Is Sacked*, CHINA DAILY (May 16, 2009), http://www.chinadaily.com.cn/cndy/2009-05/16/content_7783527.htm. (Lu, a division chief of the local taxation bureau in Yibin, Sichuan province, who payed for sex with a virgin, escaped jail time after insisting he had no idea she was underage. The Yibin police said sex with a 13-year-old is not a criminal offence if the perpetrator is unaware of the child’s age and the sex is consensual. The Xinhua News Agency ran an unusually harsh commentary, saying the judicial interpretation that the Yibin police relied upon was “a legal loophole” and had resulted in “significant controversies.”).

¹²³ See Zhang Mingkai *supra* note 51. See also *China: Outrage*, *supra* note 105. (A judicial interpretation released in 2003 stipulated that having sex with children without knowing that the girl is underage does not constitute the crime of rape.).

¹²⁴ Ye Liangfang, *supra* note 22, at 122. See also *Underage Sex Official*, *supra* note 122.

¹²⁵ *Underage Sex Official*, *supra* note 122.

dealings to obtain lenient treatment. Whether the depth of the defendant's pockets should directly influence his punishment highlights the issue of how wealth and power impact a case's handling.¹²⁶

Many have pointed out that Article 236 (Rape) of the criminal law has already protected underage girls from sexual exploitation.¹²⁷ By any measure, WUG should be seen to meet the definition of Rape.¹²⁸ Some argue that if having sexual intercourse with an underage girl regardless of her consent is rape, it is also a crime under Article 236 for a man to visit an underage girl prostitute.¹²⁹ It does not matter whether a category of underage girls is characterized as underage girl prostitutes. Underage girls, by nature, are not equipped to consistently make choices relating to sexual activities.¹³⁰ They are dependent physically, economically, and legally on adults. They could be protected from things considered to be for adults. The society needs to provide direction to the underage girl in the exercise of her right in a manner consistent with her evolving capacities.¹³¹

While virtually no one would argue that young girl prostitution does not constitute a sexual exploitation of children and a severe violation of children's rights, there might be disagreement as to what punishment should be administered to those who have sexually exploited them. Upon conviction, a sentence is imposed based on the "the facts, nature and circumstances of the crime, the degree of harm done to society and the relevant provisions of this Law."¹³² This requires looking at both the crime's harm to society and the individual characteristics of

¹²⁶ See *Second-generation Rich*, *supra* note 119.

¹²⁷ Huang Xuwei, *Piaosuyounvzui Ruogan Yinanwenti Yanjiu* (嫖宿幼女罪若干疑难问题研究) [On Several Difficult Problems of the Offense of Whoring Girls under 14 Years Old], 1 WUHAN LIGONG DAXUE XUEBAO (武汉理工大学学报(社会科学版)) [JOURNAL OF WUHAN UNIVERSITY OF TECHNOLOGY(SOCIAL SCIENCE EDITION)] 63, 65 (2006). See also Wei Luo, *supra* note 5.

¹²⁸ Wang Huasheng, *supra* note 1, at 55. See also *Does China's 'Child Prostitution' Law Protect Rapists?*, ECNS.CN (May 8, 2012), www.ecns.cn/2012/06-08/16949.shtml.

¹²⁹ Xiao Benshan & Zhao Yin, *supra* note 70, at 118-19. See also Burkitt, *supra* note 7.

¹³⁰ An Ao, *supra* note 73, at 95. See also Drobac, *supra* note 77, at 14-18

¹³¹ See Wang Huasheng, *supra* note 1, at 55. See also *Does China*, *supra* note 115.

¹³² See FOREIGN AFF. BUREAU OF THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA, THE PEOPLE'S COURTS OF THE PEOPLE'S REPUBLIC OF CHINA 17-18 (1995). See also Criminal Law (1979), art. 57, *supra* note 24.

the crime.¹³³ Although not necessarily at odds, the system of Chinese criminal punishments of sex crimes often conflicts in practice.¹³⁴ The result is a wide range of vastly different punishments for what are often quite similar offenses. On the one hand, researchers have been concerned with the effect of punishment of WUG, under which the defendant may receive a lesser punishment than Rape.¹³⁵ One of the most intriguing aspects of the issue, which has been raised regarding the discussion, is about whether the maximum penalty for WUG should be increased to capital punishment.¹³⁶ The defendants in the *Xishui* case were charged under Article 360 of the Criminal Law (WUG) instead of Article 236 (Rape). Why? Whereas Article 360 carries a maximum penalty of 15 years imprisonment, Article 236 is a death-eligible crime. In contrast to Rape, WUG actually acts as a *mian si pai* (death exemption card) available to the wealthy and powerful defendants.¹³⁷ On the other hand, the threshold of 5 years imprisonment of WUG is higher than that of 3 years of Rape, which is an illogical and confusing policy.¹³⁸ Whether WUG is an offence with less social harm comparing with Rape is much more confusing than their definitions. Ironically, if the “underage girl” gives her “consent” and receives payment, the sex offender may face heavier punishment than in the situation when he rapes the girl without her “consent” and payment.¹³⁹ The use of these sanctions has been a major concern for WUG.

B. Arguments for WUG

In response to considerable criticisms, proponents of WUG argue that the primary justification for the offence is the principle of *nullem crimen sine lege* (“no crime without law”) and *nulla poena sine lege*

¹³³ Niu Yan & Wei Dong, *supra* note 49, at 53-55. *See also* Wei Luo *supra* note 5.

¹³⁴ Zhang Yonghong & Wu Yin, *supra* note 74, at 47. *See also* Lam, *supra* note 105.

¹³⁵ An Ao, *supra* note 73, at 95. *See also* Why 98.5%, *supra* note 97.

¹³⁶ *See* Niu Yan & Wei Dong, *supra* note 37, at 52. *See also* Lam, *supra* note 105.

¹³⁷ Chen Qihua, *supra* note 54, at 65-66. *See also* Lam, *supra* note 105.

¹³⁸ Liu Shiping, *supra* note 76, at 45. *See also* Tanner, *supra* note 159; Vawter, *supra* note 159.

¹³⁹ Peng Wenhua, *supra* note 3, at 154.

(“no punishment without law”).¹⁴⁰ Only acts which are clearly defined as crimes by the law shall carry criminal responsibility.¹⁴¹ This is particularly significant in light of the fact that the act of WUG is different from rape.¹⁴² Although underage girl prostitutes, like other underage girls, do not have the necessary capacity *de jure* to make decisions regarding sexual activity, they do have cognitive and express ability *de facto*.¹⁴³ In addition, there does exist a distinction of degree of harm between WUG and rape.¹⁴⁴ As China is moving much closer to a rule of law, it is suggested that the “punishment must fit the crime.”¹⁴⁵ In accordance with taking “facts as grounds” and taking “law as standards,” appropriate punishment should be given to those found guilty.¹⁴⁶ WUG truly represents progression towards the adoption of the rule of law in China.¹⁴⁷

In the recent past, the practice of having sexual intercourse with a virgin has formed a part of “fashion” in some places in China and even become a way to entertain guests.¹⁴⁸ Thus, attention is given to young

¹⁴⁰ Xu Chen, *supra* note 99, at 11. See also Borge Bakken, Book Review, 58 CHINA J. 160 (July 2007) (reviewing RON KEITH & ZHIQIU LIN, *NEW CRIME IN CHINA: PUBLIC ORDER AND HUMAN RIGHTS* (1996)).

