The Contradictions of Chinese Capital Punishment

By

Tobias Johnson Smith

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

Jurisprudence and Social Policy

in the

Graduate Division

of the

University of California, Berkeley

Committee in charge:

Professor Jonathan Simon, Chair
Professor Thomas Gold
Professor Rachel Stern
Professor Franklin Zimring

Summer 2020

The Contradictions of Chinese Capital Punishment

By

Tobias Johnson Smith

Abstract

The Contradictions of Chinese Capital Punishment

By

Tobias Johnson Smith

Doctor of Philosophy in Jurisprudence and Social Policy

University of California, Berkeley

Professor Jonathan Simon, Chair

This project uncovers the causes and consequences of China's death penalty reform in the 21st century. China is the world's leading executioner state. Yet in recent years China has also become a leading death penalty reformer. This reform took place through the courts. In 2007 the Supreme People's Court (SPC) reinstituted a process of central review and approval of death sentences that reportedly led to a significant decline in death sentences nationwide.

Why did a one-party authoritarian state empower the judiciary to restrain state punishment? And what were the political effects of this shift? I adopt an explicitly comparative method to answer these questions. Throughout, I consider China's court-focused death penalty reform in light of another country that also used the judiciary to regulate capital punishment: the United States. My findings rest on a diverse body of evidence including case verdicts, statutes and Chinese-language scholarship. The centerpiece of my materials is an original data set of more than 70 interviews I conducted with death penalty stakeholders in China.

The first part of the project explains the causes of reform in China. In Chapters One and Two I examine the politics and functions of capital punishment administration in late Imperial China and the People's Republic of China (PRC). I show that in late Imperial China the administration of capital punishment was tightly controlled through an extensive process of hierarchical review with relatively few executions. I argue that this process served a crucial and under-recognized auditing function in helping the state regulate hazards from its own local bureaucracy. In Chapter Two I show that by contrast the political environment of the early PRC produced a heavy reliance on capital punishment with little central oversight. I contend that the implementation of death penalty review in the 21st century was not driven by concerns over the scale of capital punishment, but by a need to reassert central state control over local government.

In the second part of this project I turn to the consequences of China's authoritarian regulation of the death penalty through the courts since 2007. I identify a series of resultant contradictions in four domains: the judiciary, the legal profession, penal legislation and state secrecy. In each of these domains I begin by showing how the Chinese case of death penalty reform diverges from the US example. In Chapter Three I explain how the SPC expanded its administrative capacity in order to handle the additional work of death penalty review. In Chapter Four I show that the process of death penalty review created a new national venue for death penalty defense. While lawyers were not the focus of death penalty reform, reform is shaping the development of a capital defense bar as part of China's legal profession. In Chapter Five I examine the introduction of a new sanction—life without parole (LWOP)—as an alternative to death for only one capital crime: bribery. The creation of this sentence for a non-violent crime showcases the ways that seemingly obvious rationales for capital punishment, such as permanent incapacitation for dangerous offenders, differ in China and the US. In Chapter Six I explore China's refusal to reveal data about capital punishment. I show that death penalty reform puts

death penalty secrecy at odds with other Chinese legal initiatives promoting transparency, legal representation and due process protections. I conclude by arguing that death penalty reform may have reduced executions, but it has also further institutionalized capital punishment in China, making the practice harder to abolish.

Table of Contents

Acknowledgments

The main empirical work for this project covers roughly ten years following China's 2007 death penalty reform. This project also took me roughly ten years to compete. A decade is a tiny sliver of history but a big slice of a life. I have many people to thank for their help, care and insight over these years.

First, I thank the members of my dissertation committee. It has been my great fortune to have a committee of four people who have supported this work together, as four walls together support a structure. Jonathan Simon inspired me to come to Berkeley for my PhD. He showed me how to unearth new ideas buried in the old ones and old ideas buried in the new ones too. Tom Gold proved that one does not have to compromise between being an excellent mentor, teacher, and friend. Rachel Stern taught me the two hardest parts of the job: finding true research questions and answering them in honest prose. I would not have done interview-based fieldwork without her example, and I would not have made it through the years in China without her reliable guidance. Frank Zimring's many writings have shaped this one, in ways both big and small. His influence is evident from the title page of this project right to the very last page with a flourish of Zs in the bibliography.

Early on in the dissertation process, I received the wise advice to assemble an informal shadow dissertation committee of confidants, peers and mentors to complement my official advisors at Berkeley. While the members of this shadow committee are not listed on the signature page of this project, their guidance and support stand out on every page of the work that follows. My thanks first and foremost to Genevieve Renard Painter, the shadow chair of this project and (in the words of one astute scholar) the other half of my brain. I also thank shadow committee members Jiang Su, Johann Koehler, Liam McHugh-Russell, Susan Trevaskes and Anjuli Verma.

Beyond the shadow committee, many, many people have helped me realize this project. I thank Catherine Albiston, Bob Berring, Clark Bernier, John Bliss, Gregory Fayard, Malcolm Feeley, David Garland, Wesley Jacks, Lao Jiaqi, Margaret Lewis, Li Li, Li Sitao, Liang Bin, Lawrence Liu, Liu Sida, Liu Siyu, Judith Lubman, Stanley Lubman, Mona Lynch, Jonathan Marshall, James Martel, Timothy McLellan, Sally Engle Merry, Shayan Momin, Daniel Pascoe, Matthew Robertson, Jesse Rodenbiker, Keramet Reiter, Philip Rogers, Ashley Rubin, Willa Sachs, Kristin Sangren, Christopher Schmidt, Matthew Sommer, Brenton Sullivan, William Welsh and Zheng Xi.

Many parts of this project were first presented at conferences, workshopped in writing groups and peer reviewed in journal submissions. I thank the people who read my writing and improved it immeasurably with their thoughtful feedback: the members of the JSP writing workshops, the Placing Asia working group, the Association of Chinese Criminology and Criminal Justice in the USA, the Law & Social Inquiry Editorial Committee, the editors at Punishment & Society, conference discussants and co-panelists and numerous anonymous reviewers.

Over the course of this project I have also gained a deep appreciation for institutions. Institutions that welcomed and supported me during this project include the Jurisprudence and Social Policy Program, Berkeley Law School, Tsinghua University, Peking University, the Legal Intersections Research Centre at the University of Wollongong, the Dana St. Cooperative and the Bus Stop Cooperative.

Of course, research requires resources. I was able to devote the time to complete this project thanks to support from the Foreign Language and Area Studies Program, The Berkeley Center for Chinese Studies, The Blakemore Foundation, The Confucius China Studies Program, the UC

Consortium on Social Science and Law, The Center for the Study of Law and Society and the University of California, Berkeley.

Just as death penalty reform was shaped by what came before it, so too this project was shaped by my life before graduate school. I thank the people who have fostered this dissertation over a lifetime. My parents, Linda Lewis and Stephen Smith, my first and most influential teachers and the people who introduced me to China; Megan Shea, my partner from Berkeley to Beijing and all that comes next; Stanley Mickel, James Dobbins, Harlan Wilson, Alison Hardy and the Prison Law Office, each of whom laid a stone that paved the way to this project; John and Irene Kamm, who showed me how to devote a life to something; and Andrew Mickel, to whom I would dedicate this dissertation if he would let me.

Finally, I thank the death penalty lawyers in China who take all the risks, including the risk of speaking with me.

Introduction

Of all manifestations of power, restraint impresses men most.
– Thucydides[1]

Punishment gains its authority by not killing.
– Liu Zongzhou[2]

This project was born from the struggle to make sense of a contradiction. On the one hand, China is far and away the world's leading executioner state, reportedly killing thousands of its citizens every year (Amnesty International 2020; Dui Hua 2020). China has held this dubious global distinction for decades. Even among the dwindling cohort of countries that continue to use capital punishment, China is an outlier. No other state has an annual body count that even comes close to China's. On the other hand, China is also surprisingly the world's leading death penalty reformer, diverting executions for thousands of condemned men and women every year and reportedly reducing executions by as much as 90 percent from late 20th century highs (Amnesty International 2017, 12; Dui Hua 2020). No other country has had a bigger impact on the decline of total executions worldwide in the 21st century than China.

How can China occupy these two roles—leading world executioner and leading world reformer—at the same time? On its face, this is a contradiction about numbers: China is a big country where policy shifts have consequences on a big scale. But at its heart, this is a contradiction about politics. China is an authoritarian country in which a surprising institution—the judiciary—has come to restrain state violence.

The People's Republic of China (PRC) is a one-party state that has been under the continuous control of the Chinese Communist Party (CCP) since its founding in 1949. For roughly half a century, China's CCP leaders played a direct political role in China's high volume of capital punishment. Both Mao Zedong and Deng Xiaoping made declarations and policy pronouncements that resulted in astronomical numbers of executions. But beginning in the 21st century, something shifted; China's leaders handed a key power over capital punishment to the Supreme People's Court (SPC). Beginning in 2007, the SPC instituted a process of review and approval for every capital verdict passed by lower courts throughout the country (an authority it had largely ceded to local authorities in the 1980s) (Liang 2016, 3-4). As a result, annual executions plummeted by 30 percent that year alone (China Daily 2007).

This dissertation is about the causes and consequences of the SPC's centralization of death penalty review power. I focus on a series of puzzles—some big, some small. The biggest of the puzzles is this: why did it happen? If China's leaders were simply interested in curtailing capital punishment, there were easier ways to do it. Central authorities could have abolished or reduced executions directly through legislation or policy directives. Instead, an authoritarian Party-state made the choice to empower the courts. In this way, China's path of capital punishment reform through the judiciary looks less like that of illiberal super-executors such as Saudi Arabia and Iran

[1] Quoted in Forster 2013, 4641.

[2] Liu Zongzhou (1578–1645), Chinese scholar and statesman, memorial to the emperor. Quoted in Brook et al. 2008, 49.

and more like one of the few democratic countries that still regularly puts people to death: the United States.

I argue that the key to understanding the cause of death penalty reform lies in understanding that China's leaders were not trying to reduce executions; instead, they were trying to control their subordinates. For centuries, central authorities in Beijing have struggled with the question of how much autonomy to provide to local government. Give local officials too little authority, and they can't govern properly; give them too much, and they won't listen to orders from Beijing. In the late 20th century China's leaders gave local authorities a lot of freedom (Landry 2008). This approach produced massive national economic growth, and also corruption, social discontent and uneven application of law. In the 21st century, reining local authorities back in became a pressing priority.

As I demonstrate in the following chapters, the administration of punishment—particularly capital punishment—serves an important and under-recognized auditing function in helping the state regulate hazards from its own judicial bureaucracy. This is because the administration of the death penalty allows central authorities to monitor the routine criminal justice work of local courts and other local actors at the same level of government. When China's SPC reviews a death penalty decision, it is not just evaluating a defendant; it is also checking the work of a bureaucratic chain of agents that runs through provincial courts, intermediate courts and even into adjacent law enforcement agencies. The resultant punishment, however important to the condemned, is beside the point. The state's main concern is: do all these lower government representatives do their jobs as their supervisors in Beijing expect? China's distinctive system of death penalty review, which involves lots of capital sentences and also lots of repeated oversight, reconsideration and deferred executions, probably does a good job of protecting against wrongful convictions, but it does an even better job of catching funny business in the lower courts. China could abolish the death penalty tomorrow without serious consequences for crime control and popular opinion. But if the state abandoned capital punishment, it would also give up an important tool of central political control over hundreds of thousands of judicial workers in China today, and it cannot afford to do that.

While in the first part of this dissertation I explain the causes and functions of death penalty reform, in the second part I turn to the consequences of China's authoritarian regulation of the death penalty through the courts since 2007. When an autocratic regime empowers the courts, a new series of contradictions emerges. I identify and explain a series of contradictions that death penalty reform has produced in four domains: the judiciary, the legal profession, penal legislation and state secrecy. Specifically, in Chapter Three I explore how the dynamics of death penalty reform increase judicial professionalism but not judicial independence. In Chapter Four I explain how death penalty reform has created a nascent death penalty defense bar with a complex political view of capital punishment. In Chapter Five I uncover why, following reform, China's legislature introduced life without parole (LWOP) as an alternative to death for bribery, but not murder. In Chapter Six I explore why in an era of death penalty regulation, the SPC posts some, but not all, death penalty verdicts online.

Two Audiences

The Contradictions of Chinese Capital Punishment can be approached from two directions. From one direction, the study of capital punishment can teach us a lot about China; starting from the other direction, the case of China can teach us a lot about the death penalty in general. I therefore write with two different audiences in mind.

Contradictions and China Studies

The first audience is readers who are interested in China. These readers will recognize that this work links together three key conversations taking place right now in China Studies across the fields of law, political science and criminology and social control. The first conversation connects law and governance. For a long time, China-watchers viewed the operation of law as a marginal domain in Chinese statecraft. Courts and cases were dismissed as political window-dressing. This view has recently given way. Scholars of authoritarian legality and political scientists have demonstrated the significant role that law plays in buttressing the state in resolving disputes, boosting state legitimacy, and providing a conduit for political information to central administrators (e.g. Ginsburg 2008; Stern 2013; Wang 2015; Gallagher 2017). In particular, legal grievance and review mechanisms that may seem liberal can in fact help the Party-state solve one of the most intractable challenges in Chinese one-party statecraft: the principal-agent problem (Edin 2003; Ginsburg 2008; Minzner 2009; Sng 2014; Gallagher 2017, 32-33; Zhang and Ginsburg 2018). The problem, in a nutshell, is this—how does a central authority (the principal) ensure that local officials (agents) act in Beijing's interest and not their own? One way that central leaders do this is by monitoring local disputes reported through the courts (O'Brien and Li 1999; Edin 2003; Stern 2013, 101-104). Scholars have identified the role that civil and administrative law play as flexible tools of authoritarian governance that work when citizens initiate legal claims, but criminal law has not received such a reappraisal. Even close accounts of criminal law treat it as a lagging (Trevaskes 2007, 1-2) or instrumental (Minas 2009, 37) legal domain. This project re-considers the death penalty as a monitoring tool and situates criminal law within the larger account of authoritarian legality in China.

A second conversation in China Studies concerns the function of criminal law in punishment in China. Works on the death penalty in particular draw on insights from Western punishment studies in order to show how the death penalty in China may serve ends that are instrumental (e.g. Lu and Miethe 2007), expressive and symbolic (e.g. Brook et al. 2008; Trevaskes 2010, 80) and populist (e.g. Miao 2013). While historians of China have foregrounded the bureaucratic functions of criminal law and capital punishment in China's past (e.g. Metzger 1973; Kuhn 1990), contemporary accounts have largely overlooked the hierarchical (or Weberian) uses of the death penalty in China today. In arguing that China's death penalty reform is a way for central authorities to monitor local agents, this project re-centers the role of the administrative state in conversations about criminal law and punishment in China.

Finally, political scientists point out that China, like all one-party authoritarian regimes, faces two competing imperatives: managing threats from citizens and managing threats from ruling elites (Magaloni and Kricheli 2010, 126; Minzner and Wang 2015, 340-1; O'Brien 2017). These imperatives create a dilemma (Slovik 2012). If the state fails to manage citizens, it risks popular revolt. However, if the state delegates too much power to its agents to manage citizens, it risks a coup. Leaders must therefore make hard choices about how to deploy coercive capacity on citizens and subordinates (Greitens 2016; Greitens 2017). The threat of death is of course a major form of coercion. The death penalty is also a *legal* form of coercion. My account of the death penalty in contemporary China draws law into the political science conversation about China's coercive dilemma (Greitens 2016).

Contradictions and Capital Punishment Scholarship

This dissertation also speaks to a second audience: people who are interested in the death penalty. Since nearly the inception of social science itself, investigators have aimed to explain the

social meaning, development, function and operation of punishment—and specifically capital punishment—across time and place (Durkheim 1969; Foucault 1977; Garland 1993; Garland 2010). Why do states execute? Why do some states stop executing? These questions have taken on new force in recent decades as death penalty abolition has become an international human rights movement (Hood and Hoyle 2015). Despite the worldwide reach of abolitionism, however, death penalty scholarship has not gone nearly so global. Influential accounts of the development of capital punishment focus almost exclusively on the history of the United States and Western Europe (e.g. Durkheim 1969; Foucault 1977; Spierenburg 1984; Gatrell 1994; Whitman 2003). In this study I show that the case of capital punishment in China affirms some of the received wisdoms about punishment from these works and upends others.

Approach

My approach to this dissertation is motivated by a desire to balance two competing methodological trends: comparativism and relativism. (Another way of putting this is that I adhere to the maxim that if no reader is completely satisfied then I am doing something right.) On the one hand, I take seriously calls from thoughtful criminologists for more rigorously and explicitly comparative research (Feeley 1997; Zimring 2006). How can we understand the death penalty in one place if we do not look at other places? Unless we compare, we can fall into the trap that David Nelken terms "confusing the familiar with the necessary" (2010, 18-19).

On the other hand, I also take seriously a long tradition of cultural relativism in area studies scholarship that calls for places to be studied on their own terms (Geertz 1973; Duara 1995). When we do compare, we may, if we are not careful, employ categories that inhibit our ability to really learn anything about a foreign jurisdiction. Teemu Ruskola calls this the trap of "legal orientalism." Ruskola warns that "[t]o the extent that the categories we employ always impose limits on what we can discover in the world, it is a fundamental effect of our acts of comparison that they in part produce the objects that are being compared" (2002, 226).

Coming to this fork in the methodological road, I have chosen to take it. Throughout this project I foreground that I am an American researcher with an American orientation to the death penalty. The United States claims its own exceptionalism in retaining the death penalty, our "peculiar institution" (Garland 2010) or the "American difference" (Zimring 2003, 65), and our so-called peculiarity propels me to lead with my own assumptions on the case of China. The US also stands out as a country where, like China, a supreme court exercises lots of control over capital punishment. In the 1970s the US Supreme Court seemed poised to find the death penalty unconstitutional, but instead it chose to regulate the punishment.

Each of my chapters begins with an account of American punishment that I avow as my starting point for the inquiry. These sections establish my preconceptions. Then, having laid down my priors, I work to test and challenge them. This means that I move from a posture of hypothesis-testing based on the American experience to hypothesis-generation for the case of China. Ultimately, I hope that whether one is interested in China, the United States, or both, readers will come away provoked to thought.

Data

It is said that the death penalty in China is a politically sensitive topic; this statement is generally correct but insufficiently precise. Some aspects of capital punishment are wide-open. The black-letter law of capital punishment, for example, is public. Anyone interested in what crimes are capital-eligible can consult the criminal code. Standards of proof, rules of evidence and

sentencing guidelines are a Google (or Baidu) search away. Many executions are publicized in state media, and anyone interested in these cases can read all about them in the paper. There are even popular television shows in China that profile the condemned.

Some aspects of the death penalty in China, however, are exceedingly sensitive. National annual statistics on the death penalty are top-secret. Disclosing data on executions can actually get a person sentenced to death. Writing about a case that has not been made public is also perilous, especially if the case has some political significance. Because some information is sensitive and some information is not, researching the death penalty in China is like tying a shoe with one hand. With partial restriction, a straightforward task becomes hard very quickly.

This project is a work of methodological pragmatism. I began by looking for sources of data that had not yet been explored. At the time I began this research, the most pathbreaking empirical work on law in China drew on interviews (e.g. Michelson 2007; Liu and Halliday 2011; Stern 2013), but no scholar had used systematic interviews as a source of information on capital punishment. I set out to change that. For this project I spoke to more than 70 people in China who are involved with death penalty administration. Most of these interviews were one-on-one and conducted in Chinese. Some lasted a few minutes; others took place over a few days.

More than half of these interviews were with lawyers who had handled at least one capital case. Lawyers are a particularly rich source of information on capital punishment for two reasons. First, lawyers have a front row seat in the death penalty process, but they also exist at the margin between system insiders (*tizhinei* 体制内) and system outsiders (*tizhiwai* 体制外); they have both a view on state workings and relative freedom to speak about what they know. Second, since some lawyers have represented dozens or even hundreds of capital-eligible clients, they can collectively speak to more cases than, say, the clients themselves. The rest of my contacts include sitting or retired judges, prosecutors, legal scholars, police, non-governmental experts, interns at the Death Penalty Review Division of the SPC and assorted other death penalty-adjacent people. These interviews took place over 18 months across four visits to China over four years between 2015 and 2019, roughly a decade after the reforms took place. I went to multiple sites across the country to make sure that my data were geographically diverse (touching coastal and inland sites) and jurisdictionally diverse (covering the arc from first-instance trial to central review). I outline these interviews methods in more detail in the appendix.

An interview-based approach can answer some questions but not others. For example, these interviews have not produced a new estimate of the number of annual executions in China. I leave that task to others. However, interviews do shed new light on how actors in the death penalty process view the significance of the number of annual executions. This project shows how the secrecy around a figure shapes how people think and act and how they perceive the legal proceedings in which they are involved. Because interviews alone have limits, in many places interview data are supplemented with other data. These sources include state regulations and legal guidelines, reports on individual cases collected from the media and case verdicts, and, in some places, quantitative analysis of publicly available court records. This work also draws on secondary sources in English and in Chinese, especially sources related to the administration of the death penalty in the recent and distant past, topics for which specialized historical records are key.

Layout

This dissertation is arranged into three parts. The first part, *The Past,* provides an account of punishment in China through the end of the 20th Century. A deep dive into China's imperial past (Chapter One) lays out how the emperor and his state administrators developed a complex

system of central death penalty review in order to supervise far-flung local officials across a sprawling territory. The emperor clung tenaciously to this increasingly costly, top-heavy review process, even as the entire dynastic system collapsed at the end of the 19th century. When Mao Zedong led the Chinese Communist Party to power in 1949 (Chapter Two), he proclaimed a radical departure from China's imperial past, even as his new government adapted the death penalty practices of the past to suit the new state. Mao's use of campaign justice and extreme decentralization temporarily privileged the direct relationship between the leader and the masses. As China turned towards global capitalism and the rule of law after Mao's death in 1976, his successors maintained this approach to capital punishment. During most of the second half of the 20th century, Chinese leaders supported policies that yielded lots of executions carried out in a relatively decentralized manner. But as the 21st century Chinese Communist Party came to more closely resemble the autocratic bureaucracy of China's past, the administration of capital punishment in China came to implicate many of the traditional promises and perils—the same contradictions—as it did under China's bureaucrats more than a century earlier in Imperial China. I show how these perils, including decentralization and the rise of Party corruption, help account for the timing of China's death penalty reform and its manner of empowering the court.

Part Two, *The Present*, brings us to 2007 and beyond. These chapters explain the consequences of death penalty reforms in the decade that followed. Each chapter highlights the effects of reform on a different group, institution or process. While the people most directly affected by the reforms were surely the men and women whose lives were spared in the years that followed the return of central review, it was not the condemned who were the direct object of the reforms; rather, it was the judiciary (Chapter Three). I explain how reforms provoked a major restructuring of the SPC. I describe the work of SPC death penalty review judges and explain how the review process provides a crucial mechanism for the central government to supervise and discipline local actors throughout the country. Although judges find themselves more disciplined following reforms, another group that was not the direct object of reforms was unexpectedly set free: lawyers (Chapter Four). Most criminal defense work in China has traditionally been handled by general practitioners who rely on local connections rather than criminal law expertise. I show how death penalty review procedures at the SPC in Beijing created a new national venue for attorneys to specialize in capital cases, catalyzing the professionalization of the defense bar.

Death penalty reform controls judges and lifts up lawyers, but it also impacts groups outside the courts, such as legislators. I explain how death penalty reform creates a tension between a state desire to get tough on corruption and a de facto moratorium on capital punishment for that crime. To deal with this impasse, in 2015 China's legislature introduced its first-ever life without parole provision for just one capital-eligible crime: bribe-taking (Chapter Five). Death penalty reforms also implicate international affairs. China's national execution numbers are a state secret. The international community regularly calls for disclosure. Before 2007 execution data was spread out across dozens of provincial courts. The information was easy to keep under wraps. Now that all capital cases pass through the Supreme People's Court in Beijing, even simple figures such as the size of the court docket have become state secrets. I show that death penalty review creates a clash of policy between policy priorities of judicial transparency and national secrecy (Chapter Six).

Part Three, *The Future*, offers conclusions about the present and predictions about what comes next (Chapter Seven). I offer two sets of predictions. First, as in the US, pundits in China have been anticipating the demise of the death penalty for a very long time. I argue that while death penalty reform will continue to reduce the scale of executions, it has also made it harder for

China to get to zero. Reform has created institutions that can constrain the death penalty, but cannot abolish it. Second, death penalty reform came about in a political moment that brought together the forces of law, state self-regulation and social control. I conclude by arguing that while death penalty oversight is here to stay, the confluence of interests it serves are diverging, rather than converging, in the Xi Jinping Era.

I. THE PAST

Chapter 1: Imperial History

As government organs and institutions proliferate, the officials and the people are increasingly divorced from one another, and superior and subordinate within the bureaucracy, as well, become ever more remote.

– Chen Hongmou (1696-1771), Qing Dynasty statesman[1]

Memorialize, requesting a decision.

– The Great Qing Code, Article I, Section Five, Capital Punishment, interlineal commentary on official protocol for submitting death penalty verdicts to the emperor[2]

Legal interpretation takes place in a field of pain and death.

– Robert Cover[3]

Introduction

Yu Yingxuan, a man from Baodi County, about 100 km from Beijing, was in his mid-50s in 1858 when he killed his mother. According to imperial records, Yu had an argument with his wife and threw a piece of wood at her. He missed, striking and killing his mother instead. Baodi County authorities recommended that Yu be put to death for the matricide.[4] But Yu was not immediately executed. Instead, he was sent to the provincial seat. Provincial authorities affirmed a capital verdict and sent the file on to Beijing; they also sent Yu back to the Baodi County jail to await confirmation of the sentence. Officials in the capital reviewed Yu's sentence the next year, and Yu was issued a stay. After the stay, lower provincial officials interviewed Yu again and sent updates on the case back to Beijing. Meanwhile, Yu waited. Officials in Beijing reviewed the case again the next year and issued another stay. This happened again the next year.

In all, Yu's death sentence was reviewed and postponed 20 times. Finally, after two decades of delay, authorities decided that Yu—still confined and now an old man in his mid-70s—was eligible for a sentence reduction in light of his advanced age. His sentence was reduced to banishment, and he was finally transferred to another province to serve it.

Yu's story is common. In late imperial China the typical capital case involved a swift local trial and an inevitable finding of guilt, followed by a laborious, cumbersome and slow process of bureaucratic sentencing. This chain extended from the local magistrate all the way to the throne in Beijing. Stays of execution were so typical that the criminal code contained regulations regarding management of those deferrals. Many condemned men and women waited decades for execution (Waley-Cohen 1991, 63). This system was strikingly detailed on paper, and ridiculously time-consuming and costly for its administrators in practice.

For the average Western reader, Yu's story may provoke an uncanny sense of familiarity. His plight sounds like that of a death row inmate in a contemporary US state like California, where

[1] Quoted in Rowe 2001, 351-52.

[2] Quoted in Jones, trans. 1994, 34.

[3] 1986, 1601.

[4] This case, which is recounted by Katherine Poling (2012, 82), comes from the Shuntian Prefecture archive, year 12 of the reign of the Daoguang emperor (ru1e, 1820-50).

the average condemned inmate sits on death row for at least 25 years and is more likely to die of natural causes than to be executed (Uelmen 2009, 496). Today we are inclined to see these long delays as a modern bug; a symptom of a hypertrophied liberal democratic society that is obsessively litigious, politically divided, and morally conflicted. In his study of the contemporary death penalty, David Garland sums up the dominant critique of the American death penalty today: "it serves no functions, obeys no logic, and has no redeeming rationale" (Garland 2010, 285). It is a shock to observe a similar situation two centuries in the past in a unified monarchy. In Imperial China, in an age without death penalty abolitionism or constitutional litigation to gum up the works, what explains the endurance of a system that regularly produced outcomes like Mr. Yu's?

In this chapter I will examine the system of Chinese imperial death penalty review, and I will argue that its convolutions were a feature, not a bug. If the highest purpose of the imperial death penalty review system was to correctly and effectively mete out punishment to an offender, deter crime or meet any other traditional Western penal rationale, the steps of this process appear absurd, "needlessly complicated" (Meijer 1984, 14), "complex, overly refined…and wasteful of man-power" (Bodde and Morris 1967, 142). If, however, we consider the people who processed the death penalty cases, rather than those subjected to the crime or the punishment, the point of the system comes into new focus. What was at stake in capital review was something beyond the outcome for the offender, the victim or even the public. What was at stake was the accountability of those charged with the administration of criminal justice itself. The inter-agency review of capital punishment decisions was not an obstacle to administration of a penalty, but rather the penalty's highest state purpose.

This single chapter covers a greater sweep of time and space than the entire rest of the project. It is intended as a background chapter to fill in gaps for readers unfamiliar with Chinese history. It is also intended as a theoretical chapter, as I present institutional dynamics from the past that I believe explain capital punishment today. Unlike the four chapters in the section on the Present, I do not present original empirical research here. My argument draws almost entirely on secondary sources, though I do rely on general insights gleaned from time spent working with primary-source Qing Dynasty archival materials.[5] Because this chapter covers so much ground, it begins with some exposition on time period and historiography. As in other chapters, I explicitly frame the case of capital punishment in China against the case of the US (and here, other Western countries). After that, I proceed to lay out the story of the death penalty in Imperial China. I explain its structure in the legal code, its administration and its scope. Across the chapter I build an argument that will connect the past to the present and provide insights into capital punishment in China today.

Across Time and Place

This chapter presents a picture of the typical workings of the administration of capital punishment in the last centuries of Imperial China, and more specifically, the Qing Dynasty (1644-1912). Imperial China refers broadly to a roughly 2,000-year span of history in which a series of emperors ruled China. These emperors passed succession through family lines known as dynasties. China's first dynasty, the Qin, began in 221 b.c.e, when the Qin emperor conquered neighboring states and united the territory into an empire. The Qin Dynasty survived only 15 years. China's

[5] I thank Matthew Sommer, whose Stanford University graduate courses on Qing Law and Society and Qing Legal Documents I attended in 2014 and 2015. Those classes provided formative insights that have shaped the course of this dissertation.

last dynasty, the Qing Dynasty, which was established when foreign Manchus invaded China from the North, lasted considerably longer—more than 250 years.

This chapter focuses on the Qing Dynasty because of the unique structure of its death penalty administration, as well as its proximity in time to, and corresponding influence on, contemporary China. For nearly the entirety of this dynasty, the emperor and his bureaucracy employed a system of administrative death penalty review that bears striking resemblances to the process that China's Supreme People's Court reinstituted in 2007. While some features of imperial capital punishment—such as the Criminal Code—existed in China for millennia across many dynasties, the major studies of the imperial death penalty case review process find that this review system reached its fullest articulation in the Qing (Bodde and Morris 1967, 134-36; Meijer 1984; Sun 2007, 1-32; Poling 2012). Bodde and Morris cite the earliest reference to the death penalty review system in 1459 and state that by the first year of the Qing Dynasty (1644), documents regularly refer to the review system—which is also sometimes termed "the autumn assizes"[6] (1967, 134-36). Meijer finds the system fully established by 1661, with some periodic adjustments through the eighteenth century (1984, 13-14).

The presentation of death penalty review as an institution that persisted for centuries is not intended to paper over variation. The system was adjusted repeatedly in the 1700s (Meijer 1984). By the early 1800s, banishment became a common outcome of the process, and by the late 1800s, the review system was essentially defunct in practice, as local officials dispensed summary justice amid popular revolt (Waley-Cohen 1991, 63; Poling 2012, 110-11). Yet even then, central officials argued that the review system should be retained. If we take a long institutional view, we can ask why the empire was so committed to the persistence of this system, despite its seeming dysfunction in some moments?

Such a wide historical lens poses challenges of comparison. Throughout this dissertation, I compare China's twenty-first century death penalty reforms to reforms in the United States beginning in the 1970s. That's a relatively narrow historical window. What would a comprehensive synthesis of American capital punishment practice during the entire period of the Qing Dynasty look like? To address the period from 1644 to 1912, such an approach would have to cover colonial New England and the varied punishments of small religious settlements, in all their theological permutations (Friedman 1993; Banner 2002, 5-23). It would cover capital punishment in the antebellum North (Masur 1989) and the legacy of rough justice and slavery in the antebellum South. It would cover lynching and Jim Crow after the Civil War (Alexander 2010). Because America was not an independent country in 1644, a full account would also require an examination of its colonial head, England, notably the so-called "Bloody Code"—or harsh criminal law in place during that period—and the frequent public hangings at Tyburn (Hay 1975; Gatrell 1994). It would also require an account of other European colonial powers in America. For example, France, which controlled American territory from the Hudson Bay to the Gulf of Mexico.

Not only would such an account cover a huge range of times and places, but it would also include stretches that are considered pivotal shifts in capital practice in the West. For example, the

---

[6] 19th Century Western sinologists, translating from the Chinese term-of-art (监候秋候处决，*jianhou qiuhou chujue*, literally "waiting in jail until after autumn when a decision about the punishment was made") (Meijer 1984, 2) used this term because the court convened in the fall ("autumn") and was periodic (as an "assize court" in England). The term assize is now rarely used in English, and the process involved year-round work, so the classical term is not particularly helpful. I follow Poling (2012, 4) in jettisoning the term. Poling prefers the "case review" system.

Qing Dynasty similarly spans the entire reach of Michel Foucault's famous account of the historical shift in punishment in France (1977). The imperial case review system was already in operation before the 1670 ordinances Foucault describes in the spectacle of the scaffold (1977, 32). Case review remained in place when Damiens the Regicide was executed 1757, marking Foucault's depiction of "sovereign" power (3). It was still in use throughout the 1800s, as Foucault narrates the turn to "disciplinary" power and the birth of the prison.

Rather than provide a direct compassion with China across all such moments over centuries of Western history, it is more manageable to provide a typological framework that captures the most general set of changes in Western capital punishment that punishment scholars have identified. In his survey of the vast literature on the death penalty in the West, David Garland summarizes the historical sweep of capital punishment over Western Europe and America into three eras or modes. The eras are the "early modern," the "modern," and the "late modern"—each of which displays its own "forms and functions" (Garland 2010, 74). In the first mode, early modern, capital punishment is a tool of state formation. Weak leaders struggled to maintain a monopoly on violence and used public and terror-inspiring capital punishment in order to assert power, maintain order, establish justice and define social hierarchy (Garland 2010, 76). Early modern capital punishment was dispensed by an absolute monarch, who also used acts of mercy to signal paternalistic beneficence (81). Capital punishment in the early modern mode dominated in Europe from very roughly 1400 to 1700 (75).

The second, or "modern," mode predominated once states achieved some degree of territorial control, regime legitimacy and a monopoly on violence. According to Garland, "[t]he modern mode of capital punishment is efficient, clinical and standardized. It signals the bureaucratic routine" (93). Capital punishment shifted from a political sanction against enemies of the monarch to a legal sanction imposed against criminals who violated the law. Capital punishment in the early modern mode arose in Europe along with the Enlightenment and liberal democracy through the late 19th century. Other institutions such as prisons began to supplant the crime control functions of capital punishment as well. European states employed the "modern mode" of capital punishment during roughly the same period as Qing rule in imperial China.

Finally, Garland distinguishes the "late modern" mode of capital punishment, which predominates in contemporary liberal democracies today. In the late modern mode, the state formation and maintenance functions of the death penalty are no longer necessary. Indeed, the death penalty sits in increasing tension with other state values of humanism and rule of law. In this period, which predominates in Europe after World War II, European states abolished capital punishment. Britain did so in 1965, France in 1981 (98). In the United States, which still retains the death penalty, this period is characterized by contradictions and ambiguities, as the death penalty has fallen out of regular use but remains the subject of heated popular discourse.

The Problem of "Modernity"

David Garland's typology of modern capital punishment offers a framework for understanding the development of the death penalty in the West. Is it helpful for understanding China? Yes and no. This typology does not describe Qing Dynasty capital punishment, as the Qing dynasty system exhibits features of each of Garland's three modern modes. Garland himself is explicit that he does not intend his typology to hold outside the West. But understanding how and why Garland's typology does not fit China may help us understand what was (and is) going on with the death penalty in China, and why its imperial death penalty administration may seem uncanny to a Western audience.

"Modernity"—which is central to Garland's analysis—is at the heart of this problem. Modernity in China is a vexed subject and a longstanding bugbear for those who venture into comparativism (Fairbank 1986, 39-40). Precisely because China's history did not unfold in the same way as the West, when we talk about modernity in China, we find an unfamiliar chronology. On the one hand, looking at some markers of Western modernity, one may look at the past and ask why China modernized so late. China did not undergo an industrial revolution. China boasted no bourgeoisie class. China's early, strong central state suppressed the emergence of other power bases such as the church that were key to modernity in the West. Max Weber was an early proponent of this position. On this view, China only became modern after the fall of empire.

On the other hand, looking at other markers of Western modernity, one may look at the same past and ask why China modernized so early. China was among the world's first bureaucratic states. In his work *Lost Modernities: China, Vietnam, Korea, and the Hazards of World History*, the historian Alexander Woodside argues that China was modern before its time. Competitive, merit-based rule was a powerful tool of Chinese administration that allowed a small state apparatus to both govern a large population and maintain stability and continuity of rule across emperors and dynasties. China established a merit-based imperial examination system by the end of the Tang Dynasty (618-907). Asia was the only place in the world where civil service examinations emerged prior to the industrial revolution (Woodside 2006, 26). On this view, it is precisely because some elements typical of European modernity developed so early in China that other elements of the modern European state did not emerge in China (Fukuyama 2011).

Once we become attentive to the particulars of China's historical political development, the incongruities of the Qing death penalty review system are less incongruous. And, once we see how and why this system operated, we can also begin to understand its historical continuities and breaks and its implications for the death penalty in China and elsewhere today.

The Political Structure of the Qing

On October 30, 1644, Shunzhi performed the rituals on the Altar of Heaven in Beijing, formally establishing himself as the first in a line of Qing Dynasty emperors who would rule China for two and a half centuries. Shunzhi was six years old. No matter. As with many young monarchs across the world, he had help in his official duties; his uncle Dorgon governed in his name until he was old enough to rule. But unlike monarchs in other places, the young Shunzhi Emperor had more than just family support. This was because he inherited more than a throne; he also inherited the entire bureaucracy of the defeated Ming Dynasty (1368-1644).

The emperor relied on his bureaucracy to manage the empire. The new Qing leaders recognized the importance of imperial institutions as the goose that lays the golden egg of good governance. Qing leaders were anxious to keep this administration running smoothly. Indeed, one of Dorgon's first acts after consolidating power in the capital was to resume civil service examinations, a process that was briefly disrupted as Qing leaders invaded from the North. Although the Qing rulers were Manchus, they allowed other ethnic groups, including the conquered Han Chinese, to sit for the exam (Fairbank 1986, 18-19). In doing so, they continued a millennia-long tradition in which a meritocratic administration—rather than a hereditary one—supervised the vast empire under the command of the emperor.

The emperor recruited his bureaucracy through the civil service examination system. Men from any walk of life could sit for the rigorous exams. The lowest level exams, the qualifying examinations, were each multi-day affairs. These qualifying exams led the way to the three actual examinations, which took place in the provincial capitals, in the imperial capital and finally in the

palace itself. Applicants were only allowed to bring bare essentials to the test facility and typically spent days and nights taking the test cloistered in individual cubicles. The examinations were subject to blind review, and submissions were transcribed in order to disguise an applicant's distinctive calligraphy. Fewer than one percent of the lucky few who actually sat for the exams passed, and quotas were placed on the number of degrees awarded (Fairbank 1985, 29). Those who passed showed deep command of both literary and policy matters. They were "men about thirty-five years old who had spent at least a quarter of a century in the strenuous discipline of classical scholarship" (Fairbank 1985, 31).

The lucky and talented few who passed the civil service exams typically began their government careers as magistrates at the lowest rung of state administration. The magistrate was a generalist-statesman who presided over all the affairs of a county, the most local level of governance. The magistrate was in charge of criminal justice, as well as tax collection, and every other problem in his jurisdiction. At its height of influence the Qing dynasty state boasted a territory roughly the same size as China today and a population larger than Europe today. The entire empire employed only about 1,600 civil administrators outside the capital, including a magistrate in each of 1,500 counties and a governor in each province (Li Chen 2012, 2; Sng 2013, 110). Local officials reported to provincial officials, who reported to central ministries in Beijing and, ultimately, the throne.

The Hazards of Bureaucracy

The Qing emperor, like autocrats today (Svolik 2012; Greitens 2016), faced two major threats to his continued rule: popular rebellions and elite coups. The civil service system of the Qing offered both unique opportunities and unique challenges for managing these two threats.

The first threat is the more obvious: popular unrest. Periodically throughout the Qing Dynasty, social movements and rebellions bubbled up within China's borders (Robinson 2001, 21-26; Miller 2013). Qing rulers suppressed numerous rebellions, most notably the White Lotus, the Taiping and the Boxer (Kuhn 1970; Escherick 1987). These were not small events. The Taiping rebellion (1850-1864) lasted 14 years and led to the deaths of at least 20 million people. The line between rebellion and social "unrest" (Miller 2013) was also murky. Banditry and brigandry were perennial threats (Antony 2016). The emperor struggled to maintain control over a vast territory, particularly in border regions as the empire doubled in size over the course of the dynasty (Lipman 2006; Sutton 2003).