¹⁴¹ Article 3 of the Criminal Law provides: “For acts that are explicitly defined as criminal acts in law, the offenders shall be convicted and punished in accordance with law; otherwise, they shall not be convicted or punished.” See Luo, *supra* note 5.

¹⁴² Niu Yan & Wei Dong, *supra* note 37, at 53-55. See also *China: Child Rape Definition Gives Rapist a Free Ride*, CHILD RIGHTS INT’L NETWORK (June 6, 2012), crin.org/en/library/news/china-child-rape-definition-gives-rapists-free-ride.

¹⁴³ Niu Yan & Wei Dong, *supra* note 49, at 54. See also Drobac, *supra* note 77, at 14-18.

¹⁴⁴ Liu Yanmei & Xu Hong, *Piaosuyounvzui zhong Younv Gainian Yanjiu* (嫖宿幼女罪中“幼女”概念研究) [Definition of “Young Girls” in the Young Girl Whoring Crime], 5 ZHONGGUO XINGKEXUE (中国性科学) [THE CHINESE JOURNAL OF HUMAN SEXUALITY] 61, 63 (2012). See also Linda Fairstein, *Prostitution, Rape, or Both?*, <http://www.law.harvard.edu/publications/evidenceiii/problems/69.htm>. (last visited Mar. 14, 2014).

¹⁴⁵ Wei Luo, *supra* note 5, at 9.

¹⁴⁶ *Id.* at 41.

The people’s court, the people’s procuratorates, and the public security organs shall rely on the masses and must take facts as their basis and law as their criterion in conducting criminal proceedings. All citizens are equal in application of laws, and no special privilege whatever is permissible before the law.

¹⁴⁷ Niu Yan & Wei Dong, *supra* note 49, at 51.

¹⁴⁸ Liu E, *Cong Xishuian Tanxi Piaosuyounvzui* (从习水案探析嫖宿幼女罪) [*Study of the Crime of Whoring with Girls under 14 based on Xishui Case*], 1 YUNNAN DAXUE XUEBAO (云南大学学报(法学版)) [JOURNAL OF YUNNAN UNIVERSITY(LAW EDITION)] 106, 108 (2010). See also Cassie Ryan, *Chinese Com-*

girl prostitution. There seemed to be no specific offence for protecting young girl prostitutes from the sexual exploitation.¹⁴⁹ The status and protection of underage girls would be advanced significantly if the practice were to be outlawed.¹⁵⁰ For many in China, however, WUG is a clear reflection of the government's concern for the seriousness and frequency of the crime.¹⁵¹ It reflects the trend of accurate definition of crimes in China's criminal legal system.¹⁵² What is required here is not generality, but legal rules that provide certainty and predictability, though somewhat problematic.¹⁵³ Therefore, it is inappropriate to introduce such a change as abolition of the crime at such a time.¹⁵⁴

To deal with the criticism over the similarity between WUG and Rape, there is no denying that the two crimes may overlap.¹⁵⁵ This is not to say, however, that abolishment of the former is the best way to address the issue.¹⁵⁶ On the contrary, it only represents a fairly simplistic view of the matter.¹⁵⁷ As a general guideline, an approach has been adopted when offenses overlap. Determining which offense applies is first to consider any special provisions that are contained in the Criminal Law.¹⁵⁸ Conviction should depend upon the specifics of the case. This may, for example, relate to specific subjects, specific physi-

minist Officials Seek Child Sex for Promotion, EPOCH TIMES (June 9, 2013), <http://www.theepochtimes.com/n3/98537-chinese-communist-officials-seek-child-sex-for-promotion/>.

¹⁴⁹ See Liu Yanmei & Xu Hong, *supra* note 144. See also Mimi Lau, *Muddled Laws 'Prevent Justice' for Young Rape Victims*, S. CHINA MORNING POST (Nov. 10, 2013), <http://www.scmp.com/news/china/article/1352158/muddled-laws-prevent-justice-young-rape-victims>.

¹⁵⁰ Liu E. Cong, *supra* note 148. See also *The Global Campaign on the OPSC*, VIOLENCE AGAINST CHILDREN, <http://srsg.violenceagainstchildren.org/page/global-campaign-opsc/> (last visited Mar. 14, 2014).

¹⁵¹ See Liu E. Cong, *supra* note 148, at 109. See also *Why 98.5%*, *supra* note 97.

¹⁵² Mei Jin, *supra* note 7, at 55.

¹⁵³ See Liu Yanmei & Xu Hong, *supra* note 144, at 62-63. See also Ofer Raban, *The Fallacy of Legal Certainty: Why Vague Legal Standards May be Better for Capitalism and Liberalism*, PUB. INT'L L.J. 175, 175 (2010).

¹⁵⁴ See Niu Yan & Wei Dong, *supra* note 49, at 51.

¹⁵⁵ Tong Dehua, *supra* note 155, at 134. See also *The Crime of Soliciting Underage Prostitutes*, *supra* note 100.

¹⁵⁶ See Ye Zhusheng, *Feichu "Piaosuyounvzui": Cuowei de -Jiaolv* (废除“嫖宿幼女罪”：错位的焦虑) [Abolishment of the Crime of Whoring with Underage Girls: Anxiety of Misunderstanding], 14 NANFENGCHUANG (南风窗) [SOUTH REVIEWS] 30, 32 (2012).

¹⁵⁷ *Id.*

¹⁵⁸ Tong Dehua, *supra* note 155, at 135.

cal locations or specific times.¹⁵⁹ Then, the offense with the heavier penalty should be preferred.¹⁶⁰ From a practical perspective, those who are found guilty of WUG face a minimum imprisonment of five years and a fine, while the state only imposes a prison sentence of not less than three years on rape offenders. It is important to emphasize that, contrary to popular belief, the penalty of WUG is heavier than that of Rape in terms of the threshold of the punishment.¹⁶¹ When the death penalty is at issue, it must be remembered that it is a radical effort for WUG, which signifies the thought in favor of harsh punishment and runs counter to China's criminal policy "to execute fewer and execute more cautiously."¹⁶²

In China, no category of cases is more highly charged and receives more public scrutiny than capital cases. Conventional wisdom holds that the Chinese public remain firmly behind death penalty.¹⁶³ As a potent weapon in the government's response to crime, it has been a consistent component of China's criminal justice system.¹⁶⁴ To combat the act of WUG, however, public perceptions are being fueled by inaccurate and semi-accurate information, especially by the use of the death penalty.¹⁶⁵ The approach reflects the current thinking that tougher law enforcement best serves children. Thus, the persistent belief is

¹⁵⁹ See Zhang Mingkai, *supra* note 39, at 9-11. See also *Cuffing the Dragon: China Implements new Sentencing Guidelines*, CHINA HEARSAY (Sept. 17, 2010), www.chinahearsay.com/cuffing-the-dragon-china-implements-new-sentencing-guidelines/.

¹⁶⁰ Zhang Mingkai, *supra* note 39, at 12.