The Qing empire succeeded in quelling popular unrest and maintaining territorial control despite a very small state footprint. It accomplished this in large part because of the skill of its local administrators. Because of their geographical distance and wide mandate, local administrators wielded tremendous discretionary power in their region. This discretion allowed for great service to the empire, but also represented a constant threat of deviation from the monarch's interests.

This brings us to the second threat: a coup from within. As delegates of the throne, local administrators posed what was—and continues to be—a major challenge of governance for the Chinese state: going rogue. While magistrates were representatives of the emperor, they had constant opportunities to place their own desires ahead of those of the monarch in Beijing and amass personal fiefdoms in the process. This fact is particularly evident in two areas: death and taxes. Local officials were responsible for the sovereign's two main prerogatives: collecting money and dispensing justice. Officials faced local incentives to ignore the interests of the emperor and

strengthen their own position. In the most extreme circumstances, they might even try to usurp the throne.

In contemporary academic literature this challenge of controlling officials is typically termed the principal-agent problem (Edin 2003; Minzner 2009; Sng 2014; Gallagher 2017, 32-33; Zhang and Ginsburg 2018). A thousand years ago, it preoccupied Chinese theorists. The Song Dynasty statesman and reformer Wang Anshi, for example, worried that if civil service salaries were low, administrators would be tempted to boost personal status by acting in their own interest, rather than in the interests of the monarch (Woodside 2006, 47). As one historian writes, "They could get rich from fees and squeeze. Why do more?" (Fairbank 1986, 19). The emperor constantly struggled to ensure that his officials were both zealous in their duties and loyal to his interests.

Officials wielded the power of the emperor by proxy. They oversaw the collection of state revenue and had all the tools of state violence at their disposal yet could not claim these rights and privileges as their own. Unlike European feudal aristocracies, where the ruling class was confident in its continued right to rule through lineage, imperial Chinese officials were plagued by status anxiety and the risk of intergenerational social backslide. Officials had no hereditary claims to status. Unable to confer appointment on one's children, an official was under constant pressure to convert the political capital of officialdom into other more mobile forms of capital—monetary or interpersonal—that might be passed along to family.

The fiscal structure of the imperial state made the principal-agent problem worse. A magistrate in the mid-Qing dynasty drew a salary of between 400 and 2,000 taels per year. Meanwhile, an official's expenses—including costs for clerks and a legal advisor—easily exceeded 10,000 taels per year (Park 2002, 156). In effect, the imperial system *required* that the magistrate creatively fund a shadow administration to manage the business of the state. Thus, the bedrock of public administrative funding at the local level was nominally private income (Reed 2000, 19). Under this economic arrangement, even the most upright official was forced to seek shady sources of revenue (Rowe 2001, 339).

This funding model produced regular consternation about a bureaucratic problem China faces today: corruption. As a matter of law, most forms of revenue generation violated the legal code (Park 1997). In practice, however, there was a continuum of approaches to fundraising from the tacitly accepted to the widely condemned. On one end of the spectrum, officials might drum up money by charging customary fees for services, or what we might consider payments to induce officials to carry out their duties; this approach was almost universally practiced and rarely punished (Reed 2000; Macauley 1998). On the other end of the spectrum, bribery, or what we might consider payments to induce officials to overlook their duties, were broadly criticized and occasionally prosecuted (Park 1997, 981).

The emperor employed a wide variety of methods to manage his agents (Kuhn 1990). The most pervasive was ideological suasion. People may obey authority not out of fear of punishment, but because it is how they have been socialized. Officials who passed through the civil service exams were steeped in Confucianism, the dominant state ideology. Confucianism is a hierarchical, humanist outlook that stresses propriety, cultivated personal conduct and respect for social order and its associated relationships, including the relationship between ruler and subject and between parent and child (de Bary and Bloom 1999). It is telling that the standard appellation for magistrates in imperial China, *fumuguan,* literally "parent official," fuses these two status markers.

To better monitor his representatives, the emperor also employed an independent oversight body: the Censorate. The Censorate was an agency that possessed an administrative rank parallel with the six imperial ministries and the military. In order to vouchsafe independence, censors were

recruited young, typically immediately upon successfully passing the imperial exam (Hucker 1951, 1045). Censors were bound by strictures that were even more imposing than magistrates; for example, they were not accompanied by family on tours of duty, which were year-long regional inspection assignments (Hucker 1951, 1045).

Since corruption was in some sense universal in imperial China, the state could not afford to remove all officials guilty of corruption. Given the structural impossibility of a zero-tolerance response to corruption and the endemic nature of the principal-agent problem, the emperor typically removed officials only when corruption posed a threat to rule. This might happen when corruption produced popular unrest. A corrupt official might not only fail in the duty of quelling popular dissent, but also shake down locals to the point of triggering a rebellion. For example, the Daoguang Emperor acknowledged that one of the most significant uprisings in late imperial China—the White Lotus Rebellion (1794-1804)—occurred in response to extortion by local officials (Ter Haar 1992). The emperor would also purge officials whose corruption posed risk of a coup. Some corrupt officials' level of graft was so extreme that it threatened the central coffers (Waley-Cohen 1991, 84). This was the case, for example, with the official Heshen, the subject of the most notorious corruption case of the Qing Dynasty. When Heshen was finally brought down, his confiscated assets were reportedly valued as equal to 15 years of imperial tax revenue.

While the emperor occasionally faced a rebellion or a coup, the trick to dynastic rule was in managing and monitoring these threats before they required extreme intervention. In the following sections I argue that criminal justice in general—and the death penalty in particular—provided the emperor with routine tools for managing *both* popular and elite threats.

Two Faces of Criminal Justice

How did the emperor manage the twin threats to his state power: popular and elite revolt? Most crudely, through violence. The state is traditionally defined as an institution with a monopoly on the legitimate use of violence (Weber [1919] 1965). Classic narratives of state development stress a sequential development from the martial violence of state consolidation to the routinized policing violence of criminal justice. Of course, this sequence of violence is never so clear-cut in practice. Chinese emperors consolidated power and implemented criminal law before the first century c.e. At the same time, emperors regularly resorted to military violence to quell major rebellions through the 19th century. Nonetheless, the most typical state violence in late Imperial China was the routine violence of the law. All law is in some sense backed by violence (Cover 1986); that violence is articulated directly in punishment.

Qing emperors faced a concrete political tension in dispensing punishment. On the one hand, the emperor had to safeguard his dominion over the population: what we might call the sovereign-subject relationship. He had to repress rebellion, maintain stability, deliver justice and punish transgressions of his authority by his subjects. His subjects were far away; if he did not dispense punishment, he might lose authority and risk political instability. On the other hand, the emperor could not physically punish all his subjects himself. He had to do so through his agents. The emperor's agents were also far away. If he delegated too much of his power to punish to local officials, he might also lose authority and risk political instability. This gives rise to the principal-agent problem. Each of these relationships was of existential importance to the emperor, but the two relationships—between emperor and subject and between emperor and agent—were frequently in tension. And that tension played out in the use of capital punishment.

Capital punishment was the one form of punishment in which the emperor exercised dominion over all decisions. One of the emperor's formal duties was personal review of all capital

sentences throughout the empire. This process, which took place every fall in the capital, was filled with pomp and circumstance. The emperor undertook final judgment of routine capital cases during particular days in autumn that harmonized with prevailing lunar cosmology, demonstrating his mandate from heaven to rule (Bodde and Morris 1967). He conducted his final judgment using an iconic vermillion brush amidst days of ceremony, signaling his regal authority (Meijer 1984). Individual acts of clemency in capital punishment cases fit alongside periodic general amnesties as regular performances of mercy by the sovereign (McKnight 1981).

Nonetheless, although the emperor was the final authority for all acts of state capital violence, he did not do the deed himself. The emperor relied on his vast state apparatus to send cases up for his judgement and carry out punishments on his command. The task of dispensing routine violence in criminal cases fell to his magistrates. The local magistrate meted out punishments on behalf of the monarch. How did the monarch know that the official was acting as his emissary? One method was law.

The Qing Dynasty, as dynasties before it, employed a complex legal code. Although the emperor was not subject to the legal code and was above the law, the emperor's administrators were bound by the law. Indeed, many of the code's provisions specifically regulate the conduct and treatment of officials (e.g. Jones 1994, 40-41). Insofar as officials were the sovereign's representatives in criminal justice, if an official had to be punished by the emperor, this was the moment when the bureaucracy could break down. Ultimately, the bare application of sovereign discretion was not only a necessary recourse in these cases, it was also a useful corrective to the stultification of bureaucracy. It was also not uncommon.

During the reign of the Qianlong emperor (1735-96), for example, 22 percent of governors and governors-general were prosecuted for corruption, and about half of those officials were executed (Park 1997, 999). A mid-level official had about a one in ten chance of being put to death for corruption in this period. This is, it should be noted, a much higher rate of both prosecution and execution than the population at large at the time. Officials were also singled out for special review in the death penalty process. Officials occupied one part of a particular category of *Circumstances Deserving Capital Punishment* subject to special review during the death penalty review process (Bodde and Morris 1967, 139). Other types of offenders on this list could have their death sentence commuted to another punishment after two years. Officials were required to remain on the list for a grueling ten years—that is ten rounds of review—before finally receiving a commutation. In short, while magistrates were responsible for dispensing punishment, they were in some cases more strictly subject to punishment than those they governed.

An Overview of the Death Penalty in the Qing Dynasty

The Legal Code: Capital Punishment on the Books

How did the emperor specify his sovereign expectations regarding capital punishment? He codified them. When the Manchu invaders installed themselves in the seat of power, they installed a legal code as well. While the Great Qing Code (*Daqing lüli* 大清律例), bears the name of the dynasty, it was in fact modelled on its predecessors (Hegel 2007, 11). Legal codes date back at least a millennium in China (Jones 1994, 1). While each successive dynasty introduced its own new edition of the code, this promulgation was a copy-and-paste affair. The Code is essentially continuous across regimes.

This is not to say that law was not responsive to new circumstances. Jurisprudence that might take the form of amendments, legislative interpretations or case law today was introduced

into the code through the introduction of sub-statutes. These sub-statutes varied greatly, expounding or even drastically reinterpreting the relevant statute. In addition, magistrates or their functionaries privately circulated casebooks providing examples and interpretations of sticky cases, effectively relying on precedent. In short, the code was an enduring basis of Chinese imperial law, and also a flexible document that changed with the times.

In organization, the code is an administrative document. The code is structured according to bureaucratic responsibility, dividing duties among the six state ministries that oversee each matter in question. In this way the code has been described as entirely administrative law (Jones 1994, 6). In substance, the law contained in the code includes a range of topics that are roughly analogous to those in Western legal systems. Penal jurisprudence holds pride of place in the code, however.

The first part of the code, which might be called the General Part, is devoted entirely to punishments and their application (Jones 1994, 31). The code's very first article lays down the so-called "five punishments" available under Chinese law. They are: beating with light bamboo, beating with heavy bamboo, penal servitude, exile and death. The five punishments are arranged in an ordinal fashion. The punishments are ordinal in terms of severity—a light beating is the mildest punishment and death is the most extreme. Each type of punishment in turn includes a range of levels within it. A beating with the light bamboo, for example, may range from 10 to 50 blows; there are three categories of exile graded by distance from home (the most severe degree of exile is banishment at a distance of 1,000 miles to a malarial region) (Waley-Cohen 1991). The General Part of the code focuses on circumstances under which punishment for a crime may be modified. Thus, for example, a punishment may be reduced by degrees if the offender has only accomplice liability (e.g. Article 30), confesses (e.g. Article 25) or lacks requisite intent (Article 409). In these cases, the reductions are calculated by degrees, such that, for example, the case of a person facing the most extreme degree of penal servitude (three years forced labor), might merit sentence reduction to 70 blows with a heavy bamboo.

Capital punishment—the highest form of punishment available under Chinese law—was itself subdivided into three degrees: strangulation, decapitation and *lingchi*, which is variously translated as dismemberment, the lingering death, death by slicing or death by a thousand cuts (Brook et al. 2008, 2). While this last punishment at first appears to distinguish itself by the degree of graphic pain and suffering it entails, in fact this was not the primary quality of the punishment. Indeed, people condemned to this punishment—which was used very rarely—were often given sedatives before the act. The horror of slow slicing was cosmological as much as corporeal. Chinese metaphysics emphasized the importance of the bodily integrity of the corpse as a matter of filial honor (one's body comes from one's ancestors) in the transmission of the spirit after death. Thus, strangulation, which maintains bodily integrity, is the least severe capital punishment, while dismemberment, which scatters the body, is the most extreme (Brook et al. 2008).[7]

The ordinal nature of the five punishments is mirrored in the ordinal nature of their administration: the more serious the punishment, the more elevated the requirement for authorization. Magistrates were not obligated to submit to review in order to dispense the two penalties at the lowest level of the code—beatings with the light and heavy bamboo. The more

[7] Interestingly, this view on the relative severity of decapitation and strangulation is the precise reverse of the view in Europe at the time (Whitman 2003, 103).

severe penalties of penal servitude and exile required approval by the provincial governor. Finally, capital sentences were subject to confirmation by the emperor himself.

Penal Procedure in the Qing Dynasty				
Level of Review	Category of cases (according to punishment)			
	Bamboo blows	**Penal servitude**	**Exile or penal servitude involving homicide**	**Capital**
District (magistrate)	Tried	Investigated	Investigated	Investigated
Prefecture	Cases collectively reported	Transmitted	Transmitted	Transmitted
Provincial Court	Highest possible appeal	Tried	Tried	Tried
Provincial Governor		Confirmed	Confirmed	Confirmed
Board of Punishments		Cases collectively reported	Final judgment	Reviewed
Three High Courts				Final judgement
Emperor				Ratification
This chart is adapted from Bodde and Morris 1967, 116				

Capital sentences included a further designation of immediate or deferred review. Capital verdicts designated for immediate review were fast-tracked; such cases would be presented to the emperor for expedited ratification immediately after undergoing bureaucratic review. Such cases were uncommon. By contrast, a majority of cases were designated for deferred execution. After these sentences were reviewed by central authorities they would be placed on a general docket that the emperor reviewed annually in the autumn. This was what happened to the case of Mr. Yu, whose conviction for the murder of his mother opened this chapter.

The Bureaucrats: Capital Punishment in Action

The law of course requires people to enforce it. In Imperial China the law was enforced by state officials. These officials oversaw investigation, adjudication, case review and finally punishment. They occupied the apex of social prestige in China. Officials had higher status than elites in either the military or business. This prestige was partly practical: as the representatives of the state, officials had say over just about every matter of importance in imperial society. Official decisions had the power to enrich or ruin, punish or emancipate, give or take away. But their prestige was partly ideological: in a society with highly prescribed social relations, officials occupied a prime position in the Confucian hierarchy. And finally it was partly meritocratic: officials gained office by passing a rigorous set of examinations. While moneyed elites invested heavily in education to give their children a leg up, the tests were in principle available to all.

Successful exam-takers were presumed to be among the most talented and capable people in the empire. Of course the subject matter of the imperial exams—the Confucian classics—gave China's best and brightest no preparation for the practical challenges of state administration. A freshly-minted local magistrate could write a superb eight-legged Confucian essay, but he was unlikely to have any experience collecting taxes from recalcitrant villagers in the sticks, hunting down highway bandits, or, crucially, parsing complex legal statutes. Because magistrates had little practical experience, scarce time and scant local knowledge, much of the day-to-day work was carried out by local staff. The magistrate paid local staff out of pocket. These local staff may be regarded as sub-official bureaucrats, shadow administrators, or sub-contracted labor (Reed 2000; Rowe 2001; Guy 2017). Whatever they were, they kept the empire going.

To get a sense of the scale of the staff, consider a case of homicide. Typically murders would be reported to the office of the magistrate, which would then begin the process of investigation. The magistrate would retain a coroner who would be dispatched to autopsy the body. Constables and other local court-runners, also under the employ of the magistrate, would be tasked with bringing in witnesses for interrogation, sometimes under duress (Hegel 2007, 15; Park 2008). A clerk would prepare a transcript of depositions. In this way the magistrate and his support staff would assess the facts of the case and ascertain the guilty parties. The next step was adjudication. In order to properly rule in the case, the magistrate needed to know the relevant law—statute, sub-statute and perhaps precedent. This was beyond the ken of the average magistrate. Most magistrates got around this problem by retaining a legal advisor as a sort of in-house counsel (Li Chen 2012). Legal advisors were typically drawn from the same social milieu as officials themselves. An increasing population combined with a static level of magistrate staffing produced a large pool of failed exam-takers and aspiring literati who began to specialize in legal administration (Li Chen 2012, 8; Fuma 2007, 79). Legal advisors directed magistrates to the relevant charges and sentencing guidelines in a criminal case. In a homicide case the magistrate would make a judgment about the crime and culpability but forward the case up the judicial hierarchy for formal trial.

It is worth digressing here to emphasize that while legal advisors were certainly legal specialists, they did not form a professional class—if profession is defined by self-regulation and autonomy (Abbott 2014). While traditional scholarship has downplayed the role of the legal profession in China, more recent research shows that some types of private legal work did emerge as occupations by the late Qing. The most notable of these was the role of "litigation master" (*song shi* 讼师) (Macauley 1998; Fuma 2007). Litigation masters maintained guilds and provided legal services such as drafting plaints in civil litigation. Litigation masters were not involved in criminal proceedings, however. The criminal process was entirely inquisitorial, with no adversarial

representation for the accused. The role of the legal advisor in these criminal cases was that of judge-for-hire, not lawyer-for-hire.

Legal advisors helped draft the sentencing memorials that would be submitted to higher authorities in capital cases. Memorials were a general class of official communications. In criminal cases, these memorials were formulaic, but also technical and detailed (Buoye 1990). Memorials began with boilerplate language addressing the emperor and iterating the bona fides of the magistrate submitting the memorial. Next came a statement of the crime, sentence and relevant statutory provisions for the sentence. This section was followed by a synopsis of the case and abbreviated transcripts of depositions. An autopsy record of the victim was included in the memorial. The memorial also typically included information on the status of the offender, including certified records of transportation in custody (Poling 2012).

These records would be sent, along with the defendant, to the district administration for a trial or retrial. The case then progressed up the hierarchy to the provincial surveillance commissioner, who would re-interview the prisoner and check the testimony against the written record. The case proceeded next to the provincial governor, who would review the case (along with his own legal advisors) and confirm the sentence, and then prepare his own report for the Board of Punishments in Beijing (Hegel 2007, 16; Jones 1994, 393).

The Board of Punishments was a massive bureaucratic agency. It was one of six major ministries in imperial China (along with Civil, Revenue and Population, Rites, War and Public Works; statutes in the Qing Code are organized according these divisions). Located in the heart of Beijing, the Board was staffed by at least 100 officials, and, if clerks and translators are included, total staff may have neared 1,000 people.[8] The Board was divided into numerous departments. Seventeen of these departments were organized according to region, handling cases from a particular province or administrative unit (e.g. Anhui or Yunnan province). Other departments managed clerical duties, including hand-copying documents coming and going from the Board (in both Manchu and Chinese), managed funding and administration for the Board, and recommended and implemented revisions to the criminal law. One department was in charge of the logistics of the annual imperial case review, and it managed cases to make sure documents arrived in time for the process. Finally, the Board managed such a voluminous caseload that a designated department, the Expediting Office, was charged solely with ensuring deadlines were met throughout the institution (Bodde and Morris 1967, 124-31). In capital cases Board recommendations would be reviewed one final time by the Three High Courts, a sort of interagency panel including top officials from the Board of Punishment, the Censorate and a third agency called the Board of Revision (Bodde and Morris 1967, 132).

Since most capital cases were designated for delayed case review (that is, a nominal sentence marked for consideration during review in the autumn), much of the Board's work hinged on this annual event in which the Emperor reviewed the assembled cases and exercised sovereign executive decisions on all the cases. Some accounts of this process emphasize the singular charismatic authority of the emperor at the center of the process (Meijer 1984, 11-12). In other tellings, this was a more procedural affair culminating in a rubber stamp (Bodde and Morris 1967). The emperor's participation in the process likely varied from procedural to charismatic across

[8] Bodde and Morris make this estimate in a somewhat convoluted way: "Although the total number of all persons employed by the Board may have been under 1,000, our sources give the impression of a complex and busy bureaucratic machine at work, handling enormous amounts of paperwork" (1967, 129).

years and dynasties. In this way, the emperor's role in case review in Imperial China was probably much like a US state governor's role in clemency decisions today. Most of the time clemency decisions are reviewed and implemented almost entirely by executive staff; sometimes an engaged governor takes a more hands-on approach; very occasionally a governor will exercise the full majesty of executive power, as in the case of Governor George Ryan's 2003 blanket commutation of condemned inmates in Illinois (see Sarat 2005). These symbolic acts of mercy are the least routine, but most visible.