¹⁶¹ Ye Zhusheng, *supra* note 156, at 31. See also Oiwan, *supra* note 105.

¹⁶² Li Wenyong & Li Yajing, *Piaosuyounvzui Baoliulun* (嫖宿幼女罪保留论) [*On the Reservation of the Crime of Whoring with a Girl under the Age of 14*], 1 ZHISHI JINGJI (知识经济) [KNOWLEDGE ECONOMY] 41, 42 (2011). See also *Strike Less Hard*, ECONOMIST (Aug. 3, 2013), available at <http://www.economist.com/news/china/21582557-most-worlds-sharp-decline-executions-can-be-credited-china-strike-less-hard>.

¹⁶³ See Yu Xiaodong, *More Than a Legal Issue*, NEWS CHINA (Nov. 2010), http://www.newschinamag.com/magazine/print_article/magazine/812

(Public opinion contrasts sharply with that of experts, with overwhelming support for the death penalty. . . . A more recent online survey conducted by sina.com.cn in late August [2010], after the proposed amendment was announced, found that 92.9 percent of 14,891 respondents were against the abolition of the death penalty for all non-violent economic crimes.).

¹⁶⁴ See generally Lu Hong & Terance D. Miethe, *China's Death Penalty: History, Law, and Contemporary Practices*, 192 THE CHINA QUARTERLY (Dec. 2007), 1028, 1028-30 (providing a legal, historical, and comparative overview of the death penalty in China).

¹⁶⁵ Ye Zhusheng, *supra* note 156, at 31.

that capital punishment must be the most effective approach for child protection.¹⁶⁶ Attempts to prosecute sex offenders, specifically with respect to death penalty, have become so pervasive that it has become difficult to imagine other ways to protect underage girls.¹⁶⁷ It remains somewhat misguided.¹⁶⁸ The existence of strong laws does not signify that the laws are effective in preventing underage girl prostitution.¹⁶⁹ The death penalty can have important consequences. Lawmakers are somewhat more cautious about the long-term effects of the capital punishment and retain death penalty only for severe crimes, for example, serious crimes involving violence or large amounts of money.¹⁷⁰ In Chinese culture, the common idiom “*ren ming guan tian*” (human life and death is a matter that concerns the heavens), expresses that a case involving human life is to be treated with the utmost care.¹⁷¹ In accordance with the principle “to execute fewer and execute more cautiously,” the Eighth Amendment, which took effect in May 2011, decreased the number of death-eligible crimes despite criticisms that may follow.¹⁷²

¹⁶⁶ Liu Yanmei & Xu Hong, *supra* note 144, at 63. *See also China's Death Penalty*, CRIME, JUST. & CRIMINOLOGY (March 11, 2013), <http://crimlinks.wordpress.com/2012/03/11/chinas-death-penalty/>.

¹⁶⁷ Ye Zhusheng, *supra* note 156, at 30. *See also* Paxcely Marquez, *Rape in China*, US-CHINA TODAY (May 7, 2009), http://uschina.usc.edu/w_usci/showarticle.aspx?articleID=13037&AspxAutoDetectCookieSupport=1.

¹⁶⁸ Ye Zhusheng, *supra* note 156, at 31.

¹⁶⁹ *See id.* at 32.

¹⁷⁰ Li Wenying & Li Yajing, *supra* note 162, at 42. *See also Rare Look at China's Death Penalty*, CBS NEWS (March 10, 2008, 10:18 AM), <http://www.cbsnews.com/news/rare-look-at-chinas-death-penalty/>.

¹⁷¹ *See [Mainland China Clarifies that Evidence Obtained Through Coerced Confessions Cannot Be the Basis of A Verdict]*, IFENG.COM (May 30, 2010), http://news.ifeng.com/mainland/detail_2010_05/30/1566576_o.shtml (noting continuing problems with the system for handling capital cases despite 2007 reforms). *See also* [The Passing of the “Rules on the Examination and Evaluation of Evidence in Capital Cases” and “Rules on the Exclusion of Illegally Obtained Evidence in Criminal Cases”], ANHUI CRIM. DEF. NET (May 24, 2010), <http://www.148china.com/display.asp?id=i322> (interview with Professor Fan Chongyi, China University of Political Science and Law, explaining that capital cases were singled out in the new evidence rules because they are important, complex, and sensitive); *ren ming guan tian definition*, CHINESE.YABLA.COM, <https://chinese.yabla.com/chinese-english-pinyin-dictionary.php?define=ren+ming+guan+tian> (last visited Feb. 22, 2014).

¹⁷² *See [Promulgated Pursuant to Authorization: People's Republic of China Criminal Law Amendment Act (No. 8)]*, [XINHUA NET] (Feb. 25, 2011), http://news.xinhuanet.com/2011-02/25/c_121124346.htm; *see also* Cao Li, *China Moves to Cut Down Executions*, CHINA DAILY, <http://www.chinadaily.com>.

IV. THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD

Child sexual abuse “has been documented throughout history.”¹⁷³ Underage girl prostitution involves actions so intolerable that no human being, state, or institution, could possibly argue for their permissibility.¹⁷⁴ It represents the very worst form of commodification and exploitation of humans. Prostituted girls are essentially without identity and considered akin to animals and slaves. They “can be raped, beaten, [] emotionally abused, tortured, and even killed by pimps, brothel owners, and customers.”¹⁷⁵ “An unknown but very large number of [teenage girls] are used for commercial sexual purposes every year, often ending up with their health destroyed, victims of HIV/AIDS and other sexually transmitted diseases.”¹⁷⁶ Many of them die with no one knowing what has happened to them. The nature of organized crime and the commercial sex industry makes precise figures hard to come by.¹⁷⁷

Underage girls are children. Children have a right to a childhood. Maintaining and prolonging childhood should be provided by legal protection. Children should be given optimal care to guarantee their survival and development. The CRC called for the protection of children from all forms of sexual exploitation and abuse, “is thus an important step in international law toward recognition of children as rights bearers.”¹⁷⁸ The CRC reminds society of its inadequacies and failure to properly protect its children and continues to be one of the

com.cn/china/2010-07/24/content_11044407.htm (last updated July 24, 2010).

¹⁷³ SANDY K. WURTELE & CINDY L. MILLER-PERRIN, PREVENTING CHILD SEXUAL ABUSE 1 (Gary B. Melton & Carolyn Stineman Schroeder eds., 1992).

¹⁷⁴ See David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 228–29 (Spring-Summer 2005).

¹⁷⁵ HUMAN RIGHTS WATCH, *Sexual Abuse and Exploitation, in PROMISES BROKEN: AN ASSESSMENT OF CHILDREN'S RIGHTS ON THE 10TH ANNIVERSARY OF THE CONVENTION ON THE RIGHTS OF THE CHILD* (Nov. 1999), available at <http://www.hrw.org/campaigns/crp/promises/abuse.html>.

¹⁷⁶ Sara Dillon, *What Human Rights Law Obscures: Global Sex Trafficking and the Demand for Children*, 17 UCLA WOMEN'S L.J. 121, 128 (Winter 2008).

¹⁷⁷ See Brian M. Willis & Barry S. Levy, *Child Prostitution: Global Health Burden, Research Needs, and Interventions*, 359 LANCET 1417, 1417–22 (2002) (providing estimates of the number of children prostituted in various countries).

¹⁷⁸ Paula C. Littlewood, *Domestic Child Abuse Under the U.N. Convention on the Rights of the Child: Implications for Children's Rights in Four Asian Countries*, 6 PAC. RIM L. & POL'Y J. 411, 412 (1997).

most widely ratified treaties in force.¹⁷⁹ The Convention seeks to establish children's rights as distinct from their parents'. Simply stated, children are enjoying human rights. It is significant that children's rights in the Convention do not derive from the rights of adults, but rather children are in essence *sui generis*.¹⁸⁰ While the Convention is not the first international agreement to address the rights of children, its passage does mark the first binding treaty to deal specifically with children's rights as separate from both adults and the family.¹⁸¹ "Rights for children began, however, as a protective mechanism designed to preserve valued aspects of personhood."¹⁸² The main objective of the Convention is to facilitate the improved protection of children in its broadest sense, not only from a concern for the welfare of children, but also accepted as an obligation owed to society.¹⁸³ The Convention reinforces this objective through its three basic underlying principles: "(1) children need special legal protection beyond that afforded adults; (2) a protective and caring family setting is most conducive to a child's survival and development; and (3) adults should respect and act in the child's best interest."¹⁸⁴

The Convention provides recommendations on measures to implement laws effectively in order to best serve the interests of chil-

¹⁷⁹ *Id.* at 411–12 n.4 (quoting LAWRENCE J. LEBLANC, *THE CONVENTION ON THE RIGHTS OF THE CHILD* xii, xvi (1995) ("As of July 1, 1996, the Convention had been ratified or acceded to by 187 States. Note by the Secretary-General, 13th Session, U.N. Committee on the Rights of the Child, P 2, U.N. Doc. CRC/C/56 (1996). It has been suggested that one reason for the Convention's popularity is that all over the world, people believe that children are vulnerable to the most serious forms of human rights abuse; thus, a treaty which seeks to protect children is not going to be as controversial as other specialized conventions may be." "Moreover, the Convention may be widely perceived as necessary, and at a minimum more beneficial than harmful." Leblanc, at xvi.))

¹⁸⁰ Robert F. Drinan, *Saving Our Children: Focusing the World's Attention on the Abuse of Children*, 26 *LOY. U. CHI. L.J.* 137, 138 (1995).

¹⁸¹ At least eighty international instruments regarding the special status of children have emerged since the 1930s. Karen A. McSweeney, *The Potential for Enforcement of the United Nations Convention on the Rights of the Child: The Need to Improve the Information Base*, 16 *B.C. INT'L & COMP. L. REV.* 467, 468 n.6 (1993). Although many of the rights included in the Convention appear as general principles in other human rights documents, none apply these rights to children specifically. *Id.* at 471.

¹⁸² Kohm & Lawrence, *supra* note 71, at 371.

¹⁸³ CRC, art. 3 *supra* note 86.

¹⁸⁴ Roger J.R. Levesque, *International Children's Rights Grow Up: Implications for American Jurisprudence and Domestic Policy*, 24 *CAL. W. INT'L L.J.* 193, 213 (1994).

dren.¹⁸⁵ For example, it requests to provide supportive services to children throughout the various phases: investigation, prosecution, treatment, and remediation.¹⁸⁶ Further, it calls for the use of non-stigmatizing language and explicitly prohibits the use of adversarial or accusatory words.¹⁸⁷ It requires that “those involved in the investigative and prosecutorial processes must understand both the proper legal basis for prosecution and the needs of the children involved.”¹⁸⁸ This approach would involve attending more to prevention and treatment efforts, which aim to reduce the harm to victims. The goal is to maintain a child-friendly environment that is tailored to the needs of young victims, making the investigative process more child-friendly and less inquisitorial.¹⁸⁹ States must undertake preventive and treatment programs to this end.¹⁹⁰

In the global discourse on child prostitution, a child’s right to freedom from all forms of sexual exploitation and abuse plays a crucial role in the level of awareness of the problem.¹⁹¹ It focuses primarily on Article 34 of the Convention which pertains to a child’s right to freedom from all forms of sexual exploitation and sexual abuse.¹⁹² Member states are obligated to protect children from all forms of sexual exploitation if they are complying with their obligations under the Convention. The role of the state in child protection and treatment must be clarified and weighed against cultural biases.¹⁹³ “[I]f cultural biases are allowed to exempt a state from certain obligations, the most widely ratified Convention in the world may be left devoid of its es-

¹⁸⁵ When States Parties take all appropriate legislative and administrative measures concerning children, “the best interests of the child shall be a primary consideration.” See CRC, *supra* note 86.

¹⁸⁶ See *Child Protection from Violence, Exploitation, and Abuse: Justice for Children*, UNICEF, http://www.unicef.org/protection/57929_57999.html (last visited Jan. 25, 2014).

¹⁸⁷ See *Child Protection from Violence, Exploitation and Abuse: Sexual Violence Against Children*, UNICEF, http://www.unicef.org/protection/57929_58006.html (last visited Jan. 26, 2014).

¹⁸⁸ Jennifer Bays Beinart, Note, *Beyond Trafficking and Sexual Exploitation: Protecting India’s Children from Inter and Intra-familial Sexual Abuse*, 21 IND. INT’L & COMP. L. REV. 47, 61 (2011).

¹⁸⁹ See *Child Protection from Violence supra* note 186.

¹⁹⁰ See CRC, art. 34 *supra* note 86.

¹⁹¹ See *Protection Rights: Keeping Safe From Harm, The Convention on the Rights of the Child*, UNICEF, http://www.unicef.org/crc/files/Protection_list.pdf (last visited Mar. 14, 2014).

¹⁹² See CRC, art. 34 *supra* note 86.

¹⁹³ For example, a reservation incompatible with the object and purpose of the present Convention shall not be permitted. See CRC, art. 51 *supra* note 86

sential quality.”¹⁹⁴ A poor understanding of child rights and a lack of a child-friendly approach may affect the doctrine of *pacta sunt servanda* in international law, which requires that promises must be kept.¹⁹⁵ As to whether states are complying with the provisions of the treaty, states’ reports must therefore outline what domestic measures have been adopted in accordance with the Convention and to what extent progress is being made toward full realization of those rights.¹⁹⁶

The National People’s Congress of China has ratified CRC and it took effect on April 2, 1992. While it is clear that the principle of a child’s best interest should have been recognized in Chinese laws, they do not detail the specific provisions that conform to the principle.¹⁹⁷ As we have seen, it is debatable whether prosecutions and investigations in China are in children’s best interests. Many of the rights and protections contained in CRC are not available to underage girl prostitutes.¹⁹⁸ Sexually abused girls who testify are often harmed by their experiences, particularly in the criminal justice system.¹⁹⁹ They have been experiencing more injuries in the course of the prosecution of sex offenders than in the sexual assault. This is in violation of CRC, which emphasizes the supremacy of child’s best interest.²⁰⁰ Moreover, vesting young girl prostitutes with the capacity to consent to sex, which is not currently legally vested in any individual under the age fourteen, is

¹⁹⁴ Littlewood, *supra* note 178, at 448.