However the emperor performed his duty, his decision marked the culmination of annual case review and triggered a cascade of bureaucratic follow-ups. For a minority of cases, the disposition of the case would be death. In these cases the order would be given to another ministry, the Board of War, to carry out the sentence (Bodde and Morris 1967, 134). Most cases, however, did not result in a disposition of death. Many sentences were modified to a lower sentence. Yu Yingxuan, for example, was ultimately exiled, a reduction in punishment he received owing to his advanced age. Yu received this reduction after two decades, however. In the intervening years, his case ping-ponged up and down the judicial ladder. Yu's capital sentence, protracted review and ultimate sentence reduction was the norm, not the exception in the Qing Dynasty.

Imperial Executions: Rare, Slow and Labor Intensive

How common were executions in the Qing Dynasty? The long delays, frequent stays and nominal sentences make this question surprisingly hard to answer. The historian James Lee estimates there were an average of 461 executions annually for the years between 1760 and 1903 (Lee 1991). Thomas Buoye places annual executions at between 2,200 and 3,300 annually during that period (Buoye 1990). These figures look high compared with, say, the 68 executions that took place in England and Wales in the first year of national punishment statistics in 1805 in the midst of the bloody code (Gatrell 1996, 617). But the statistics are not so stratospheric when taking into account China's enormous population. England and Wales had a population of less than 10 million people in 1805; China's total population at the beginning of the Qing Dynasty was already quite large; at around 150 million people in 1700 (Kuhn 1990, 41), it was more populous than Britain and France today. And China's population grew to 400 million by the end of the Qing dynasty. Adjusting for population, the rate of execution in some years of the Qing Dynasty may have been lower than in the PRC at the turn of the 21st century.

Another way to think about the number of executions is that the average magistrate oversaw about one execution per year in his county. But this average comes with a couple of important caveats. First, because crime does not adhere to a normal geographic distribution, punishment does not either. For example, in his study of homicide, Buoye estimates that the rate of execution for homicide in 1789 ranged from a high of 3.8/100,000 in Sichuan to a low of .29/100,000 in Gansu (Buoye 1990, 96). Second, a tally of executions is not the same as a tally of capital cases. The number of capital cases far outstripped the number of executions. In Imperial China most death sentences ended up being converted to lesser punishments. The eminent Qing Dynasty jurist Shen Jiaben (1840-1913) estimated that only about ten percent of capital verdicts resulted in executions (Meijer 1950). Contemporary researchers broadly concur with this estimate (Sun Jiahong 2007; Poling 2012, 5). This discrepancy was an integral part of the capital punishment system, rather than an ancillary effect. More capital verdicts produced more opportunities for the emperor to review decisions and flex his sovereign authority. Indeed, the criminal code specifically called for deferred death sentences—or what might be considered nominal capital judgments—in many cases. Perhaps a majority of death sentences handed down

at trial were of this type. Nonetheless, even nominal sentences embarked on the long and circuitous route of central administrative review. Through either a merely nominal capital verdict at sentencing or a later downward modification to the sentence during the review process, most of the condemned ultimately escaped death. Regardless of the ultimate disposition of the case, contemporary administrators viewed all these cases under the umbrella of capital crime and punishment (Sun 2007, 59-62).

While the condemned surely wished to avoid execution, as the case of Yu Yingxuan related at the beginning of this chapter suggests, a person could also die of waiting. The dynastic process of death penalty review operated on an annual calendar with a full docket review by the emperor every autumn. Some capital verdicts were either ratified or modified during this annual process, but many more were simply granted a continuance until the next year. The structure of capital recordkeeping makes it difficult to track the average wait that the condemned faced, but a wait of years was common, and a wait of decades was not out of the question (Waley-Cohen 1991, 62-63). For officials sentenced to death the number of stays was set at a whopping *ten years*, which suggests that very long periods of delay before sentence disposition were not unusual (Bodde and Morris 1967, 141). Indeed, the legal code itself specifies that under some circumstances a person whose case has been deferred for a certain number of years was to have a sentence automatically reduced to a lesser punishment—presumably to keep the docket manageable. Multi-year deferrals were common enough that an imperial edict from 1748 dictated that condemned individuals whose dispositions had already been postponed for three or more years were to be reported differently than cases with cases with fewer stays (Poling 2012, 101). A response to the edict from officials in Guangxi province documents more than 3,000 condemned prisoners awaiting punishment whose executions had been stayed three or more times (Poling 2012).

It is also worth noting here that while the well-being of individuals undergoing capital review was a matter of record that required notification to the central government, the well-being of defendants facing less serious charges was not, leading magistrates to sometimes mete out rough justice through indirect means. One historian relates the case of a criminal who was much despised by villagers in the community. The local magistrate took the unusual step of delaying the case and placing the defendant in detention throughout a hot summer in Chongqing—one of China's three "furnace" cities—while awaiting case disposition. Not surprisingly, the defendant died in custody. While the magistrate would still face official scrutiny for this death (Dikotter 2002, 28), that scrutiny would follow the death, rather than precede it as in the case of capital case review.[9]

Making Capital Punishment Useful

Capital Punishment as an Auditing Tool

Now that we have observed how capital punishment worked in the Qing Dynasty, we may turn our full attention to a related matter: what did capital punishment *do* in the Qing Dynasty? Another way of putting it is this: what is the use to the state of reviewing capital convictions? This chapter has introduced some provisional explanations: capital punishment exterminated rebels and punished criminals; it reaffirmed the symbolic power of the sovereign over his subjects; it upheld a social order. Review helped the state ensure all these goals. Surely these explanations are not wrong; yet they are also not right. These are not wrong in so far as capital punishment did do all

[9] This anecdote was recounted by historian Matthew Sommer in a seminar.

these things. Yet they are also not right in so far as these functions cannot fully explain the form of capital punishment in the Qing.

To whom is a judgment of lenience—performed in a palace compound thousands of miles and many years from the site of the crime—conveying expressive meaning? Certainly not to absent offenders or victims. An audience tracking on any particular case endured decades of bureaucratic tedium in the leadup to the emperor's symbolic punchline. If Yu Yingxuan were punished *only* for any of the reasons above, why did his files travel up and down the empire for years on end? Why did he wait decades for the disposition of his case? Why was he ultimately spared?

In his work on capital punishment in the contemporary US, David Garland asks a similar question about the American death penalty (2010). Americans claim that the death penalty serves penal rationales such as retribution and deterrence, but the long waits, uncertain outcomes, and endless proceduralism create a system that does not deliver on these goals. Given that the form of the US death penalty fails to achieve its penal rationales, why does it persist? Garland turns to Michel Foucault to make sense of the seeming dysfunction of the US death penalty. He quotes Foucault: "Do not concentrate the study of the punitive mechanisms on their 'repressive' effects alone, on their 'punishment' aspects alone, but situate them in a whole series of their possible positive effects, even if these seem marginal at first" (Garland 2010, 295). Garland concludes that for American capital punishment in the late modern mode, "[w]hat becomes apparent is that the state's power to kill is actually productive, performative, and generative—that it makes things happen—even if much of what happens is in the cultural realm of death penalty discourse rather than in the biological realm of life and death" (Garland 2010, 296-7). He argues that politicians, for example, harness the power over the rhetoric of death in order to mobilize political forces. Taking Garland's cue, how might the Qing capital review system's production of endless paper and reduplicated reporting produce "positive effects" for the state?

Recall that for the Qing emperor, principal-agent relations were at least as pressing a concern as sovereign-subject relations. Viewed in this light, the seeming dysfunction of the case review system *with regard to the discipline of the subject,* masks its function *with regard to the discipline of the officials.* Capital cases provided a ready, universal and often low-stakes pathway for the emperor to control his bureaucrats. Administrative notification and review in capital cases kept officials under Beijing's thumb in several key ways.

First, and most obviously, the review process forced local bureaucrats to adhere—at least nominally—to the Qing legal code. Magistrates, like bureaucrats everywhere, found workarounds, but the formulaic process nonetheless ensured formal compliance with the law of the land. Bureaucrats were not sovereigns, and they were forced to perform that fact by obeying the code. Officials could be punished for dereliction of duty if they did not comply (Hegel 2007, 15). The complexity of the code forced magistrates to hire legal advisors, who thus entrenched a shadow bureaucracy of compliance at the local level of government.

Second, this compliance promoted lip service to the ideological interests of the state, including the orthodoxies of loyalty and service embedded in the code. The code is full of language honoring the emperor. It also emphasizes the gravity of crimes against the sovereign. The first crimes listed in the Qing Code are "The Ten Great Wrongs," which are the most egregious offenses one might commit. The first of these crimes is plotting rebellion (Jones 1994, 34). Magistrates were reminded of these prohibitions whenever they consulted the law. And they memorialized these views in the reports on the case in which they ritualistically extoled the emperor and referred to themselves using diminutives.

Third, the reporting system provided some temporal, horizontal checks on behavior. Reports contained a summary trial transcript with witness depositions, forensic documentation and reports by jailers. All of this documentation might be manipulated by local officials, but it was difficult for a magistrate to manufacture out of whole cloth. Magistrates were local chief executives, and so retained tremendous discretion. Since cases often outlasted a magistrate's tenure, death penalty review provided a measure of inter-official accountability. The typical magistrate rotated posts every few years (Guy 2017, 81-82). Some capital cases involved *decades* of bureaucratic review. What new magistrate wants to be on the hook for a predecessor's lapses? With case dockets stretching across a series of magistrates in every district, a malfeasant administrator faced the prospect of exposure by a successor official. Meanwhile, a new official had plenty of incentive to immediately raise problematic cases he encountered at his post so as not to incur the blame for the case himself.

Fourth, capital cases created a high level of vertical accountability. The paperwork of the capital case placed every magistrate in the empire in discursive relationships extending all the way to the emperor. Across a wide empire in which many officials did not even speak the same dialect of Chinese, administrators rarely spoke to each other. Text was the medium of the state. In reviewing a decision, the prefectural, provincial and central authorities audited the work of the entire bureaucracy below them and produced a written record that was copied and stored in both the capital and in the district. Capital punishment provided an instance for the state to employ the technology of the written record. The venerable Qing statesman Chen Hongmou (1697-1771) put it like this:

> The business of government all relies upon written documents. In communicating one's views to others one must use writing. Because the population keeps growing and the affairs of the people are increasingly numerous, the number of government personnel and the complexity of government tasks likewise continue to grow. (Quoted in Rowe 2001, 351-52)

Fifth, the Censorate made use of capital punishment to spot-check local officials. Upon arrival in a new district, the censor would immediately review criminal case records and then visit local prisoners (Hucker 1951). In so doing, the censor could review the written records of the magistrate against convicts in custody. Dead men tell no tales, but a living condemned man would surely spill any dirt he had. The censor could pass this information directly to the emperor though a secret palace memorial system, informing him of the malfeasance of his agents. Perhaps for this reason, the Qing Code demanded a high degree of care for prisoners under a magistrate's watch. Prisoners were to be provided with food, shelter and clothing. If the prisoner fell ill, the magistrate was required to report this fact; if the prisoner died, an autopsy was performed. Officials were legally responsible for a prisoner death, whether from sickness, suicide or abuse (Dikotter 2002, 28). Katherine Poling suggests that Qing prisoners also served as "human case files" (Poling 2012, 83) who remained available for interrogation by an official's superiors years or decades after sentencing.

Does this story of capital punishment as bureaucratic accountability mean that other scholarly narratives of the death penalty in China are wrong? Of course not: it just means they are incomplete. Just like in other monarchies, the Chinese emperor cared about the majesty of office, with all the symbolic trappings that capital punishment and mercy entailed (McKnight 1981; Meijer 1984). Just like in other monarchies, the ideology of justice and fairness in life and death mattered, sometimes (Buoye 2007, 109; Ocko 1988). And just like in other monarchies, executions—both real and intimated—deterred crime (Fu 1996; Antony 2016). But perhaps no

other state in history relied so much on bureaucratic review of its lower officials in capital cases, and no other state clung so tenaciously to that procedure despite its mounting costs. So, along with the well-known catalog of Western uses of capital punishment in history, we should add this one: bureaucratic monitoring. This legacy of capital punishment as bureaucratic check remains in place today.

Other Explanations

What other reasons might there be for the persistence of the laborious process of death penalty review in Imperial China? One possible alternative account is bureaucratic path dependency. After all, administrations tend to grow, and middle-men butter their bread with the inefficiencies of big agencies. Perhaps some magistrates were surveilled by this process, but didn't others up the ladder benefit? One reason to doubt that this is the case is that in the waning years of the Qing Dynasty it was the emperor, not the officials, who fought to maintain an increasingly larded death penalty review process.

By the 19th century cracks were beginning to appear in the empire. Internally, deep-seated crises in the social structure—a rapidly rising population and lack of arable land, increasing gender imbalance and a growing wealth gap—were producing social upheavals (Kuhn 1990). Social unrest was everywhere. Externally, Western powers were subjecting China to unequal treaties. The center could not hold. As rebellions broke out across the empire, local officials complained that the death penalty review process made it impossible to dispense rough justice when time was of the essence (Sun 2007, 355-77).

The social instability of the 19th century produced a vigorous policy debate about how much autonomy local officials should have to use capital sanctions without imperial approval (Xu 2007, 233-235). The Qing Code always provided some carve-outs for summary execution in military matters, but these were of limited scope. In the midst of the upheaval of the Taiping Rebellion (1850-64) the emperor reluctantly permitted the use of "execution in place" (*jiudi zhengfa* 就地正法) in which provincial officials might kill first and notify the central government later (Sun 2007, 356). Although execution in place was supposed to be reserved for rebels—that is criminals who posed a threat to sovereign rule—local administrators quickly applied the practice more flexibly to cover other types of criminals as well (Xu 2007, 234).

In the wake of the Taiping rebellion, central administrators attempted to roll back the policy of execution in place, prompting strong protests from provincial officials (Sun 2007, 360). With provincial and central officials at an impasse,

> the emperor issued an edict to declare once again that the decision-making power of the death penalty should belong to the emperor, and that local administrators did not have this expertise, and then to require local governors, especially in provinces where the bandits had been purged, to restore the old death penalty review system, and not treat life as worthless. (Sun 2007, 361)

Nonetheless, provincial administrators continued to argue that execution in place was necessary for public security and refused to relinquish their execution powers (Xu 2007, 234).

The debate over execution in place makes clear that capital review was about evaluating officials as much as criminals. After all, the requirement that a magistrate submit capital sentences for evaluation *after* execution can hardly be seen as a service in the interest in the condemned. Post hoc review does not spare a life or right the cause of justice. It does hold local officials to account, however. Resistance to the re-assertion of central death penalty review also shows the political

stakes for the emperor in relinquishing capital punishment powers to his agents, even in the service of social stability.

Ultimately, the emperor was unsuccessful at reasserting control over the death penalty, over his territory, and over the agents who administered it. The policy of "execution in place" signaled the end of the imperial politics of death penalty review. Although it took more than half a century from the first execution in place edicts of the 1850s until the fall of the Qing Dynasty in 1912, by the time of the empire's formal demise, much of the territory had already fallen to warlordism and local interests. Death was still present, but it was no longer a tool for the emperor, or grist for the bureaucrat to grind.

Conclusion

In this chapter I have described the administration of the death penalty under the Qing Dynasty. The Qing process of death penalty review was certainly among the most attenuated and bureaucratic capital punishment regimes in the history of the world. Every case in the empire travelled from the lowest rung of state officialdom all the way to the emperor, and then typically back and forth many more times before punishment was dispensed. The system presents a conundrum: why did the Chinese empire institutionalize such a slow, cumbersome process to review and carry out executions?

I have argued that the Qing system developed and persisted because it fused two of the emperor's pressing governance concerns. One the one hand, the administration of the death penalty in late imperial China served the same functions it served in many other empires in the West: projecting the power of the sovereign in the lives of his subjects. The emperor oversaw capital punishment throughout the empire in order to quell rebellions, harmonize society, demonstrate mercy and re-enforce the power of the throne.

On the other hand, the administration of capital punishment in late imperial China addressed a problem of governance that was particularly acute in China as compared to early Western states: managing the principal-agent relationship of an imperial bureaucracy. In China the emperor was at least as worried about his representatives as he was his subjects. The particular form of capital punishment administration in Qing China—the labored memorials to the emperor, the legal minutiae of case disposition and protracted correspondence, the long periods in which magistrates confined the condemned—kept the lower bureaucracy under the emperor's thumb.

The claim that the death penalty review system in China regulated the state as well as the subject may surprise the contemporary reader for two reasons. First, it is hard to conceive of a penal institution without fixating on the institutional function of punishing offenders. While works on bureaucratic penality in the West have identified "managerial justice" in lower court work (Kohler-Hausmann 2018, 60) and pointed out that "the process is the punishment" in some institutions (Feeley 1979), these accounts still center criminal justice on the governance of subjects. This account of the Qing refocuses the narrative on the administrators themselves. In its function as a check on the work on Qing officials, one might go as far as to say that for the death penalty in the Qing Dynasty, "the punishment is the process."

A second reason this story is surprising for the contemporary Western reader is that it appears so out of step with capital punishment in the West at the time. Understanding Qing capital punishment demands conceiving of a society with problems and institutions that did not unfold in the same sequence as elsewhere. Throughout its two and a half century history and up until its demise in 1912, the Qing was plagued by internal challenges to stability and state penetration that had been resolved in Western Europe. The Qing's problems were, to use Garland's phrase, "early

modern." At the same time, the Qing evinced a bureaucracy that appears quite contemporary. Eighteenth century Chinese statesmen discussed internal management problems that are debated vigorously in boardrooms and business schools today (Woodside 2006). David Garland describes capital punishment in the 21st century US as "late modern," and characterized by discursivity (2010, 312). When Americans talk and write about capital punishment, they *do* something, even if the thing they do is not in fact an execution. So too the Qing Emperor did something when he forced his administration to write endlessly about the death penalty. When he asked his agents to discipline his subjects, he in fact disciplined them both.

Chapter 2: Recent History

Please make certain that you strike surely, accurately and relentlessly in suppressing the counterrevolutionaries.

– Mao Zedong, 1950[1]

Although we said before that we won't organize any more political campaigns, we have to mobilize the masses to crack down on serious criminal activities.

– Deng Xiaoping, 1983[2]

Introduction

In 1949 the Chinese Communist Party (CCP) successfully routed rival Nationalist forces from Mainland China and established the government of People's Republic of China (PRC) across the country. The following year Communist Party Chairman Mao Zedong launched The Campaign to Suppress Counterrevolutionaries, the PRC's first major crime campaign. In 1951 he directed particular attention to the city of Shanghai, a former Nationalist stronghold where Mao indicated "[i]t is absolutely necessary to kill 300 to 500 people in the spring, in order to curb the arrogance of the enemy and raise the morale of the people" (Zhang 2016, 68). One of those enemies was Zhang Wentian.

Zhang was tried for crimes committed as a gang leader. On May 10, 1951 the Shanghai People's Court notified the Shanghai Military Control Council that Zhang was sentenced to death. Within two weeks the local prosecutor and Shanghai mayor approved the proposal. On May 25 the Military Council instructed the local government to organize a denunciation meeting at the local harbor, the alleged site of Zhang's criminal activity. While the historical account does not record the details of the denunciation meeting, it likely followed a formula of similar meetings taking place around the country. Zhang would have been publicly shamed for his crimes and then executed in front of a crowd (Zhang 2016, 73-76).[3] This process took less than two weeks.

Zhang Wentian's case is a contrast to the case of Yu Yingxuan, recounted in the previous chapter on Imperial China. The most obvious difference between the two cases is that Yu was ultimately spared, while Zhang was not. But this particular detail, while certainly paramount for Yu and Zhang, is less important for our analysis than the paths these two cases took to their divergent outcomes. In Yu's case, a variety of elite civil servants ranging from a local magistrate to the emperor's trusted ministers reviewed the case not just once, but many times over two decades, a fact we can know because detailed copies of Yu's file were maintained in the county office, as well as the capital. His sentence was pronounced and ultimately modified according to a highly rarified set of statutes open to textual interpretation. By contrast, Zhang's case never made it beyond local officials. It concluded not with approval from the top, but with a popular rally that

[1] December 1, 1950 (Mao 1951).