¹⁹⁵ Qu Xuewu, *Guanyu Quxiao Piaosuyounvzui de Lifa Fansi* (于取消嫖宿幼女罪的立法反思) [Reconsidering Abolition of the Crime of Whoring with a Girl under 14], 8 FAZHI YANJIU (法治研究) [RESEARCH ON RULE OF LAW] 60, 61-62 (2012). *See also* Hans Wehberg, *Pacta Sunt Servanda*, 53 Am. J. Int’l L. 775, 775-86 (1959).

¹⁹⁶ McSweeney, *supra* note 181, at 483. Interestingly, the Committee adopted reporting guidelines which describe generally the information States Parties should submit; consequently, the type of information to be included in the reports is left up to the sole discretion of the submitting Party. *Id.* at 484.

¹⁹⁷ For instance, the principle of a child’s best interest has never been articulated and provided in Constitution of the People’s Republic of China [hereinafter Constitution], which has been revised in 2004. Nor has it been provided in Law of the People’s Republic of China on the Protection of Minors [hereinafter Minors Protection Law], revised in 2012. *See* Constitution and Minors Protection Law (promulgated by Order No.50 of the President of the People’s Republic of China, effective Sept. 4, 1991).

¹⁹⁸ The term of WUG, for example, is contrary to the use of non-stigmatizing language.

¹⁹⁹ Qu Xuewu, *supra* note 262, at 62. *See also* Andrea L. Dennis, *Prosecutorial Discretion and the Neglect of Juvenile Shielding Statutes*, 90 NEB. L. REV. 341, 343 (2011).

²⁰⁰ *Id.* at 61.

not the most appropriate way to care for their best interests. In the current system, children are often left unprotected or are harmed by operates from the victim's perspective.²⁰¹ To be sure, investigating and litigating do not, by themselves, inevitably cause harm to children. The legal prosecutorial system aims to promote justice. What is truly at stake is not justice, but the best interest of the child, which has been virtually ignored. China must revamp its legal system to deal with a modern understanding of CRC. A useful move would be to change the goal of the legal system and its relationship with children.

As "children lack the kind of autonomy and competence presumed by the idea of a right, and therefore, require protection from adults."²⁰² Underage girls cannot fully care for themselves, nor can they "decid[e] many important matters that directly affect them. "Children will be either paternalized or victimized. There is no alternative."²⁰³ Given the difficulty of having children protect themselves, age limits are imposed to "insure that kids grow up a bit before they risk making the wrong kinds of mistakes."²⁰⁴ Teen years may be a transition from childhood to adulthood, but a teenage person is not an adult. Underage girls need to be allowed to experience childhood. "They need to be afforded the 'right' to be children, not forced to be adults."²⁰⁵

V. HISTORICAL AND CULTURAL INFLUENCES

Although underage girl prostitution, as a form of child sexual exploitation, has been documented throughout history, the offence of WUG has been rooted firmly in the historical, cultural and social context of China. This section explores these aspects and presents some understanding of Chinese legal history and culture, with an eye to shedding some light on the explanation of the status quo in terms of the social and cultural attitudes toward the crime.

²⁰¹ *Id.* at 62.

²⁰² Kohm & Lawrence, *supra* note 71, at 396.

²⁰³ John E. Coons et al., *Puzzling Over Children's Rights*, 1991 BYU L. REV. 307, 341 (1991). "Clearly, the extreme liberationist can be understood only as provocateur. Yet to dismiss him or her completely is to miss the point. Buried in the rhetoric of 'kiddie lib' is an important problem. Children are not static; each is a moving target of social policy." *Id.*

²⁰⁴ Bruce C. Hafen, *The Learning Years*, 81 MICH. L. REV. 1045, 1060 (1983) (reviewing FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* (1982)).

²⁰⁵ Kohm & Lawrence, *supra* note 71, at 404.

A. Obligation-oriented Legal Tradition

In order to fully understand the backgrounds of WUG, it is set out in full below to explain why the current Chinese system has inadequate child protection resources and cannot truly guarantee the rights of underage girls. The supremacy of state power over individual rights had a profound effect on the laws. The traditional Chinese legal culture is prominently characterized with the stress on obligations, never on rights.²⁰⁶ “Early Chinese conceptions of rights were mainly imported from the west.”²⁰⁷ “[F]undamentally, notions of political and civil liberties and concepts of inherent legal rights associated with them are extremely underdeveloped in China today and are only beginning to be accepted.”²⁰⁸ Confucius, the greatest philosopher in China, introduced the concept of the importance of society over the individual in order to achieve social harmony.²⁰⁹ Underlying these philosophies is an emphasis on harmony and unity, rather than individuality and difference.²¹⁰ Individuals passively fulfilled their obligations to the state and their family with little awareness of enjoying rights, for fear it would cause confusion and chaos.²¹¹ It is for this reason that the Emperor has maintained strict control of most elements in Chinese society, including the functioning of the legal system of the law was a mere tool of social control. Because he was concerned primarily with maintaining order, his attention, and likewise the attention of local bureaucrats, was hardly drawn to what would be called individual rights today. While codification of laws was undertaken a long time ago in China, most of these codes focused on punishment for administrative breaches of bureaucratic procedure or for conduct considered disruptive of social order.²¹²

²⁰⁶ See LIANG ZHIPING, XINBOSIREN XINZHA (新波斯人信札) [THE NEW PERSIAN LETTERS] 122–23 (2000).

²⁰⁷ Gun Luoji, *A Human Rights Critique of the Chinese Legal System*, 9 HARV. HUM. RTS. J. 1, 2 (1996).

²⁰⁸ Stanley Lubman, *Bird in a Cage: Chinese Law Reform after Twenty Years*, 20 NW. J. INT'L L. & BUS. 383, 412 (2000).

²⁰⁹ See generally Huang Chichung, THE ANALECTS OF CONFUCIUS (LUN YU) (1997).

²¹⁰ Sam Hanson, *The Chinese Century: An American Judge's Observations of the Chinese Legal System*, 28 WM. MITCHELL L. REV. 243, 246 (2001).

²¹¹ See LIANG ZHIPING, *supra* note 206, at 127–28.

²¹² See *cf.* George Jamieson, CHINESE FAMILY AND COMMERCIAL LAW 4-8 (1921); William C. Jones et al., LAW OF THE PRC III, 10 (1993) (noting “[O]ver half the [Ching] Code is devoted to the regulation of the official activities of government officials.”).

“Although Chinese legal history is quite ancient, Chinese historians argue that the Chinese legal system as it currently exists has little connection to the past.”²¹³ Before exploring the concept of rights in Chinese legal context, I should pause briefly to discuss some changes in the evolution of China’s modern legal system. China has been geographically isolated from the rest of the world for much of history. “[A]s a result, its culture and society have developed in an individualized manner.”²¹⁴ “It was not until modern times that China began to have frequent contact with other civilizations.”²¹⁵ By the end of Qing (1644–1912), the last ruling dynasty in imperial China, a Law Reform took place.”²¹⁶ “[A] number of modern legal notions and systems in the West, especially the legal systems of civil law countries such as Germany and Japan, have flowed into China.”²¹⁷ Rights were, for the first time, legally stipulated before they could actually be realized.²¹⁸ Following the May Fourth Movement in 1919, a national aspiration of rights, the general public had a stronger legal awareness of individual rights than before.²¹⁹ Greater importance has been attached to protecting individual rights and ensuring freedom. The ideas that “[e]veryone enjoys equal rights” and “one needs to act in accordance with law,” for example, have been introduced.²²⁰ Before the founding of the PRC in 1949, even “early [Communist] Party leaders in pursuit of power asserted openly that human rights were to be enjoyed by people of all

²¹³ Dobinson, *supra* note 17, at 5.

²¹⁴ Littlewood, *supra* note 178, at 426–27.

²¹⁵ *Id.* at 426.

²¹⁶ See ZHANG JINFAN, *ZHONGGUO FAZHISHI* (中国法制史) [The Legal History of China] 289 (2007). See also Daniel Chang, *Modernization of the Chinese Legal System: A Brief Historical Review*, NZCTA, <http://www.nzcta.co.nz/chinanow-commentary/1517/modernization-of-the-chinese-legal-system-a-brief-historical-review> (last visited Feb. 6, 2014) (hereinafter *Modernization*).

²¹⁷ Shen Deyong, Justice of the Supreme People’s Court of PRC, Chinese Judicial Culture: from Tradition to Modernity, Speech at Brigham Young University Law School (Oct. 21, 2009), in 25 *BYU J. PUB. L.* 131, 139 (2011).

²¹⁸ See ZHANG JINFAN, *supra* note 216, at 302. See also *Modernization*, *supra* note 216.

²¹⁹ See Gao Like, *Wusi Lunli Geming yu Gongmin Jingshen* (五四伦理革命与公民精神) [*Ethical Revolution and Spirit of Citizenship in the May 4th Movement*], 3 *ZHEJIANG SHEHUI KEXUE* (浙江社会科学) [*ZHEJIANG SOCIAL SCIENCES*] 122, 123–27 (1999).

²²⁰ See Su Jing, *Dui Wusi Shiqi Faxue shang Fanchuantong de Xin Pingjia* (对五四时期法学上反传统的新评价) [New Comments on Anti-tradition of the Science of Law in the May 4th Movement Stage], 3 *ZHONGGUO FAXUE* (中国法学) [*CHINA LEGAL SCIENCE*] 113, 122–26 (1989).

classes.”²²¹ It appears that the historical command-and-control political culture in China is under increasing pressure to yield to individual rights and liberties. Yet the changes are merely symbolic rather than substantial and the historical impact still remains. The state has generally neglected to ensure the concrete embodiment of such rights in the laws.²²² “Even though much Chinese legislation since 1979 has created new rights and obligations, the assertion of rights is still relatively novel in Chinese society.”²²³ Thus, the public awareness, for a long period of time, was that infringement of children’s rights was unheard of.

B. Hierarchical Order

Chinese judicial culture intertwined the law with ethics (“To Embed Rites in Laws and Combine These Two”), and is thus of distinct Chinese characteristics.²²⁴ “Rites and laws were two systems of rules with profound influences on ancient China.”²²⁵ “Rites had already become the general principle in social relations and the fundamental guideline in judicial decisions as early as the Western Zhou Dynasty” (1046–771 B.C.).²²⁶ “The purpose of [R]ites was to maintain a hierarchical order in the society and families, such as the relations between the close and the distant, the noble and the humble, as well as the superior and the inferior.”²²⁷ Confucius defined five cardinal relationships: between ruler and ruled, husband and wife, parents and children, older and younger brothers, and friends.²²⁸ Among the pairs, the former was known as the “superior” and the latter was known as the “inferior.”²²⁹ Confucius emphasized the complete obedience and loyalty of the inferior to the superior while also mentioning the benevolence of the superior to the inferior.²³⁰ Moreover, in order to maintain social harmony, the stress is favoring the “superior” at the expense of the “inferior.” “Hai Rui, a renowned judge in the Ming Dynasty, once

²²¹ Gun Luoji, *supra* note 207, at 3.

²²² *See id.* at 8.

²²³ Lubman, *supra* note 208, at 406.

²²⁴ Shen Deyong, *supra* note 217, at 133–34.

²²⁵ *Id.* at 133.

²²⁶ *Id.* at 134.

²²⁷ *Id.*

²²⁸ William P. Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 TEX. L. REV. 915, 972 n.205 (1986).

²²⁹ *See id.* at 954–55.

²³⁰ *Id.*

said, 'Whenever there is any reasonable doubt with a case, we'd rather wrong the younger brother than the elder one; rather the nephews and nieces than the uncles; rather the rich than the poor; rather the unruly than the obedient.'²³¹ "If the case is about quarrels and dignity, we'd rather wrong the humble than the noble in order to preserve social normality."²³²

In accordance with Rites, the filial piety has been the predominant guiding principle for socializing children. Owing to the expectation that children should obey and respect their parents without question, absolute authority over children was the commonly accepted approach to child rearing.²³³ Parents (mainly fathers) and other caretakers exercised practically unlimited power over children, which reflected a view that parents were incapable of error. "The essence of this paternalism is to replicate the mode of the patriarchal rule to the state rule characterized by both affection and absolute authority."²³⁴ Children were regarded as property that could be disposed of at the will of their parents.²³⁵ For example, Chinese have traditionally viewed physical punishment as an important component of child rearing.²³⁶ The use of corporal punishment or other conduct injurious to human dignity was a common practice in a Chinese family. Another influence of Rites has been shaped into a tradition favoring boys and disparaging girls. Boys enjoyed much higher status than girls, which conforms to the characteristic of patriarchal society. In ancient China, it was not surprising that prostitutes, who existed just as "tools" and "commodities" to satisfy men's sexual demand, were in the lowest class of the society and could not press their interest in public forums in the manner generally employed by other adult groups.²³⁷ They were not only looked down

²³¹ Shen Deyong, *supra* note 217, at 134.

²³² *Id.*

²³³ See Ho Tingpong & Kwok Waiming, *Child Sexual Abuse in Hong Kong*, 15 CHILD ABUSE & NEGLECT 597, 599 (1991) ("The Chinese pattern of child rearing is characterized by an initial period of permissiveness followed by strict discipline and a demand for unquestioned obedience.").

²³⁴ Shen Deyong, *supra* note 217, at 141.

²³⁵ See Ho Tingpong & Kwok Waiming, *supra* note 233, at 599 ("In Chinese children's stories (for example, the classic 24 stories of filial piety), defiance of parental authority results in admonition, punishment, or death" for the disobedient child).

²³⁶ *See id.*

²³⁷ See Ding Shuya, *Shehui Diwei Shiyexia Tang Song Chuanqi Zhong Jinv Zhi Bijiao* (社会地位视野下唐宋传奇中妓女之比较) [Comparison of Social Status of Prostitutes in Legends Between Tang and Song Dynasties], 20 HENAN JIDIAN

upon by the other classes, but they were also placed in a status similar to slaves.²³⁸ Building on this idea, we can foresee the attitude of Chinese society towards the underage girl prostitutes. They have all the labels of the “inferior” and “humble” on their bodies: female, prostitutes, and children. As China lacks the tradition and belief of equality before the law among different social status, it seems more appropriate to disregard their rights if they were said to have rights.