[2] Quoted in Wang et al. 2018, 3.

[3] Zhang's case is one of three cases from the period discovered in the Shanghai Municipal Archive reported by Zhang Ning (no relation) in archival work on the Campaign. Shanghai was the one of the most developed and cosmopolitan cities in 20th century China. Because of Shanghai's status and developed legal system, this case surely received more procedural care than rural cases.

emphasized judgment from below. Zhang's sentence was not based on an intricate legal code, but on a series of regulations which were in fact nothing more than directives authored by Chairman Mao and published in the *People's Daily* newspaper. Zhang's adjudication and review were measured in weeks, not years. We know of Zhang's case from notes preserved at the Shanghai Historical Archive. While the paper trail in Zhang's case is paltry compared to the record on Yu, the existence of any preserved textual sentencing record at all from this historical period is noteworthy (Zhang 2016, 62-63).

Zhang's story is not an anomaly. If anything, he received more procedural attention than most of the people executed during the Campaign to Suppress Counterrevolutionaries (1950-53), which served as a blueprint for periodic episodes of "campaign justice" or "mass justice" (Yang 2008; Mühlhahn 2009) that dominated criminal justice policy in the PRC throughout the second half of the 20th century. Crucially, this campaign model of capital punishment persisted—albeit in modified form—through both Maoist China (1949-1976) and post-liberalization China (1978 onward). Throughout the second half of the 20th century, these campaigns were characterized by huge social mobilizations with popular participation, decentralized adjudication, the dismissal or suspension of criminal procedure, and swift and aggressive use of capital punishment. They were incredibly punitive. More than 700,000 people were executed over three years during the Campaign to Suppress Counterrevolutionaries (Yang 2008, 60). While the scale of capital punishment in the PRC declined after Mao's death in 1976, the scope of capital punishment in the following decades remained massive compared to international contemporaries and China's own imperial record. It is estimated that as many as 30,000 people were sentenced to death during China's first strike hard campaign between 1983 and 1986 (Tanner 2005, 175) and hundreds of thousands more were executed in the decades that followed (Trevaskes 2016, 146).[4] In the 21st century that number has fallen. Even so, it is estimated that the number of annual executions remains in the thousands, making China the world's leading executioner (Amnesty International 2020).

This chapter focuses on capital punishment during this period of campaign justice from roughly the founding of the PRC in 1949 to the institution of death penalty reform in 2007. I aim to address two questions.

First, how do we understand the scale and shape of capital punishment in the PRC during this half-century span? In this chapter I seek to provide an account of the politics of campaign style capital punishment in China in this period in relation to what came before—dynastic structures—and what has come since—the post-death penalty reform period discussed in the rest of this

[4] China-focused accounts of capital punishment in the second half of the 20th century typically hone in on one particular campaign or transition during this period. With a few exceptions (e.g. Dutton 2005) these accounts roughly divide into depictions of campaign justice under Mao until his death in 1976 (e.g. Cohen 1968; Yang 2008; Su 2011; Zhang 2016) or post-Maoist campaigns following economic reforms from 1978 to the early 2000s (e.g. Tanner 1999; Tanner 2000; Liang 2005; Trevaskes 2010). The former foreground "mass line" politics and the absence of legal institutions, while the latter emphasize the importance of campaigns in rebuilding state power and maintaining stability after the Cultural Revolution. These descriptions of the micropolitics of the campaigns highlight both the continuities and discontinuities in capital punishment during the first half century of PRC governance. However, they do not fully explain the institutional dynamics that made Zhang's sentencing and execution so different from the case of Yu Yingxuan under Chinese empire or contemporary condemned people in the PRC today.

dissertation. This account provides context for one of the contradictions that animates this project: is the number of people executed in post-death penalty reform China big or small? The answer to this question turns on one's baseline (see Zimring and Hawkins 1993; Johnson and Zimring 2009, 233). By global standards, China remains a world outlier in the 21st century. But by the standards of its own recent past, China's 21st century capital punishment numbers look downright small (Johnson and Zimring 2009, 233).

Second, this chapter also helps illuminate a lingering question: why did death penalty reform take place when it did? We do not lack for explanations for the causes of death penalty reform. In fact, we have too many: wrongful executions, the ineffectiveness of tough on crime justice, state centralization, an activist judiciary and concerns about popular legitimacy (Minas 2009; Lewis 2010; Scott 2010; Trevaskes 2012; Bin Liang 2016; He 2016; Nessosi 2017). I do not believe that any of these explanations are factually wrong. However, they are incomplete as explanations for at least three reasons. First, they are incomplete because, paradoxically, there are too many of them. The sheer volume of explanations means that no one explanation provides parsimony. Second, they are incomplete because many of these reasons held not just in 2000, but in 1990 and even 1950. An explanation of death penalty reform should help us understand why it occurred when it did. Third, the timing of death penalty reform seems particularly curious in light of a general "turn against law" that was taking place at the same time (Minzner 2011). Why would the central government support judicial power in precisely a moment when China was also rejecting law more generally? A full explanation must square the seeming success of death penalty reform as a legal reform with the partial retreat of law at the time.

In order to make sense of why death penalty reform happened when it did, we need an explanation at a higher level of abstraction. I argue that death penalty reform happened when it did because in the early 2000s the Party-state began to elevate the regulation of its agents as a governance priority. Even as law fell out of favor as a tool of controlling the public and stability maintenance (*weiwen* 维稳) became a watchword (Liebman 2014; Wang and Minzner 2015; Clarke 2019, 2), the law became increasingly important as a way to control state agents. Because of this general political priority, central officials had new political will to support greater regulation of capital punishment by the courts. They could therefore take more seriously the proximate concerns to which reform is often credited. This analysis also helps us understand why other legal reforms aimed to better regulate courts—such as professionalization—could succeed even as law was under attack as a tool of civil and administrative action.

This chapter covers a much shorter historical period than the last chapter on Imperial History (about 50 years, rather than 250), but because the period covered here is closer at hand, I provide more detail on variation across this period. As with Chapter One, this chapter is intended as background, particularly for readers unfamiliar with China. Because this chapter covers the first half century of national rule by the single-party government that still controls China today, this account also provides much of the background information on political and legal structures that are important for the chapters that follow. Most notably, background on judges, lawyers, alternative sentencing options and death penalty data in the late 20th century all prepare the reader for a deep dive on each of these topics in subsequent chapters.

As with other chapters, I begin this chapter with an explicit comparison to the United States. I hope China scholars will likely find this comparator novel and generative. For punishment scholars, this material is a reminder of core insights the field has gleaned from the study of the US case that merit consideration in the discussion of China that follows.

Punishment in the Post-war United States

Before diving into capital punishment in PRC China, I begin with a discussion of the US. Beginning a description of US punishment in about 1950 does more than make for convenient symmetry with China. It also fits with shared world history. The Chinese Communist Party took control of all of China in 1949 following not only a civil war, but a global war—World War II—that shaped the national governance and penal policies of states across the world. In Europe the Second World War catalyzed an opposition to the death penalty as a political priority that has now spread to virtually every country on that continent and about two-thirds of counties around the world (Zimring 2003, 16-41; Amnesty International 2019b). Once abolition became Western orthodoxy in the late 20th century (Zimring 2003, 27), the retention of capital punishment in the US became an "American difference" in need of explanation (Zimring 2003, 65). By the late 20th Century this American difference itself sat within two additional differences: the growing extremism of US penal practice—sometimes termed "the punitive turn"—and the more general identification of US exceptionalism in a wide variety of political matters. These nested differences offer both purchase for understanding China and a caution about the limits of comparative frames (Brangan 2020). These differences also animate much of the Western research on punishment with which this project is in dialogue.

Court-driven Death Penalty Reform

The American difference in capital punishment was not inevitable. When Great Britain abolished the death penalty in 1969 the global drive to abolition was still uncertain (Zimring 2003, 21; Hood and Hoyle 2008, 12). The US also came close to abolishing the death penalty at nearly the same time. In *Furman v. Georgia* (1972), the Supreme Court Of The United States (SCOTUS) found state death penalty practices to be a violation of the 8th Amendment protection against cruel and unusual punishments and appeared set to get rid of capital punishment all together. Four years later in *Gregg v. Georgia*, the SCOTUS did an about face, instead allowing for the constitutionality of capital punishment under a new "death is different" jurisprudence that has constrained but permitted its use until today (1976, 188).

The Supreme Court's decision to regulate but not abolish the death penalty during this period significantly impacted the trajectory of the death penalty in the decades since, in ways that I discuss in more detail in subsequent chapters. Here, a few points bear noting. First, the US dalliance with death penalty abolition resembled the European experience more closely than it appears in hindsight. For one thing, as a decision of nine robed justices in the capital (following litigation by national lawyers), US death penalty reform was a program driven by elites. Across the world, the cessation of the death penalty is most typically a result of top-down action by political elites (Sarat 2019, 4-5). Yet the US stands out with regard to the way in which elites initiated this action. Rather than through a constitutional change (as took place in Germany) or a decision by a coalition government (as in France), the US near miss with abolition in the 1970s came from courts (Gottschalk 2006, 227). Indeed, US elites were divided on the issue of abolition, as leaders in legislatures around the country seized on charges of court overreach and promoted capital punishment to establish *bona fides*. The constitutional challenges to capital punishment through the courts created a regulatory regime, that constrained, rather than eliminated, the death penalty. The regulation of the death penalty also paradoxically ensured that rather than being taken off the political agenda, capital punishment would remain a front and center issue in politics and law for decades to come (Garland 2010).

The Punitive Turn

US regulation of the death penalty sits within a larger story of American criminal justice in the second half of the 20th century. The US rate of incarceration rose precipitously starting in the early 1970s, quadrupling over the next four decades (National Research Council 2014, 1). This growth was "historically unprecedented and internationally unique" (National Research Council 2014, 2). The US now has the largest prison population in the world. The scale of US imprisonment earned its own moniker: mass incarceration. Mass incarceration in the US has qualitative as well as quantitative characteristics. The harshness of the qualitative conditions of criminal justice practice, including tough on crime rhetoric, increasingly long sentences, poor conditions of confinement and degrading treatment, have been described as elements of a complex punitive turn in American punishment (Garland 2001, 142; Matthews 2005).

The research on the causes and consequences of American mass incarceration and the punitive turn is extensive (e.g. Garland 2001; Zimring et al. 2001; Tonry 2004; Gottschalk 2006; Western 2006; Simon 2007; Lynch 2009; Alexander 2012; National Research Council 2014; Hinton 2016; Forman 2017). From this literature I would like to highlight four points that bear on capital punishment in China.

First, the US case shows that the relationship between the death penalty and other forms of punishment is indeterminate. It is possible to imagine restrictions on capital punishment as part of a larger political or social trend towards penal moderation, dignity or human rights.[5] In that case, the restriction or abolition of the death penalty and the reduction in punishment more generally would be correlate results of a single trend (Durkheim [1900] 1969). But in the US, court restraint in capital punishment occurred at the beginning of a long period of increase in incarceration and punitivity. In fact, death penalty reform arguably produced a backlash that contributed to greater penal harshness (Bessler 2012, 5; Gottschalk 2016). The US experience challenges the more general intuition that there is a necessary social arc towards penal moderation (contra Durkheim [1900] 1969) and that capital punishment reform lies at a fixed point along it. This is an important lesson for considering China.

Second, the American experiences with both capital punishment and mass incarceration underline the broader criminological finding that crime and punishment are not direct social correlates and the causal relationship between the two remains unclear. Crime is connected to punishment in complex and mediated ways (Garland 2017, 15-16) if in fact the two phenomena are even linked at all (Wacquant 2009; Alexander 2010). Crime and punishment rose together in the first decades of mass incarceration, while punishment continued to increase even as crime fell in the 1990s (National Research Council 2014). More narrowly, the relational indeterminacy of crime and punishment holds for the death penalty as well. On the question of the deterrent effect of the death penalty in particular, a prominent review of the research to date found the evidence inconclusive on "whether capital punishment decreases, increases, or has no effect on homicide rates" (Nagin and Pepper 2012, 2).

Third, although punishment is not necessarily driven by crime, it is shaped by politics (Stuntz 2001; Simon 2007; Lynch 2009; Murakawa 2014; Hinton 2016; Miller 2016; Barkow 2019). There is overwhelming agreement that the scale and character of punishment in the US is a political derivation; there is considerable disagreement as to the specific mechanisms at play. At a minimum, concepts such as governing through crime, penal populism, and the myth of mob rule point to a political relationship that involves an interplay between the ruling and the ruled that is

[5] There is a case to be made that this happened in Europe (Whitman 2003).

more than simple top-down repression or straightforward direct democracy (Simon 2007; Miller 2016).

In thinking about China—a one-party, authoritarian, formally socialist regime—it is unclear to what degree the political dynamics of American punitivity apply. That question turns on how US penal politics are relevantly or most relevantly analyzed as capitalist (Gilmore 2007; Wacquant 2009), federalist (Zimring 2003; Barkow 2011), liberal (Murakawa 2014), democratic (Stuntz 2011), party-driven or populist (Pratt 2004). Regardless of the specifics, cross-cultural research in response to the punitive turn more broadly increasingly confirms the observation that variation in punishment in general, and capital punishment in particular, is best explained by political variables (Greenberg and West 2008; Johnson and Zimring 2009; Hood and Deva 2013; Hood and Hoyle 2015). This chapter (and this project) takes it as a starting point that China's high rate of capital punishment in the late 20th century is a *political* matter tied to the structure of governance in the PRC, and that an explanation must be sought in politics (Johnson and Zimring 2009, 15-26, 318-19).

Finally, the American penal experience raises questions about whether China's use of capital punishment is better explained as *extreme* or in fact *exceptional* (Brangan 2020). Since de Tocqueville first commented on American exceptionalism (Nelles 1997, 750), many scholars have looked to explain US deviation from global trends through this lens. It may be that late 20th-century American punitivity is the unique progeny of slavery (Alexander 2010) or a unipolar neoliberal hegemony (Wacquant 2009). And it may be that capital punishment in particular is flagged as an American difference and a peculiar institution. If capital punishment in the PRC is also exceptional, as others have argued (Zhang 2008; Johnson and Zimring 2009, 225) and I argue as well, is there anything that can be concluded about the commonality of these two exceptional states? In the rest of this chapter I recount the last 70 years of Chinese capital punishment, mindful of these US assumptions.

Capital Punishment in Maoist China (1949-1976)[6]

On October 1, 1949 Mao Zedong stood atop the Gate of Heavenly Peace and made a proclamation to the crowd of 200,000 gathered in Tiananmen Square, formally establishing the

[6] This chapter presents a description of the politics of capital punishment administration from the founding of the PRC in 1949 until the Supreme People's Court regained the power of central death penalty review in 2007. I periodize this chapter in this manner for two reasons. The first reason is that it allows me to lay out the entire penal timeline for all of mainland China from the beginning of the current PRC regime up until my main subject of this project. The second reason is that I believe that despite wide variations across this span, the history of this period reflects a constancy of decentralized penal administration that helps explain the causes and consequences of the 2007 reform.

Framing this chapter beginning in 1949 also presents two difficulties. The first difficulty with beginning in 1949 is that leaves out nearly half a century of Chinese politics from the fall of the Qing dynasty to "liberation" (*jiefang* 解放) under the CCP. This period between two revolutions, from the collapse of imperial rule in 1912 to the consolidation of PRC territorial control in 1949 is not inconsequential. For much of this period parts of Chinese territory were under the control of the Republic of China (ROC). The Republican Period offers one rendition of a post-imperial Chinese criminal justice system. While recent scholarship suggests that Republican capital punishment practice drew on imperial law (Neighbors 2008), leaders also actively stepped away

People's Republic of China and declaring Beijing as its capital (The Guardian 1949; Lieberthal 2004, 87). The gate divides the square from the Forbidden City, the former residence of the Chinese emperor. Mao was canny to choose this site of imperial power for his address. In this setting, Mao performed a message about China's political past, just as the Shunzhi emperor did when he enacted the rituals to enthrone the Qing Dynasty in Beijing three centuries earlier. Yet where the new Qing rulers were quick to appropriate the existing state apparatus of the previous rulers, Mao envisioned new administrations to govern a new China (Lieberthal 2004, 59-60).

Mao envisioned a socialist state for the people—a people's democratic dictatorship—with the Chinese Communist Party (CCP or "Party") as its vanguard. The Party would lead through use of the "mass line," a process by which the Party concentrates and enacts the political will of the people (Blecher 1979; Tang 2016, 6-10). In Mao's classic formulation, "All correct leadership is necessarily 'from the masses, to the masses'" (Quoted in Blecher 1979, 107). The mass line presented an inversion of the hierarchies of traditional Chinese governance. While the emperor relied on agents to manage the people, Mao called for the people to manage the state's agents. This inversion also challenged the politics of criminal justice examined in Chapter One.

For Mao, punishment was self-evidently political. And the politics of criminal justice boiled down to a query: "Who are our enemies, who are our friends?" (Quoted in Dutton 2005, 3). Mao turned to Marxist dialectics to answer this question. Dialectical materialism presents history as a series of social contradictions produced by struggles over material conditions (Leiberthal 2004, 63). Mao and the CCP believed the revolution was the articulation of that struggle: on the one side of struggle sit the people (the masses; the peasants; the proletariat), who are friends; On the other

---

from imperial practices and towards a self-consciously different criminal justice system, one that ROC leaders themselves believed embodied a vision of Chinese modernity. The ROC promulgated its first Provisional Criminal Code in 1912. The code did away with imperial corporal punishments, such as beatings, which were seen as antiquated, and introduced "modern" punishments including fines, imprisonment and execution (Dikotter 2002, 62). The death penalty in the Republican period was relatively rare. In 1918, for example, only six people were executed in the capital (Dikotter 2002, 77). A decade later, in 1929, only 174 men and 5 women were condemned to death throughout the country. The rich literature on criminal justice on this period shows that the course of capital punishment in 20th century mainland China was not inevitable (Wakeman 1995; Dikotter 2002; Muhlhahn 2009; Kiely 2014). Similarly, the case of Taiwan, where the ROC government fled after losing the civil war for Mainland China in 1949, provides an alternative vision of Chinese history that shows that contemporary PRC capital punishment practices are not culturally inevitable (Johnson and Zimring 2009, 192).

A second difficulty with beginning in 1949 is that while it captures the entire history of the PRC, it misses a large chunk of rule by the Chinese Communist Party (CCP), which was established in 1921. A narrative that begins in 1949 passes over, for example, the party purges of the late 1920s, which were also campaigns against counterrevolutionaries (Dutton 2005, 33). Many of the core values and institutions of PRC capital punishment—the mass line, the friend/ enemy distinction, public trial and punishment and suspended death sentences—were initially conceived in the CCP controlled base areas in the 1930s and '40s. These areas "functioned as a laboratory of sorts for the regime of punishment and criminal justice that was later established for the whole of China" (Mühlhahn 2009, 159-60). Nonetheless, these were martial institutions. This project is focused primarily on capital punishment as an institution of criminal rather than military justice, and so I have chosen to begin at the moment of PRC statehood.

side sit those with the means of production (the capitalists; the imperialists; the bourgeoisie; the landowners) who are enemies. During the revolutionary struggle, violence by the people against capitalists was revolutionary; violence by capitalists against the people was counterrevolutionary. The founding of the PRC marked the success of the people in achieving the revolutionary goal of control—articulated by Marx as the dictatorship of the proletariat.

Criminal justice posed a conceptual problem for the PRC. If social conflict is rooted in class conflict, then crime in capitalist states is explicable as a manifestation of that conflict. But what explains conflict between people in the PRC? According to Mao, under the people's democratic dictatorship we can distinguish two types of conflicts, or contradictions. One type of contradiction exists between classes, even after revolution. This is a conflict between friend and enemy. Rightists, counterrevolutionaries and capitalists are still present in society, and these groups will come into conflict with the masses because these two groups have differing material interests. For example, a formally rich landowner whose land has been expropriated may try to secret his possessions or steal the possessions. This type of conflict between classes is an *antagonistic contradiction.*

Harder to explain are conflicts among parties with the same class background, which is to say between friend and friend. Workers and farmers have material interests that are aligned. Yet because of the lingering influence of capitalist thinking (or a false consciousness produced by capitalist ideology) people may still misunderstand their interests and act against their class. For example, a peasant may steal another peasant's tool. According to Mao, this thief is not counterrevolutionary. He simply doesn't yet understand his class interests. Once he grasps that under the dictatorship of the proletariat the workers own the means of production, he will no longer wish to steal a tool. A conflict among the people such as this one is a *non-antagonistic contradiction* (Clarke and Feinerman 1995, 136).

These two types of contradictions require two different types of penal interventions. Non-antagonistic contradictions require political re-education. The goal of such an intervention is not punishment, but cultivation and reform. Once the offender understands their class interest, this contradiction will disappear. Mao in particular valued learning through practice, and so promoted reform through labor (Mühlhahn 2009, 147-171). By contrast, antagonistic contradictions cannot be solved through re-education. These crimes are committed by enemies of the revolution. Such criminals pose a constant threat to the people. While re-education may work in some cases, simply purging these individuals from society is the surest way to protect against them. The demand to not just punish but also purge those guilty of counterrevolutionary crimes led to China's first criminal campaign, which set a template for criminal justice for a half century to come.

Campaign Justice

Campaign politics is one of the hallmarks of Maoist governance. In its broadest formulation, a campaign is any "concentrated attack on a specific issue through mass mobilization of the populace" (Lieberthal 2004, 65). The early PRC government marshalled campaigns to meet all sorts of political goals—from increased agricultural production to collectivization. The campaign style was so influential that it still endures today (van Rooij 2016). Campaigns in turn relied on the mass line. Campaigns driven by the mass line in the Mao era were "an organized form of 'democratic centralism' that could be very responsive to local need and that included the broadest actual popular consultation and participation in any communist movement" (Cheek 2010, 14).

Campaigns were often used for criminal justice ends. These campaigns applied the mass line to the task of making distinctions between friends and enemies. One of the first major

campaigns of the fledgling CCP was the Campaign to Suppress Counterrevolutionaries (1950-1953). Indeed, this campaign arguably served as the blueprint for all campaigns in Maoist China, as "preparation for this campaign began almost from the moment Mao stepped down from the podium on the gate of Tian'anmen [on October 1, 1949]" (Dutton 2005, 171). The campaign was a continuation of the revolutionary struggle. As Mao put it, the CCP simply shifted from fighting enemies with guns to fighting enemies without guns (Zhang 2016, 64). The first step in the campaign was the "Directive to Suppress Counter-Revolutionary Activity" issued on October 10, 1949 (Dutton 2005, 170). The campaign mobilized society to uncover political threats including rightists, spies, counterrevolutionaries and other hostile elements. Over the next three years the Campaign to Suppress Counterrevolutionaries unfolded across China. Although the Campaign to Suppress Counterrevolutionaries ended in 1953, criminal justice campaigns have been a regular feature of Chinese politics ever since. Small criminal justice campaigns have taken place every year, and larger campaigns take place every few years.

Mao made active use of campaigns to target the Party itself. One of the first campaigns, the so-called Three Antis (1951-52), targeted corruption, squandering and bureaucratism (Lü 2000, 68). The use of campaign justice is a novel solution to the principal-agent problem that imperial leaders also faced. Campaign justice marked a radical departure from not only China's own tradition of criminal justice administration, but the criminal justice practices of most states throughout most of world history. The notion that state punishment can and should be determined and administrated through popular decision-making challenges the very conception of the state as an institution with a monopoly on the legitimate use of violence (Weber 1918). While in theory the mass line ensures that campaign justice does not collapse into either totalitarianism or mob rule (Tang 2016, 6-7), in practice it often embodied the excesses of both.

Quotas and Diversions

Quotas are a central feature of campaigns. Mao exhorted party leaders to use the mass line to identify problems and then set targets to address them. In the case of criminal justice campaigns, leaders set quotas for arrests and executions. Mao established a quota system for executions near the beginning in the Campaign to Suppress Counterrevolutionaries (Yang 2008, 121). Early on in the campaign, Mao specified that death sentences should be limited to a percentage of the population (Zhang 2016, 84). Mao believed that the enemy—that is hardline counterrevolutionaries—represented less than one percent of the population. Therefore executing about a tenth of that population would be sufficient (Zhang 2016, 84-85; Yang 2008, 108-109).

Consider the case of Zhang Wentian, the gang leader from Shanghai who was sentenced to death in May 1951. In February of that year, Mao wrote to leaders in Shanghai, stating:

> Shanghai is a big city of six million people. Considering the fact that among the 20,000 arrested people in Shanghai only 200 were executed, I believe that in the year of 1951 at least 3,000 bandit chiefs, professional brigands, local tyrants, secret agents and sectarian leaders who committed serious crimes should be executed. During the first half of the year, at least 1,500 should be executed. (Quoted in Yang 2008, 109)

The Shanghai Party Committee responded in March, notifying the central government that Shanghai had established a target of 3,000 executions for the year (Yang 2016, 110). This system of quotas would follow in crime campaigns throughout the Maoist period, including the Three Antis and Five Antis (1951-1956), The Purge of Counterrevolutionaries (1956), The Anti-rightist Movement (1957), the Four Cleans campaign (1964) and the Strike Against

Counterrevolutionaries (1970) (Zhang 2016, 84-85; Yang 2008, 121). Quotas not only targeted bad elements among the proletariat, but also among leadership. Mao set quotas for "tigers"—that is major grafters—that "tiger hunting teams" were expected to bring to justice (Lü 2000, 53).

While Mao himself called for severity in dealing with counterrevolutionaries, as the campaign progressed, he became concerned that the scale of the killing was out of hand. In 1951 Mao issued a series of directives calling for a diversionary mechanism, death-with-two-year-reprieve (hereafter "suspended execution"). Under this policy, some counterrevolutionaries with less serious offenses who were sentenced to death were granted a two-year reprieve and subjected to two years of labor and supervision. If they did not reform, they might still be executed; if they did reform, they might be spared (Mao 1951). Mao indicated that this policy had many benefits: it conserved labor, prevented mistakes and reformed individuals. He applied the rationale of quotas to this act of lenience as well as executions, writing that "those who have done extremely serious harm to the national interest make up only a small number, roughly 10 to 20 per cent, while those to be sentenced to death but to be granted a reprieve probably account for 80 to 90 per cent, that is to say, 80 to 90 per cent may be saved" (Mao 1951).

Mao made no mention of the historical antecedents of his suspended execution directive. But circumstantial evidence that the policy is modeled on the imperial deferred execution system (discussed in the previous chapter) is substantial (Sun 2007, 369-377). For example, Mao gives no explanation for the choice of two years as the period of reprieve, but in the Qing Dynasty the first category of cases included in annual case reviews was the category of "deferred execution"; these cases were also set aside for two years. At the end of the two-year period the execution could theoretically be enacted, but in the vast majority of the cases the capital sentence was reduced (Bodde and Morris 1967, 138). Mao was born and raised at the end of the Qing Dynasty and read imperial history voraciously (Spence 1999). He was surely aware of this antecedent practice.

The Scale of the Death Penalty under Mao

Because Maoist governance emphasized decentralized administration, campaign politics and social quotas, the scale of political decision in many areas of Maoist China was massive. This included the scale decisions that led to the loss of human life. Much of this death was due to quotas that had nothing to do with punishment. The Great Leap Forward, for example, was a disastrous agricultural modernization campaign that led to tens of millions of deaths (Dikötter 2010; Yang 2013). Data from this period—including execution data—is spotty. As mass line politics became more prominent, state institutions were sidelined. Legal institutions that did produce data did not do so reliably; and the national government has been tightlipped about statistics.

Mao himself reported public security data on the Campaign to Suppress Counterrevolutionaries indicating more than 1.2 million people were imprisoned, 1.2 million people were subject to social control, and 700,000 people were executed, a figure that represented 0.124 per cent of China's total population at the time, an estimate that scholars believe is probably an undercount (Yang 2008, 120). Other sources put the number of executions during the campaign as high as two million (Strauss 2002, 87). This scale of capital punishment during the Campaign to Suppress Counterrevolutionaries predicted capital punishment in Maoist campaigns to come. In the Anti-Rightist Campaign (1957-58) between 550,000 and a million people, mostly intellectuals, were denounced and purged (Zeng and Eisenman 2018, 251). If the rate of capital punishment during this campaign were consistent with the Campaign to Suppress Revolutionaries, this means possibly hundreds of thousands of people were executed. Historian Frank Dikötter estimates that more than 2.5 million people were tortured to death or summarily killed during the Great Leap

Forward (2010, xi). During the Cultural Revolution (1966-1976)—Mao's last great public mobilization—popular justice was manifest in its most direct form, with almost total breakdown of institutional moderation. And 1.5 million people died as part of collective killings during this period. Most of these deaths took place at the local level and were carried out with farm implements (Su 2011). While it is debatable whether deaths carried out in this manner qualify as executions, the political sociologist Su Yang argues that they should be considered state killings, because they were the result of state mobilization as much as state breakdown (Su 2011, 222). In sum, we will likely never have a detailed accounting of capital punishment under Mao, but the figure is certainly denominated in the millions.

Law Under Mao: Marginalized and Decentralized

China under Mao is sometimes crudely characterized as lawless. In fact, the situation was more complex. As we saw, in Imperial China, law (and particularly criminal law) served a duel state function of regulating both popular threats and elite threats. Mao adopted a Marxist critique of law and viewed it as a tool of oppression. But the Party also saw law's possibilities as a weapon of the people (Altehenger 2018, 8). In the early 1950s revolutionary ideology fused with law in what was referred to as "political-legal work" (Lubman 1999, 72). Some early PRC efforts to remake civil society through revolutionary law had a big impact. The 1950 Marriage Law showed the power of legislation for social change, empowering women and challenging the traditional social order (Cheng, Lestz and Spence 2014, 360-61). The PRC also introduced its first constitution in 1954. This early period is often called the golden age of law in China.

There was no golden age for criminal justice under Mao, however. Drafting efforts notwithstanding, the PRC did not codify any criminal law during Mao's tenure. Instead, it relied on mass sentiment from the bottom and general directives from the top, most fundamentally the directives that Mao issued during the Campaign to Suppress Counterrevolutionaries. From the get-go, criminal law existed in uneasy tension with the mass line and campaign politics. If correct leadership was indeed "from the masses, to the masses," what happened when the law and the people disagreed? As internal political tensions within PRC leadership intensified in the 1960s, Mao used his directives to target both the law and the institutions of law, including the state. The criminal process became "an arena for competing values" of mass mobilization and bureaucracy (Lubman 1999, 84-85). Some Party leaders hoped that campaign justice would ease the new nation into legal institutions; instead the political power of campaign justice overwhelmed efforts to institutionalize criminal law, and campaign justice became the dominant mode of penality (Dutton 2005, 142-143). As a result, as one Chinese scholar quipped, "law didn't come prior to campaigns, but out of them" (Quoted in Dutton 2005, 163).

In the criminal justice battle pitting red against expert—that is political correctness vs. the technical proficiency—red won out, and legal experts were sidelined (Lubman 1999, 84-85). Unreformed judges were targeted—subject to re-assignment, self-criticism, discipline and punishment (Lubman 1999, 48, 77-78). Meanwhile lawyers barely rose to the surface at this period. After a brief flirtation with a Soviet-Style criminal defense bar between 1954 and 1957, "the formal criminal process ceased to exist and the activities of [police, prosecutors and courts] were variously suspended, disorganized and disbanded, depending on the location and time. Lawyers disappeared altogether" (Liu and Halliday 2016, 20-21).

In other periods of Chinese history, criminal law has served to channel state power through state agents, part of an effort to govern the apparatus of the state from above. Mao instead governed the state from below. Regular people were called to regulate and adjudicate criminal behavior.

What is more, people were called upon to regulate officials. Mao's anti-corruption campaigns exhorted the masses to hold cadres to account. This tactic became more extreme over time. In 1966 Mao said that "rebellion is justified," called for the masses to "bombard the headquarters" (that is, the national government) and encouraged a 1967 piece in the People's Daily, China's paper of record, titled *In Praise of Lawlessness*. The article sums up the contradiction of law under the mass line, stating "proletarian revolutionary rebels armed with the thought of [Mao Zedong] are both 'lawless' and 'law-abiding.' In our minds there are no bourgeois 'law' or the capitalist 'world' but the proletarian 'law' and the socialist 'world.'" The Cultural Revolution represented both the theoretical extremity of Maoist criminal justice and the practical endpoint of Mao himself. His death in 1976 marked the end of the Cultural Revolution. But not the end of his legacy in Chinese capital punishment.

The Death Penalty during Economic Liberalization (1976-2000s)

Mao's influence in shaping state politics—including penal politics—is practically unrivaled in world history. He directly molded a criminal justice policy that produced millions of executions. Only his death in 1976 brought his final political campaign, the Cultural Revolution, to an end. In the years that followed China embarked on a momentous political and economic pivot towards an open-door policy and a market economy under the leadership of Deng Xiaoping. That pivot produced China's economic miracle—decades of sustained growth that made China the world's second largest economy today. But even as China's economic direction provided a radical departure from the past, its criminal justice policy remained moored in the campaign style justice of the Maoist years. This section explores capital punishment during that period.

Legal Institutions after Reform: Ambivalent Reconstruction

In many ways, the reform period began with signals from central leadership that after the horrors of the Cultural Revolution, things were going to be different in China in all areas of life, including punishment. If the apogee of Maoist struggle was the praise of lawlessness, the hallmark of reform capital punishment was its reliance on the trappings of legal institutions.

Given the turn towards legal institutions, it is fitting that the reform period opened with "the most famous trial in Chinese history" (Cook 2016, 1). In this trial, conventionally referred to as the Gang of Four trial (although there were in fact ten defendants) (Cook 2016, 1), senior Maoist leadership stood accused of a host of crimes connected with the cultural revolution. This trial was a moment of transitional justice (Cook 2016, 21-28), a referendum on the past and a pivotal for the development of capital punishment (that has oddly received relatively little attention in the death penalty literature). Although it was in many ways a show trial, broadcast on television and covered exhaustively in the media, it was also an explicit political step towards governance through legal institutions.

The Gang of Four trial was a trial in a court of law. The Supreme People's Court convened a Special Court for the case, marking the only time in PRC history that the highest court has served as a first instance trial court. The very fact that the CCP decided to hold the past administration to account through a hearing—rather than a struggle session or other Maoist trope—points to efforts to reshape the relationship between law, punishment and politics in this period. Yet the charges, counterrevolutionary crimes, also maintained revolutionary commitments to the friend/ enemy distinction of Maoism.

The Gang of Four trial was based on codified law. In 1979 the PRC passed its first Criminal Law—three decades after its founding. Although the 1979 displayed continuity with Maoist

directives on criminal justice policy, most notably in emphasis on counter-revolutionary crimes (Lu and Miethe 2007, 49), the new Criminal Law nonetheless codified these principles into a formal legal document. The 1979 code contained 15 capital offenses. The largest category of capital offenses remained counterrevolutionary crimes, including overthrowing the political power of the dictatorship of the proletariat (Article 103) (Lu and Miethe 2007, 50). The Gang of Four defendants faced 48 charges. Many of these were counterrevolutionary capital charges stemming from accusations of Party purges, planned rebellion and attempted assassination, as well as persecution of citizens resulting in the unlawful deaths of nearly 35,000 people (Cook 2016, 2).

The Gang of Four trial was not just the most famous trial in Chinese history, it was also the most famous *capital* trial in Chinese history. The unprecedented decision to hold the trial at the Supreme People's Court showcased a renewed role for the judiciary in capital punishment decision-making. Article 43 of the 1979 Criminal Law specifies that "all death sentences except for those that according to law should be decided by the Supreme People's Court, shall be submitted to the Supreme People's Court for approval." This stipulation was a call to return to form, a turn away from the decentralized and populist decision-making of the Mao years and a harkening back to central capital review. It was this article that established the power of review that the SPC would first lose in 1983 and then recapture in 2007 to implement death penalty reform.

Although the new Criminal Law granted the SPC the legal power to hand down capital sentences in the Gang of Four trial, it also retained the practice of deferred executions. The Chinese state has used nominal capital sentences as a sanction against its agents under a variety of regimes. A version of this practice was central to imperial capital review under the Qing Dynasty (see Chapter One), and Mao echoed this practice in his directives calling for most counter-revolutionaries to be spared through a sentence of death-with-two-year-reprieve. The 1979 Criminal Law lifts Mao's directives almost verbatim. Article 43 of the law reads:

> The death penalty shall only be applied to criminals who have committed the most heinous crimes. If the immediate execution of a criminal punishable by death is not deemed necessary, a two-year suspension of execution may be pronounced simultaneously with the imposition of the death sentence; the criminal shall undergo reform through labour and the results shall be observed.

Ultimately none of the Gang of Four defendants received a sentence of immediate execution—that is, a sentence intended to result in execution. Two of the defendants, Jiang Qing and Zhang Chunqiao, were given suspended death sentences. Their capital sentences were later reduced, a practice that continues in virtually all suspended death cases to this day (Seet 2017, 467).[7]

The Gang of Four trial did not produce a long-lasting legacy for the SPC in capital cases. Although capital cases were again tried in courts after reform, the highest court was quickly sidelined. In 1983 the NPC devolved the SPC's power of death penalty review to lower courts in order to expedite capital trials during the first strike hard campaign. The SPC would wait more than two decades to get that power back as part of 2007 death penalty reform, the subject of the rest of this dissertation.

Despite the marginalization of the SPC, China's leaders turned to the *form of law* throughout the reform period. As CCP concern over crime and order maintenance grew alongside economic prosperity in the late 20th century, so too did the number of capital offenses codified in

[7] Jiang Qing ultimately committed suicide a decade later; Zhang Chunqiao was released in 1998.

statutory law. These offenses were passed willy-nilly, a pile of one-offs. By 1996 the National People's Congress had passed 24 special criminal regulations enacting severe punishment including death for a wide variety of crimes ranging from selling cultural relics to hunting endangered animals (Liang 2017, 32-33).

These regulations expose the contradictions in capital punishment in the reform era, which have been described as puzzling, contradictory (Tanner 1999, 141) or a riddle (Murray Scott Tanner 2000, 98). While the trappings of capital punishment in the reform period were increasingly legalistic, the form itself was in fact a continuation of the Maoist campaign, albeit rebranded as "strike hard."

Strike Hard

In the reform era China's leaders pivoted away from the dangers produced by radical socialism; they also turned towards a new set of dangers produced by radical economic liberalization. In particular, a generation of leaders steeped in Marxist ideology were troubled by the worry that the free market would bring with it crime, violence and social instability.

In 1983 CCP leaders gathered to discuss concerns about public order. Although the overall crime rate was in fact declining (Tanner 1999, 85), Deng and others nonetheless believed China was in crisis (Tanner 2000). While the Maoist enemy was the counterrevolutionary, the new enemy was the criminal hooligan (Tanner 2000). Fearing instability, China's leaders drew on a ready political vocabulary. In 1983 China's leaders launched the first in a series of "strike hard" campaigns that would dominate criminal justice policy for the next two decades.

The term "strike hard"（*yanda* 严打）is a shorthand for of the phrase "to strike hard at serious crime" (Trevaskes 2010, 27). Strike hard campaigns are both a particular kind of campaign and an appellation for a more general campaign approach to crime control in the reform era. The first national strike hard campaign ran from 1983 to 1986 and became the blueprint for other multi-year national campaigns. Two more major national strike hard campaigns followed: a campaign focused on violent crime in 1996 and a campaign aimed at organized crime in 2001 (Liang 2005, 91). A shorter national strike hard campaign against violent crime was launched in 2010 (CECC 2010). In addition, more localized struggles under the strike hard banner occurred annually through the early 2000s (Trevaskes 2010, 24-41).

The hallmarks of strike hard campaigns are both intensity and speed. As Susan Trevaskes explains:

> In all Yanda [strike hard] campaigns…the objectives of the drives are rationalized as a key means of crime prevention and social control using the policy of employing "severity and swiftness" (congzhong congkuai) to deal with criminal cases considered a serious threat to public or social order. "severity" is applied as a sentencing rationale and essentially means meting out comparatively severe punishment within the scope of the law. "Swiftness" refers to the accelerating and simplifying of criminal procedure to deal with targeted criminals. (2007, 88)

Observers have noted the strong continuity between Maoist campaigns of the 1950s and strike hard campaigns under Deng beginning in the 1980s (Trevaskes 2007, 137-40). Summarizing the key commonalities as they apply to capital punishment, Johnson and Zimring note, among others: the use of targets and quotas, the decentralization, expedited decision-making in the criminal process and an emphasis on mass or popular justice (Johnson and Zimring 2009, 263-64).