C. Family-and-State Culture

Unlike its western counterparts, family played a significant role in China’s judicial culture. Interestingly, the word for “state” in Chinese is “Guo Jia”, which is combined by two characters “Guo” and “Jia”. The former means “state” and the latter, “family.” In imperial China, state and family meant almost the same thing and the border-line between them was in theory sometimes indeterminate.²³⁹ Clearly, there is a peculiar relation between family and state in Chinese society. The most predominant doctrine underlying both conceptions of family and state is the natural harmony of Confucianism, which emphasizes social/legal obligations mainly in the form of filial piety/loyalty. By enhancing the role of family, it seems possible that the “obligations permeate[d] all relationships and [turned] society into an enormous family headed by the emperor.”²⁴⁰ Indeed, “Confucianism extend[ed] the family’s hierarchical relationships to all social relations and transform[ed] society into a pyramid of overlapping father-son relations that culminates in the sovereign.”²⁴¹ On the other hand, “the central government, through unrelenting fortification of traditional familial and social hierarchies, [also] transformed the family into a de facto extension of the bureaucratic state.”²⁴² In ancient times, everyday local affairs were regulated, not from “Yamen”, but by institutions such as

GAODENG ZHUANKE XUEXIAOXUEBAO (河南机电高等专科学校学报) [JOURNAL OF HENAN MECHANICAL AND ELECTRICAL ENGINEERING COLLEGE] 65, 65 (2012).

²³⁸ See *id.*

²³⁹ Liang Zhiping, *Jia Yu Guo: Guanyu Zhongguo Chuantong Falü Wenhuade Sikao Zhiyi* (家与国：关于中国传统法律文化的思考) [Home and State: A Reflection on Chinese Traditional Legal Culture], 2 ZHENZHIXUE YANJIU (政治学研究) [STUDIES ON POLITICAL SCIENCE] 1 (1989). See also ZINZHONG YAO & YANXIA ZHAO, CHINESE RELIGION: A CONTEXTUAL APPROACH 127 (2010).

²⁴⁰ See Hayden Windrow, *A Short History of Law, Norms, and Social Control in Imperial China*, 7 ASIAN-PAC. L. & POL’Y J. 244, 292 (Summer 2006).

²⁴¹ *Id.* at 252.

²⁴² *Id.* at 301.

the family and clan, which were firmly rooted in local usage, and reflected local kinship ties.²⁴³ A family was an agency of local self-government.²⁴⁴ Family and clan codes prescribed standards of personal conduct for their members and enforced them through their own courts.²⁴⁵ "Family heads became the unpaid foot-soldiers of government authority, implementing its policies without direct compensation, because maintenance of the political and legal system granted them powers and privileges over their subordinates."²⁴⁶ Under Family-and-State centered law, state and family neither confirmed nor protected individual rights and the law was a mere tool to maintain social order. Because the philosophy underlying the law led them to deal with legal cases in terms of a situation to be restored rather than in terms of individuals seeking justice.²⁴⁷ With strict social control through the local self-government of the family, and based on severe punishment, a situation may be restored and the social order may be maintained. This impact is also prevalent in China's cultural disposition towards young girl prostitution.

Although it has been globally admitted that young girl prostitution is a kind of child sexual exploitation, it is important to bear in mind that traditional Chinese political and legal aspects influence the level of awareness of the problem. Sexual abuse remains a "predominantly secret underreported phenomena."²⁴⁸ Besides the "seduction process" by which offenders entice girls into a web of secrecy, the sexually abusive experience also makes the victim not testify in the presence of the accused.²⁴⁹ Being less able to speak for themselves than any other population, it is not surprising that there is an apparent inability to prevent abuse from occurring in the first place. However, there are

²⁴³ "Yamen" is both the local government and court, with its chief both the administrative official and judge; the clan was a grouping of families with a common surname, claiming descent from a common ancestor. See Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 5 CAL. L. REV. 1284, 1286, 1294-95 (1967).

²⁴⁴ See *id.*

²⁴⁵ *Id.* at 1294.

²⁴⁶ Windrow, *supra* note 240, at 301.

²⁴⁷ See J. L. BRIERLY, *LAW AND GOVERNMENT: IN PRINCIPLE AND PRACTICE* 316 (Odhams Press).

²⁴⁸ Cf. Carol R. Hartman & Ann W. Burgess, *Sexual Abuse of Children: Causes and Consequence*, in CHILD MALTREATMENT: THEORY AND RESEARCH ON THE CAUSES AND CONSEQUENCE OF CHILD ABUSE AND NEGLECT 95, 122-23 (Dante Cicchetti & Vicki Carlson eds., 1989).

²⁴⁹ See Roland C. Summit, *The Child Sexual Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 181-88 (1983).

clearly other factors operating to prevent cases from being reported, which make the situation worse. Parents sometimes would not report it to authorities even though their girls are sexually exploited due to some influence of traditional Chinese family culture. Such issue was viewed as “domestic” and largely outside state control. China has developed a culture that prizes virginity in female children, which is essentially a reflection of its favoring of male concerns. As previously outlined, traditional Chinese family is a male-dominated close unit. Law and society have treated underage girl sex as an indignity of a family (*Jiachou*).²⁵⁰ This attitude further reflects the importance of family reputation and secrecy over individual suffering. It is therefore deemed as a “family problem” inflicted by parents and other caretakers if it occurs between family members. Chinese people are inclined to maintain secrets within the family, so frequently it is only during a period of intense conflict that a parent may bring the abuse to the attention of authorities, despite the fact that the abuse may have been occurring for quite some time. Additionally, nor is the family encouraged to disclose incidences of the sexual exploitation. The notion that underage girl prostitution is a voluntary act rather than sexual exploitation, though inconsistent with the realities of child development, also makes the process of disclosing the crime very difficult. The problem is often treated as unfortunate, like poverty, but not as infringement of rights. Thus, there is good reason to believe that the number of underage girl victims is greater than we wish to acknowledge. The figures have been an underestimate of the scope of the problem.

As we have seen, the traditional value pervades China today. Likewise, historical and cultural influences cannot be excluded when we reconsider the discussion on the death penalty for WUG. As discussed earlier, the public debate over the punishment of WUG is mainly concerned with whether it is appropriate to remove it from the scope of the death penalty. In assessing this, it is important to place the development of criminal law in a historical context. In the long river of history of China, law meant nothing more than criminal law and punishment.²⁵¹ In a word, criminal law-centralism is a pronounced feature

²⁵⁰ *Jiachou* means a family scandal, which should not be let known to outsiders, otherwise it would be a loss of face for the whole family or clan.

²⁵¹ See Liang Zhiping, *Zhongguofa de Guoqu, XianzaiyuWeilai: YigeWenhua de Jiantao* (中国法的过去, 现在与未来: 一个文化的检讨) [The Past, Present and Future of Chinese Law: A Review from the Perspective of Culture], 2 *BIJIAOFA YANJIU* (比较法研究) [J. COMP. L.] 19 (1987).

in the traditional Chinese Family-and-State culture.²⁵² Death as punishment is an option for a number of different crimes which are considered the most heinous in China. Sex crimes against young girls involve actions which were rated the most despicable in the patriarchal culture and described as bestial.²⁵³ More importantly, the society expressed a concern that such crimes might undermine the stability and natural harmony of family. Harmony is the common philosophical basis underlying both family and state. Any act jeopardizing a family will also be deemed as a challenge to the rule order of state.²⁵⁴ Hence, the government turned its attention to those serious crimes. Since the crimes defile the whole family, the eradication of evil must reach to the roots. With increasingly harsh penalties, more stringent penalty sanctions for sex crimes against underage girls have been articulated. It is not surprising that a public pressure keeps making the death penalty available for such offenses. Further, the traditional ethics and norms require that no leniency is permissible for such a crime.²⁵⁵

VI. ABOLITION OF WUG

Underage girl prostitution is consequentially harmful to both young girls and society as a whole. It often results from poverty and organized crimes. To understand the status quo, it is also necessary to become acquainted with the transformations of Chinese society. Agriculture was one of the mainstays of China's economy. Chinese traditional value has adapted itself to the agricultural civilization and echoed with the natural economy, patriarchal society, and monarchy in ancient China.²⁵⁶ In the late 1970s, with China's economic reform and the introduction of market economy, the harmony between agricultural communities and traditional values has been broken. The worship of money has extended into all walks of life. On the other hand, some populations, especially those living in the rural areas, are experiencing economic marginalization. Some female children have been forced into prostitution to support themselves and their families because of

²⁵² See *id.*

²⁵³ See *Abuse, most foul*, *supra* note 15.

²⁵⁴ See Liang Zhiping, *supra* note 206, at 5.

²⁵⁵ *Abuse, most foul*, *supra* note 15.

²⁵⁶ See Wang Luyu, *ZhongguoChuantongFalüWenhua de XingzhizhuyiTezheng*

(中国传统法律文化的刑治主义特征) [A Characteristic of Chinese Traditional Legal Culture: Focus on Criminal Sanction], 6 FAZHUYUSHEHUI (法制与社会) [LEGAL SYS. & SOC'Y] 29 (2008).

the lack of opportunities in education and employment. Investigation revealed that many rural girls, often living near cities, formed the market for young girl prostitution.²⁵⁷ Other girls with behavioral problems become vulnerable to being prostituted when there are sufficient markers of vulnerability present: social chaos and family breakdown.²⁵⁸ Homelessness, lack of formal education, the lifestyle of a sexually exploited young girl is far from romantic. The conditions of children's lives and their future prospects largely reflect the well-being of their families. "When families are strong, stable, and loving, children have a sound basis for becoming caring and competent adults. When families are unable to give children the affection and attention they need and to provide for their material needs, children are far less likely to achieve their full potential."²⁵⁹

Children need protection from sexual exploitation. While it is clear that legal efforts are being made to combat the problem of young girl prostitution in China, it is hard to ascertain whether the offence of WUG functions well regardless of increasing public concerns. The current child protection approach can never truly be "child-friendly," as it has lost its focus on the child protection and the need for treatment and prevention. WUG tends to be counter-productive. This may have something to do with China's Confucian tradition. Its purpose is to preserve harmony (social order) rather than to protect the rights of children. Those in favor of WUG are not necessarily pro-child. Indeed, the very opposite of these trends may more adequately serve the needs of young girls. They should be given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity. Unfortunately the female child carries the stigma of prostitution into adulthood and frequently is unable to rehabilitate herself or to assimilate into society.²⁶⁰ This is exactly what is happening. Drawing a distinction between WUG and Rape of underage girls is not easy, and not necessary. The problem of the artificial distinction between underage girls and underage girl prostitutes is simply a paradox to minority legal status of underage girls. Underage girls are underage girls. There is no

²⁵⁷ See Sun Xiaomei, *Feichu Piaosuyounvzui de Yanjiu Zongshu* (废除嫖宿幼女罪的研究综述) [Study on Abolition of Crime of Prostitution Involving Underage Girls], 3 ZHONGHUA NVZI XUEYUANXUEBAO (中华女子学院学报) [JOURNAL OF CHINA WOMEN'S UNIVERSITY] 23, 27 (2013).

²⁵⁸ Chen Qihua, *supra* note 54, at 67.

²⁵⁹ Kohm & Lawrence, *supra* note 71, at 399.

²⁶⁰ Rights of the Child, U.N. ESCOR, Comm. on Human Rights, 48th Sess., at 29, U.N. Doc. E/CN.4/1992/55 (1992).

need to create a hierarchy of them.²⁶¹ More importantly, this attitude can ultimately lead to the victimization of underage girls as it breaches the principle of best interest of children.²⁶² The government misappropriates its resources to justice and investigation instead of helping children. But the death penalty argument for WUG is on the incorrect perception that punishing sex-offenders best serves children. A careful deliberation must be done regarding the balance between offender punishment and child protection. The *Xishui* case, arising under the guise of protection of underage girls, is significant because it increased public awareness and sensitivity about the problem. At a minimum, the current heated discussions indicate that the notion of the protection of children's rights has been put forward. Unearthing the worst would bring out the best. In articulating the shortcomings accompanying WUG, we can envision ways in which China's sex crimes can be reformed.

In the context of examining China's international obligations, most would agree that children protection laws in China have not been developed with an eye to protection of human rights.²⁶³ If the goal is to protect children, there should be, in most circumstances, a right-based approach. To better tackle the problem, a general blueprint for reform would be to increase the child-centeredness of child protection efforts, whether culturally or through legislation, which may more effectively prevent sexual exploitation of underage girls and protect a greater number from harm. It seems that, especially given the rationale behind offender punishment-to protect children from abuse-the balance should weigh more heavily on greater child protection. In any case, the pursuit of justice should subordinate to concerns over the welfare of the child. Thus, I suggest that China focus on taking a victim-friendly approach and consider abolishing WUG, with a view to take "underage girl prostitutes" out of hostile domestic settings. This approach, emphasizing the primary needs of the victim and making the process more child-friendly, both increases children's reliability and self-esteem, and protects the human rights of children.

VII. CONCLUSION

China is in the early stages of addressing the problem of child sexual exploitation. It must make changes to its sexual assault crimes

²⁶¹ See An Ao, *supra* note 73, at 95.

²⁶² Zhao Hejun, *supra* note 85, at 6.

²⁶³ See Sun Xiaomei, *supra* note 257, at 25.

against children. Yet, this does not mean that there exists a cure-all solution. It is believed that the problem will only be solved when “root causes” are addressed by the state in which the reform is taking place. Until the government takes a more active role, however, it does not seem possible that awareness of the problem of child protection in the prosecution of child sexual exploitation will be raised in China. For it is not only China’s laws that must be restructured to accommodate a new concept of children’s rights set forth by the CRC, but also its cultural attitudes. There are recommendations regarding the effective implementation of international instruments and treaties, such as giving special focus to assessing China’s compliance with the Convention as well as reviewing and commenting on proposed legislation from a child protection perspective. However, it may not be achieved until children are understood as rights bearers within the family as well as in society. Surely, adopting a child-centered protection system and making it more victim-friendly are not without legal obstacles. An effective solution to the problem remains elusive and it will only be known with the passage of time.