Of the many continuities in campaign justice that stretch across the Mao and Reform eras, the reliance on capital punishment is the most significant for this study. The first major strike hard campaign, which ran from 1983 to 1986, has been described as the "bloodiest period in post-Mao Chinese politics" (Tanner 2000, 93). Firsthand accounts of this period drive home this point. In a 2015 talk, former SPC death penalty review judge Lu Jianping describes his experience as a 20-year old prosecutor witnessing an execution at the beginning of the first strike hard campaign in 1983. He vividly describes 28 condemned people, four rows of seven, trussed up like traditional sticky rice balls bound in cord. The military police executed these condemned prisoners by rifle shot, sometimes administering multiple shots if the condemned tried to crawl away. Lu recounts that he was so close to the scene that his pants were splashed in brains and blood. He says that the most harrowing part of the experience was not the execution, but his return to the prosecutor's office, where, after retching, he was told that the kitchen had prepared a special dish for the young recruits, "tofu brain," (*doufu nao* 豆腐脑) to mark the occasion (Lu 2015).

It is estimated that strike hard was "primarily responsible for hundreds of thousands of offenders executed over the twenty-five year period from 1981 to 2006" (Trevaskes 2016, 146). The annual variation in executions during this period is unclear. In their extensive review of the available, partial data, Johnson and Zimring conclude however that there is "clear support for a peak annual volume of 15,000 executions or more at the turn of the 21st century" (Johnson and Zimring 2009, 242).

Capital Punishment in the 21st Century

If the first 25 years of capital punishment in the PRC were typified by revolutionary zeal under Mao, and the second 25 years were typified by strike hard transition under Deng, the years since have been characterized by reform. This was especially true under the administration of Hu Jintao and Wen Jiabao (2003-2013), whose political slogan was "harmonious society" (Zheng and Tok 2007). Hu-Wen presided over the death penalty reforms that are the focus of the rest of this chapter. Death penalty reform has largely continued under Xi Jinping, whose administration is discussed in more detail in subsequent chapters.

Death penalty reform in the Hu-Wen era was a matter of both character and magnitude. In character, the tough-on-crime death penalty policy of strike hard, sometimes termed "kill many," was replaced with a more lenient policy of "balancing leniency and severity" and an ethos of "kill fewer, kill cautiously" (Keith et al. 2014, 143-44; Trevaskes 2016, 116, 123-125). In the era of "kill fewer," annual executions have reportedly declined from a low five-digit number at the turn of the century to a low four-digit number today (Trevaskes 2016, 146; Dui Hua 2020). This decline appears to have been reasonably steady and incremental, involving a range of "kill fewer" governance decisions in law, policy and administration across a range of institutions. The most significant reductions in executions are attributed to policy action led by the judiciary, most notably the SPC's reassertion of the power of final death penalty review in 2007. This reassertion required that the National People's Congress reverse 1983 strike hard legislation that had devolved the death penalty review power in most cases to the provincial courts in an effort to expedite strike hard sentences. The return or review power had an immediate impact on executions. At the end of 2007, in a rare public announcement, the SPC disclosed that death sentences dropped 30 percent in the year it reinstated review (China Daily 2008). The SPC also announced that it had remanded 15 percent of immediate execution verdicts that year to lower courts for further review.

Why did these reforms take place?

The Five Ws (and H) of Death Penalty Reform

It is often said that empirical accounts of any event should answer the five Ws and an H: who, what, when, where, why and how. Of these queries, sociologists point to two as particularly important for explaining social phenomena. The question *why* is a query about function, an effort to explain what higher-order process explains an individual event in question as part of the larger world (Martin 2003, 11). In the case of death penalty reform, an answer to *why* would situate death penalty reform as an instance of a broader political or social system. By contrast, *how* is typically a query about a mechanism, an effort to explain the lower-order process that underly the event in question. An account of how death penalty reform took place should detail the concrete steps that the shift was enacted.

A survey of the literature on death penalty reform shows no lack of answers to the question of why it took place. In fact, it provides too many, suggesting that death penalty reform was an overdetermined event. Leading reasons for reform include revelations of wrongful execution and popular doubts about state legitimacy, state desire for centralization and consistency of rulings, as well as judicial opposition to harsh punishment and the ineffectiveness of strike hard as a crime control policy (Minas 2009; Lewis 2010; Scott 2010; Trevaskes 2012; Bin Liang 2016; He 2016; Nessosi 2017). Indeed, scholars tend to invoke many reasons at once. For example, Steven Minas (2009, 47-56) identifies "imperatives for reform" that include legalization, judicial reform, centralization and CCP legitimacy. Kandis Scott's article on reform includes a section titled "Many Forces Contributed to the Decision to Reform Death Penalty Review." Scott lists international pressure, wrongful executions, increased judicial capacity, a drop in crime, humanitarian concerns and central-local tensions as reasons for reform.

The current story of death penalty reform is the proverbial "everything but the kitchen sink" explanation. Individually, each of the many reasons given for death penalty reform is well-documented and compelling. But in aggregate, they become less, rather than more, convincing. One problem is that having so many explanations dilutes their explanatory value. If all of these factors explain death penalty reform, do any?

These accounts also fail on the question of timing. A solid account of why an event happened should fit the more narrow question: why now? As I show below, in the case of death penalty reform, existing explanations do a poor job of explaining the occurrence of death penalty in the early 21st century, rather than a decade before or after.

Not only do the explanations not seem rooted in the 2000s, but empowered courts and legal regulation seem at odds with a general trend in law in the Hu-Wen period. While criminal justice scholars tell a narrow story about death penalty reform as a court victory, scholars of Chinese law tell a larger tale of a state "turn against law" and judicial autonomy in the early 2000s (Minzner 2011; Liebman 2014). The Hu-Wen administration is best known for its push away from adjudication and litigation and towards mediation and alternative dispute resolution. During this period officials also began to view law as inimical to stability, what scholar Benjamin Liebman calls the "law-stability paradox" (Liebman 2014). Liebman explains that although rule of law is traditionally associated with consistency of decision-making and state legitimacy, in the early 2000s Party leaders became concerned that law was being marshalled in support of contentious politics in a manner that undermined state stability (Liebman 2014).

Why might the state have granted the courts more procedural power over capital punishment review during this period when law was otherwise under attack? What is needed is a broader answer that can capture these forces. I argue that all the reasons for death penalty reform find common cause in the concern with the state's regulation of itself. This broader level of

abstraction is of course further removed from the particulars of capital punishment. But it has the advantage of bringing together all the disparate explanations provided in the literature.

A Matter of Timing

The question of when (or why now?) hangs over all explanations for death penalty reform. Here I examine two: wrongful execution and the ineffectiveness of strike hard.

Numerous commentators point to public outrage at wrongful executions as a spur to capital punishment reform (Trevaskes 2012; Liang 2016, 8-9; He 2016; Nessosi 2017; also, interviewees, e.g. X69). In the early 2000s stories of wrongful execution were all over the national news. Teng Xingshan, a Hmong minority man with a primary school education, was convicted of killing a young woman, Shi Xiaorong, and executed in 1989 (He 2016, 23). Shi—supposedly the victim of a homicide—returned to the village alive in 1993, irrefutably proving that Teng had not murdered her. Nonetheless, authorities did not admit the mistake until 2005. Nie Shubin was executed for homicide in 1994. In 2005 another man confessed to the murder and the media reported it, posthumously exonerating Nie. She Xianglin was sent to prison for murdering his wife in 1994. In 2005 he was released after his wife turned up alive. There are more stories like this. He Jiahong, a leading Chinese scholar of wrongful capital convictions and wrongful executions, lists 14 major cases in his account *Back from the Dead* (2016, xxv).

It is not surprising that wrongful executions have taken place in China. Under strike hard, hundreds of thousands of people were executed with minimal procedural protection. Of course some were innocent. What is surprising is that in a country with draconian media regulation, none of these cases emerged for decades, and then a handful emerged all at once. If outrage over wrongful execution caused death penalty reform, what caused the media coverage that brought these cases to light? Proximately, the commercialization of media in the 1990s certainly contributed to competition for legal reporting. But this reporting was only possible with tacit state endorsement. At the turn of the century both the central Party-state and the SPC began promoting media as a check on local corruption (Liebman 2011, 151-52). Writing on media transparency in 2011, Benjamin Liebman remarks, "[o]ver the past decade, the central party-state has attempted to curb the abuses that threaten to undermine the legitimacy of CCP rule by encouraging a range of institutions to assume roles as supervisors of misconduct and wrongdoing." Liebman contends that the central state encourages both courts and the media as forms of "controlled transparency" that serve as checks on corruption (Liebman 2011, 169-170). In other words, sitting behind popular outrage over wrongful executions was unified central state concern with the actions of lower level officials.

From August 2006 to March 2007 He Jiahong surveyed 1,715 legal professionals about the causes of wrongful conviction. The four most commonly cited explanations are telling. 63 percent of respondents cited "insufficient professionalism of legal officers;" 55 percent cited "unclear laws or rules;" 50 percent chose "interference by higher agents or superiors"; 45 percent cited "investigators who bend the law for personal interest and who exhort confession by torture." All of these answers point to administrators who are ill-equipped or unwilling to act as agents of the state. Also notably, despite the longstanding dominance of campaign justice, agents interests do not seem to boil down to a response to populism. "Public pressure" was the least often cited reason for wrongful conviction selected in the survey (He 2016, 5). In sum, the state allowed judicial and media mechanisms that highlighted wrongful execution as a bigger problem than strike hard crime control only when the state became more concerned with the control of its actors than the control of its citizens.

Let us consider one more of these proximate explanations for death penalty reform: the ineffectiveness of strike hard as a crime control strategy. The argument here is that death penalty reform came about because the state came to recognize that strike hard didn't work. Indeed, some commentators go further, arguing that strike hard and other security state tactics may even be criminogenic, creating a brutalizing effect that exacerbates public violence (Trevaskes 2010, 17; Minzner and Wang 2016, 355-56).

There are two problems with the claim that the ineffectiveness of strike hard encouraged death penalty reform. The first problem with this argument is that it assumes that state actors base penal policy on rational evidence of crime control. The US case discussed at the beginning of this chapter makes clear that state decisions about punishment do not bear a direct relationship to crime. This is empirically the case in China as well. Overall, the available data on strike hard's effect on crime have been mixed all along (Harold Tanner 1995, 296). That truth has not stopped leaders in the past. Deng Xiaoping's initial decision to launch strike hard stood on thin data regarding a rise in crime (Welsh n.p.). It is true that plenty of Chinese scholars identify that strike hard was ineffective (Trevaskes 2010, 79). But there is no more reason to believe that data on the death penalty played a part in death penalty reform than there is to believe that data drove the launch of strike hard.

The second reason to doubt that death penalty reform was a response to the ineffectiveness of strike hard is that strike hard hasn't actually gone anywhere. Strike hard campaigns—and the campaign style of Chinese politics more generally—persist in China (van Rooij 2016). In 2010 China launched its fourth national strike hard campaign, the first since death penalty reform. State media reported that the seven-month campaign was launched in response to a spike in crime in 2009 (CECC 2010). Both Hu Jintao and Xi Jinping launched periodic strike hard campaigns in Xinjiang, notably in 2009 and 2014.

Indeed, strike hard is still alive and well, especially in regions where state control of local populations is perceived as a more pressing threat than government malfeasance. However, outside of these restive areas, death penalty procedures increasingly constrain local criminal justice agents. So, instead of considering death penalty reform as a signal of strike hard's decline, it is possible to consider both death penalty reform and strike hard in light of the competing state priorities I have laid out in this project: namely, the one-party authoritarian dilemma of managing Chinese citizens and managing the apparatus of governance itself (Svolik 2012; Magaloni and Kricheli 2010, 126; Minzner and Wang 2015, 340-341; Greitens 2016). Strike hard delegated tremendous penal power to state agents for the purpose of managing stability. Death penalty reform did not repudiate state interest in managing stability. Rather, it displayed increasing state concern for procedural accountability from local penal actors amid this process.

How Did SPC Death Penalty Reform Take Place?

In contrast to the abundance of accounts of why death penalty reform took place, very little has been written about the mechanisms of death penalty reform. According to the Sociologist John Levi Martin, "[m]echanisms are usually what is invoked when someone accepts a theoretical claim, but insists on asking 'how' it comes to be the case…. While providing mechanisms is not necessary for a theory to be useful or correct, such provision often increases its plausibility" (2001, 11). We may also use this logic in the other direction as well. A strong theory should account for why a mechanism works in one case but not another. If we accept the account of the mechanism but that mechanism does not hold for other instances, we may need to reconsider our theory.

By far the most thorough account of the mechanisms by which death penalty reform took place is Susan Trevaskes's book *The Death Penalty in Contemporary China*. Trevaskes says up front that "the concern of this story is 'how' rather than 'why'" (2012, 10). The first mover in her account is the SPC, and specifically Xiao Yang, the SPC's president from 1998 to 2008. Xiao Yang and like-minded jurists opposed the widespread and haphazard application of the death penalty and wanted to reform it (Trevaskes 2012, 4, 35). However, they faced opposition from a central Party-state (Trevaskes, 2012, 3-4). Xiao Yang succeeded in death penalty reform in two ways.

The first way that Xiao Yang and the SPC reformed the death penalty was through policy changes within the judiciary, where they did not face political opposition. Specifically, in the early 2000s court leaders began encouraging policies to divert executions as much as possible. They were most successful in doing so by harnessing a long-standing sentencing alternative: suspended execution. As we have seen, nominal capital sentences were a hallmark of criminal justice sentencing in Imperial China. Mao Zedong established suspended execution as the standard method of capital reprieve in the PRC. Even following revisions to the Criminal Law in 1997, the black letter law on when a capital case should result in a suspended or immediate execution remained fuzzy. That indeterminant space had been filled by policy, specifically strike hard. Without more explicit legal guidance, judges had previously followed the social policy pressures of strike hard and erred on the side of immediate execution, rather than suspended execution. The SPC encouraged local courts to develop guidelines calling for the use of suspended execution in more particular instances (Trevaskes 2012, 116-142). The SPC also issued directives specifying the use of suspended execution in place of immediate execution in more and more situations. Because court leaders couldn't change law, they circulated the minutes of judicial conferences in which policy guidance constrained the use of immediate execution (Trevaskes 2016, 152-153).

Reform within the judiciary could only go so far. The second way that Xiao Yang and the SPC reformed the death penalty required wresting back control over final review of capital cases, a power that the legislature had delegated to intermediate courts in 1983 in order to expedite sentencing during the strike hard campaigns. To do this, Xiao Yang and colleagues had to exert leverage outside the judiciary within the central Party-state. They did so by playing off the policy language of the Hu-Wen initiative calling for a "Harmonious Society" (Trevaskes 2016, 175). Specifically, the Court aligned this catchphrase with slogans of "balancing leniency and severity" and "kill fewer, kill cautiously." In Trevaskes's account, this rhetorical line of attack capitalized on anti-strike hard headwinds that allowed the SPC to prevail in convincing the National People's Congress to decide in October 2006 to return the power of death penalty review to the SPC (Trevaskes 2016, 142). While the nuance of the SPC's approach is important, Trevaskes's claim can be boiled down to this: the SPC succeeded in a political contest over death penalty reform by aligning judicial interests with broader state imperatives.

The Untaken Road to Judicial Reform

What is most striking about this story of *how* death penalty reform took place is what it leaves out: other initiatives in which the SPC took a similar approach and failed. If death penalty reform could be pushed through the central Party-state through the rhetorical maneuvers of SPC leadership, we might expect to see this result across a range of priorities. But this was not what happened. Instead, in the early 2000s the SPC pushed for a panoply of reforms. Xiao Yang was explicit about this agenda (Ip 2011, 384). In some cases, the SPC was successful at overcoming political opposition. In others they were not. What unites the successful legal reforms, including

death penalty reform, is that those reforms increased the power of the Party-state over its own institutions. By contrast, reforms that would reduce Party self-regulation failed.

Since Trevaskes's account focuses on SPC President Xiao Yang, it may be helpful to look specifically at his role. Xiao Yang is well-known as a reform-minded leader. Xiao Yang was the first judge to preside over the SPC. He also brought a history as a prosecutor and leader at the Ministry of Justice, making a name for himself as an anti-corruption advocate (Keith et al. 2014, 22). In his tenure at the SPC, Xiao Yang called for comprehensive legal reforms. These reforms included not only death penalty reform, but also increased judicial professionalism (see Chapter Three), anti-corruption, transparency and judicial autonomy (Keith et al. 2014, 23-34).

But Xiao Yang's personal commitments—no less the goals of the judiciary—do not translate into policy. That requires buy-in from actors outside the courts, including, at a minimum the Party's Central Political-Legal Commission, which coordinates many aspects of law enforcement, and more generally central Party leadership, including the Politburo Standing Committee. As a political figure, Xiao Yang used the same mechanisms that achieved death penalty reform—rhetorical maneuvering and Party-state powerplays—to work towards all his goals. He was successful and indeed received support for some of these initiatives, notably death penalty reform, anti-corruption efforts and calls for increased professionalism. By contrast, he received major pushback on his efforts at judicial independence (Keith et al. 2014, 36). Ultimately, it was these latter reforms that created a backlash that led to his ouster.

In 2008 Wang Shengjun replaced Xiao Yang as head of the SPC. Wang and his mentor, CCP Central Party Committee on Political and Legal Affairs Zhou Yongkang, were hardliners who endorsed Party supremacy and opposed judicial independence (Keith et al. 2014, 39-41). Zhou in particular was a top law enforcement official strong advocate of stability maintenance (Ip 2011, 380). Nonetheless, after Xiao Yang's departure SPC death penalty reforms were left intact, and efforts at anti-corruption and professionalization went forward under Wang.

In contrast to Trevaskes's depiction of the reform mechanism as one of factional disagreement, I submit that the continuity of death penalty reform under Xiao Yang and Wang—and the lack of support for Xiao Yang's call for judicial independence—point to a wider endorsement of death penalty reform as in line with the imperatives of a one-party state facing a survival dilemma. The SPC succeeded in reforming the death penalty but failed in pursuit of other initiatives such as judicial independence because the former goal was also in the interest of broader Party-state leadership, while the latter goal was not. Specifically, the broader complex of judicial reform issues that gained elite support in the early 2000s—professionalism, anti-corruption and death penalty reform—all reflect the larger CCP concern with regulating the actions of its agents. These concerns are not inimical to the stability maintenance paradigm. They point to a state-level imperative that stretched beyond the proximate causes of capital punishment reform identified in the literature. Indeed, once we jettison the blinkered view that death penalty reform's primary function must be about regulating the death penalty or prioritizing law—we can see how it fits with a set of court reforms that all came about precisely at the moment when stability maintenance was in ascendance as a political priority.

A spot-check of the court's conduct during this crucial period bears out this observation. The Court actively pursued malfeasance of lower court actors in capital cases, even where that meant increasing penalties. The case of Liu Yong stands out. Liu Yong was a gang leader in Shenyang who was sentenced to death by a first instance court in 2002. However, the second instance court modified the sentence to suspended execution, in a move that was widely attributed to judicial corruption. In response, the SPC took the unprecedented step of ordering a retrial of the

case and replacing intermediate court judges with members of the SPC. The SPC judges found Liu guilty and resentenced him to immediate execution (Lu and Miethe 2007, 99-100). Here the SPC intervention in the death penalty increased punishment and was entirely in line with regulating its own actions.

Conclusion

In this chapter I have endeavored to provide a descriptive account of the scale and character capital punishment in China from 1949 to 2007 and an analysis of the origin of death penalty reform.

Descriptively, I divided the PRC's death penalty history into the revolutionary period under Mao Zedong until his death in 1976, the liberal period under Deng Xiaoping through roughly the turn of the century, and the reform period typified by Hu Jintao that has continued to the present. Mao's revolutionary politics set the patterns that frame China's death penalty exceptionalism to come. Under Mao, criminal justice was dominated by a friend/ enemy binary and orchestrated through campaigns. Mao marginalized law and centered quotas. In the crucial early years of the PRC, hundreds of thousands of people were executed as part of campaigns, a scale that dwarfs any period since. While Deng took China's economy in a new direction after Mao's death, his criminal justice policy displayed continuity as much as difference. Despite a renewed emphasis on legality, in the Deng administration campaign justice persisted in the form of strike hard campaigns. While the scale of execution diminished from the revolutionary period, hundreds of thousands of people were nonetheless executed during these decades of liberalization. Finally, the reform period since the turn of the century is characterized by court regulation of capital procedures. Executions have declined, but China still executes thousands of people a year, making in the world's leading executioner (Amnesty International 2020). This long arc shows how from the vantage of historical comparison China's death penalty regime may look tame today, even as by world standards it sits as an outlier.

Analytically, in this chapter I addressed the question of why death penalty reform took place. Existing accounts indicate that death penalty reform was overdetermined. Commonly cited proximate causes include wrongful executions, the ineffectiveness of strike hard justice, state centralization, an activist judiciary and concerns about popular legitimacy (Minas 2009; Lewis 2010; Scott 2010; Trevaskes 2012; Bin Liang 2016; He 2016; Nessosi 2017). I show that these causes lack explanatory punch. Not only were many of these causes present for a decade or more prior to reform, but the explanations seem particularly dubious when we consider that death penalty reform was a court initiative that took place amid the wider "turn against law" in the early 2000s (Minzner 2010). We gain more purchase on the reason for success of death penalty reform when we examine it next to other court initiatives in the same period. We can see that despite a heightened interest in stability maintenance in the Hu-Wen period, SPC initiatives that aligned with further self-regulation of state actors, notably a push for judicial professionalism and efforts to root out corruption, also succeeded. Meanwhile, efforts to increase judicial autonomy—that is, to reduce the Party-state's ability to regulate some of its agents—failed. Viewed in this light, death penalty reform is intelligible as part of the broader political survival agenda of China's one-party state.

II. THE PRESENT

Chapter 3: Judges

[SPC death penalty review] judges from a legal perspective are extremely, extremely knowledgeable and professional.

– Young criminal defense lawyer in Beijing[1]

I came to think of the Supreme People's Court as an insurance company that was processing claims. They were not an august body of nine robed judges.

– US death penalty specialist who provided clinical training in China[2]

The work of death penalty review is arduous and boring.

– SPC Death Penalty Review Judge Lu Suxun[3]

Nations restrain or abolish capital punishment in lots of different ways: executive decree, legislative amendment, constitutional provision, court decision, popular referendum and even revolutionary dictate (Death Penalty Worldwide 2016; Sarat 2019, 1-6). In 21st century China, death penalty reform means judicial reform. The Supreme People's Court (SPC) initiated changes in capital punishment procedure; in turn, capital punishment procedure changed the SPC.

In the previous chapter I argued that the SPC was able to pull off death penalty reform when it did because elites made the political calculus that a more empowered SPC could rein in local officials. But after the court reclaimed this power, it still had to implement new structures in order to use it. In this chapter I provide an empirical account of how this process unfolded. I begin by explaining how death penalty reform took place in US courts, and how China's SPC—which functions as a sort of bureaucratic auditing agency—upends American expectations about the role of apex courts. I detail the formation of the SPC Death Penalty Review Division, the work of the hundreds of people who staff it, and the impact of their work on the hundreds of thousands of judges below them in the lower rungs of the judiciary. I also describe three mechanisms of SPC death penalty review supervision: example-setting, investigation and case remand, and show how these mechanisms serve to control local agents.

Death Penalty Reform and the US Judiciary

One thing that the US and China have in common is that in both countries the biggest national constraints on capital punishment have come through the courts. In post-war Europe, political leaders and coalitions drove the end of the death penalty, chiefly through constitutional amendments (e.g. Germany) and parliamentary decisions (e.g. France and England) (Sarat 2019, 4-5).[4] But while European politicians on the other side of the Atlantic were dismantling the death

[1] Interview with author [X15].

[2] Interview with author [X9].

[3] Lu 2015.

[4] I am not aware of any comprehensive study documenting the frequency of various political mechanisms by which states across the world restrain the death penalty or achieve abolition. Death penalty abolition is frequently the result of the interplay of actions by a variety of state actors (Death Penalty Worldwide 2016). A perusal of the literature (e.g. Hood and Hoyle 2015) does not seem to suggest that courts are the most common proximate cause of abolition worldwide.

penalty in the second half of the 20th century, in the US the major challenge to capital punishment came from the judiciary.

There are a couple of ways to understand the prominence of the American judiciary in the trajectory of the US death penalty. Branches of government offer one way to think about the court's role. The US system of checks and balances divides American political power over the death penalty (Whitman 2003, 13-14). All three branches have a role in capital punishment. The legislature is charged with putting death penalty statutes on the books and holds the power to get rid of capital sanctions if it so wishes; the executive branch carries out capital sentences and may intervene with stays, clemency and moratoriums. And of course the judiciary not only adjudicates cases, but also considers the constitutionality of death penalty statutes and procedures. This means that in the US, it is easy for any branch to gum up the works, but hard for any branch to unilaterally abolish the entire death penalty process.

Given the structure of US federal politics, it is not surprising that the judiciary intervened most forcefully in the death penalty. Among the federal branches, the court arguably has the easiest political opportunity to put a wrench in the death penalty machinery. The Supreme Court of the United States (SCOTUS) consists of nine justices, all of whom serve life tenure. A ruling on the constitutionality of the death penalty by a majority of these unelected officials is arguably easier to come by than a moratorium by a term-limited president, legislation through elected officials in congress or a constitutional amendment through the states. Perhaps for this reason, at the federal level, the SCOTUS stands out as prime-mover in the trajectory of the American death penalty. It did so first in seeming to invalidate the constitutionality of the death penalty in *Furman v. Georgia* in 1972 and then in regulating its application in *Gregg v. Georgia* and its brethren in 1976. In the decades since, the US Congress has left federal capital statutes on the books. And presidents have declined to take a strong position on abolition. Meanwhile, the court has continued to intervene.

But thinking about the importance of branches of government in the US case can distract us from thinking about the importance of levels of government. The US capital punishment system includes 51 jurisdictions: the federal government and the 50 states. Each state may pursue criminal policy as it wishes, provided it does not violate the US constitution. Most capital sentences have always taken place at the state level, and states have always varied in their use of capital punishment. Michigan, for example, abolished capital punishment for murder way back in 1846 (Banner 2002, 134). There are also longstanding regional distinctions; the death penalty has always been more prevalent in the South than in the North (Banner 2002, 112-42). Today most of the action in the US death penalty continues to take place at the state level. In the modern death penalty era since 1976, the federal government has carried out only six executions (two in 2001, one in 2003, and three under the Trump administration at the time of writing in 2020) (DPICa 2020). By contrast, the states have collectively carried out 1,521 executions over the same period (DPICb 2020).

When the SCOTUS opined on the constitutionality of the death penalty in *Furman*, it was not just intervening in a matter of penal sanctions; it was also intervening in a matter of federal oversight of state police power. *Furman* struck down particular state capital punishment protocols that were deemed discriminatory and capricious. Immediately dozens of states responded with amended protocols aimed at addressing constitutional deficits. SCOTUS's follow-up decisions in *Gregg* approved new protocols in a number of states, showing that the court deemed capital punishment constitutional, so long as it was regulated with guardrails and constrained discretion.

On its face, US court regulation of the death penalty fits one of the broad themes of the development of capital punishment across the world: centralization (Garland 2010, 108). The

constitutional regulation of the death penalty projected federal power down to the level of the county trial court. Yet there is a peculiar irony in this project: while centralization and regulation in federal states typically lead to uniformity, US Supreme Court regulation of the death penalty has instead created greater divergence (Steiker and Steiker 2016, 116-17). States must all meet constitutional standards with regard to the death penalty, but each state is afforded wide latitude in formulating these standards. The SCOTUS regulates in the negative: intervening where action is unconstitutional, rather than prescribing best practices. And it intervenes irregularly, issuing opinions in fewer than one percent of capital cases (Zimring 2003, 71). The result is that today the states that retain capital punishment (DPICc 2020) exhibit more diversity in their use of the death penalty than they did before *Gregg.* States differ wildly in everything from funding for provision of counsel to state level appeals mechanisms (Steiker and Steiker 2016, 116-153). The death penalty is also more concentrated after reform. Most executions now take place in a small handful of states, and most death sentences come from a small handful of counties in those states (Zimring 2003, 67-88). The legal process also means that the time between sentencing and execution is lengthy. In a 2015 federal district court opinion regarding a challenge to the long delays in California executions, the judge noted that the state administration of capital punishment following death penalty reform has become "dysfunctional"; only 13 of the over 900 people sentenced to death in the state since 1978 had been executed (*Jones v. Chappell* 2015, 1).

Supreme Court regulation of the US death penalty has been generative—it has produced new institutions, new regulations and new discourses (Garland 2010). But it has also produced a system of judicial oversight and a body of jurisprudence that is variable, fragile, hyperextended, inconsistent, "messy and meaningless" (Zimring and Johnson 2011, 738; Steiker and Steiker 2016, 155, 154-216; Garrett 2017). As one of the most astute observers of the federal-state relationship in US capital punishment writes:

> [US death penalty reform] combines all the costs of attempting to impose national standards on state capital punishment decisions with few of the benefits. The system is slow, redundant, and expensive yet produces very little evidence of quality control or consistent principles in the selection of those criminal defendants who are sentenced to death or eventually executed. (Zimring 2003, 88)

The US case offers a cautionary tale of comparison for China's more recent reform. More court intervention in the death penalty may make the administration of capital punishment more onerous, and therefore reduce executions, which may be desirable. But the price of court intervention in capital punishment in the US was also high. It may not be a price China wishes to pay.

China's Supreme People's Court

China's SPC and the US Supreme Court are identical institutions in one obvious and important way: both courts are apex courts. Each court is the highest court in the land and sits at the top of a vertical hierarchy of adjudication. Each court exercises ultimate court authority to review lower court judgements on matters of national law. In this sense, the SPC and the SCOTUS are apples and apples. But this one likeness can easily distract from the myriad crucial ways that the SPC and the SCOTUS are apples and oranges.

For one thing, although the SPC and the SCOTUS are apex institutions in the vertical hierarchy of judicial governance, the Chinese judiciary wields far less horizontal authority over other peer national institutions than its American federal counterpart. China's judiciary is not a co-

equal branch of government as in the US. In fact, China lacks branches of government in the American sense of the term. That is, the PRC does not operate under a separation of powers in which the judiciary, the legislature and the executive conduct themselves relatively autonomously and exercise checks and balances on one another. Rather, the PRC is a unitary Party-state. Central political authority rests solely within the Chinese Communist Party (i.e. "the Party"), which manages the institutions of government (i.e. "the State") (see generally Heilmann 2017, 50-56). The senior leadership of the SPC—like the leaders of all significant Chinese institutions—is selected from among high-ranking Party members (McGregor 2010).

Of course, although the Party-state system is unitary, it is not monolithic. There are still political factions within the Party, and institutional tensions among agencies within the state. Among state agencies, the SPC is a relatively weak actor. Formally, it is under the administration of the National People's Congress (NPC) and is on a similar footing as the Supreme People's Procuratorate. The SPC does not possess some of the crucial powers that can make apex courts—and rule of law more generally—institutionally influential elsewhere, like in the US. The SPC does not have the authority to interpret China's constitution and strike down laws and actions that violate it. The SPC cannot establish binding precedent through the power of *stare decisis*. Officially, the SPC can issue guidance to lower courts on interpreting the law, and it can overturn lower court decisions, but ultimate authority over statutory interpretation rests with the legislature in the NPC. The NPC also appoints the SPC president. This appointment is for one or two five-year terms (rather than the lifetime appointment enjoyed by US justices). Prior judicial experience is not a requirement for appointment, and in fact Xiao Yang was the first SPC president with any significant legal background (Keith et al. 2014, 58-89, 99).

As with other Chinese agencies, the SPC is part of a political matrix and may be thought of in horizontal terms—as one of the weaker agency players at the highest level of Chinese governance—and also in vertical terms—as the top dog in a massive judicial bureaucracy penetrating down to the county level (Lieberthal 2004, 187). Indeed, whatever images of nine robed justices the term Supreme People's Court may conjure to unfamiliar readers, the SPC is in fact a massive bureaucracy. It employs hundreds of judges who toil at not just case adjudication, but also research, policy, training and many other routine activities of civil service. The SPC is large because it must manage a large government footprint.

China has hundreds of thousands of judges, and more judges per capita than the US (The Economist 2015). At the bottom level sit the Basic Courts. At the time that the SPC took back death penalty review, China had over 3,000 Basic Courts staffed by about 240,000 judges and other personnel. These courts handled over six million total cases in 2008 (Keith et al. 2014, 97). One level up are China's Intermediate Courts. There are over 400 Intermediate Courts with over 50,000 staff. Intermediate Courts serve as second instance courts for appeals on lower court judgements, as well as courts of first instance for some major categories of cases, notably capital cases. Above Intermediate Courts at the provincial level sit the High Courts. These 33 courts contain over 10,000 judges and staff. High Courts are responsible for trials of the second instance in capital cases. Prior to reform, High Courts also carried out the death penalty review process themselves (much like a student grading their own homework) (Keith et al. 2014, 98-99).

As a vertical bureaucracy the SPC arguably wields more powers over lower courts than apex courts in other countries. For one thing, as with many civil law states, China has only one national Criminal Law. This means that its agents all deal with the same unified code and can be directed to apply it uniformly. The SPC also has power to exert its influence on lower courts. Whereas the SCOTUS, for example, has one big lever for directing the actions of lower court

judges—judicial review—the SPC can intervene in lower court activities through many of the smaller levers of traditional bureaucracy: policy directives, guidelines and sanctions. But even though the SPC has many levers to control lower courts, it also has management troubles. That's because lower courts have mixed loyalties.

China's Captured Lower Courts

The SPC faces unique problems associated with managing a Chinese judicial hierarchy; but it also faces the problems common to the management of any Chinese government bureaucracy. Although the Chinese Party-state is unitary, it is also strikingly decentralized (Landry 2008; Heilmann 2017, 92-93). On one common measure of decentralization—the share of government spending that takes place below the national level—China leads the world: almost 70 percent of government spending in China is subnational (compared to about 50 percent in the United States, a country that is traditionally depicted as federally decentralized) (Landry 2008, 3-4).

China's leaders actively pursued decentralization as a growth strategy in the late 20th century. Beginning under the leadership of Deng Xiaoping, the central Party-state starved local governments of operating revenue and forced them to produce creative solutions through political entrepreneurship (Kroeber 2016, 1-26). In response, local officials made the economy grow in innovative and diverse ways. Under this system all local officials face competing incentives: they serve at the pleasure of the Party-state in Beijing, yet they must work with local interests to keep business humming. Even the most scrupulous local officials have strong incentives to disregard orders from Beijing if they can generate revenue for their local government. And as in Imperial China, leaders of government agencies in the capital correspondingly face a survival dilemma between granting more autonomy to agents for local management and reining them in under central directives.

While the entire Party-state struggles with control over local agents under decentralization, the judiciary faces a particularly acute dynamic of local capture (Gong 2004; Wang 2020, 2). The same dynamics that make the SPC a relatively weak institutional actor on the national stage—dependence on the Party and the NPC—are structurally replicated at every level of government. High Courts are under the thumb of provincial Party officials and provincial People's Congresses. And so on down to the local courts. Local courts are also even more starved for revenue than the local government as a whole because in an era of fiscal federalism, local courts depend on local government for their operating budget (Wang 2015; Ng and He 2017, 168-69). The political scientist Yuhua Wang (2015) argues that the power of the purse that local governments exercise over local courts causes a huge national variation in local judicial power. In areas where local government relies heavily on foreign investment, local authorities do adequately finance the courts and stay out of judicial affairs, because independent courts encourage international economic engagement. In these areas local courts remain relatively free of local influence. But in areas where local industry drives government revenue, local economic elites will lean on local officials to serve their interests; local officials will in turn use funding threats to influence court decisions. In these areas courts therefore serve not just two masters but three: they must be attentive to the formal requirements of law, the vertical expectations from superiors in the court hierarchy, and the horizontal pressures from other officials in parts of the local Party-state.

Decentralization is also a particular challenge for the SPC because of the character of law. While other types of government agencies have a mandate for local innovation and policy variation, consistent local application of the national law is a crucial feature of a functioning national court system. Courts in Chengdu and Tianjin aren't just both tasked with resolving disputes and

punishing criminals. They are tasked with resolving disputes consistently, both over time within each court and in a similar manner across courts.

It is not just the SPC that is concerned about captured courts. Other central government agencies care as well. As a result of decentralization, corruption (which is discussed in more detail in Chapter Five) is now endemic (Gong 2004; Li 2012) and a major preoccupation of the average Chinese citizen. 84% of respondents on the Pew Global Attitudes China survey say corruption is a big problem (Wike and Parker 2015). All agencies including the judiciary are subject to corruption. But not all agencies also regulate corruption. Courts are uniquely positioned to find other local agents guilty of corruption and punish them for it. Once lower courts are captured by local interests, they cease to reliably serve this purpose.

In the previous chapter I argued that death penalty reform came about when it did because in the early 2000s a coalition of Party leaders was more concerned about reining in Party agents at lower levels of government than about ceding some additional authority to the judiciary. The SPC is a pragmatic actor (Zhang 2012) that succeeded in gaining support for initiatives that served shared ends with other central agencies. Specifically, death penalty review is a new channel of vertical oversight that allowed the SPC to directly expand its central capacity to monitor the actions of lower court judges, and, indirectly, monitor other agents of government as well, as review helps prevent the judicial capture that makes local courts subservient to other local actors. At least, I argue that these concerns explain the manner and timing of the return of SPC death penalty review. But they do not predict how centralization played out in practice after 2007. In the following sections I explore the development and work of the SPC's death penalty review unit in the decade after reform.

Building Judicial Capacity

When the SPC reclaimed the power to review death sentences, the judiciary didn't just overhaul its processes, it also overhauled the physical space of the highest court and the professional staff who populate that space. Preparations for the new procedures began in earnest in 2005, when it became clear that the National People's Congress would approve the handover of review authority. In order to accommodate the new work, the SPC needed a second Courthouse. Since the founding of the PRC in 1949, China's apex court has been located in Beijing. The court's official address, as publicized on its website, is No. 27 Dongjiaomin Lane in Dongcheng district in the heart of Beijing (Supreme People's Court 2020). This building serves as the Court's civic face. The main Court building is not open to the public, but it is nonetheless a public edifice; with a towering Soviet-style entrance and a prominently displayed massive court seal, the building is hard to miss.

A half hour walk East from the main Courthouse, but still in Beijing's city center near the remains of the Ming Dynasty city wall, sits another SPC court. This building, located at No. 9 Beihua City Road, is the SPC's "second office area" (*di er bangongqu* 第二办公区), but it is more commonly referred to as the "Death Penalty Review Building" (*sixing fuhe dalou* 死刑复核大楼). In 2007, the SPC's entire Criminal Division moved into this building (Ren 2014).

The physical structure of the Death Penalty Review Building can tell us a lot about how reform transformed the SPC. The first thing to notice is that capital punishment reform in China requires a lot of space. The Death Penalty Review Building is ten stories tall and takes up a quarter of a city block. The second thing to notice about the building is how easy it is to miss it. Its size notwithstanding, the Death Penalty Review Building is a plain office building. It has no grandiose frontage or imposing crest; only a small national flag flies from its wall. In fact, the building

entrance is easily upstaged by the Hunanese restaurant next door. This is not a building intended to communicate the grandeur of law to the public. Lu Jianping, a scholar who served for two years as vice president of one of the SPC death penalty review units and speaks with unusual candor about that experience, had the following to say about the visual effect of the Death Penalty Review Building.

> Of course, the thing I found most unforgettable was that I was a justice of the Supreme People's Court appointed by the Standing Committee of the National People's Congress, [but] my place of work was actually unmarked and slightly mysterious. I used to joke with our leaders. On the first day we met I said "boss, put up a sign for this place, or I won't come in." On the day I left, I said "boss, I implore you, put up a sign for this place, or else I won't go." Anyway, regardless of whether or not I stayed, that sign still hasn't been put up. (Lu 2015)

Even without a sign, the building is not totally inconspicuous. It stands out in one way: it is fortified. A fence surrounds it. Military police are visible (Qian and Jiang 2015). One is not invited to linger. Capital punishment in China remains an activity that is kept firmly under wraps (see Chapter Six).

Staffing the New Courts

The Death Penalty Review Building had to be big in order to house a big staff. The SPC is divided into divisions according to substantive areas of law, and death penalty review is managed by the Criminal Division. Prior to death penalty reform, this division was charged with criminal law and policy research and guidance. After reform, the division's primary occupation became review of capital verdicts. To accommodate this workload, the division expanded from two court units (or courts, *ting* 庭) to five. Units reportedly each have between fifty and seventy personnel, including judges, secretaries and other workers (Ren 2014). A survey of the SPC's internal organization chart indicates the SPC has fewer than 400 judges overall; more than a third of those judges work in the Criminal Division (Supreme People's Court 2020). As a staffing matter, death penalty review is a big part of the work of the SPC.

In order to staff the expanded Criminal Division after the return of the power of death penalty review, the SPC embarked on a hiring and promotion campaign to recruit hundreds of death penalty review judges and personnel (Qian and Zhang 2015). This process took place over three years [X69]. In 2005, 2006 and 2007, the court hired three cohorts of death penalty review judges. The SPC appointed these judges through a variety of channels (Dong 2007). First, the SPC shifted a small number of older SPC judges to the new units. Second, the court elevated some lower court judges to the new units. To illustrate: Wang began his career by serving 13 years at the Zhangye Intermediate Court. He transferred to the Guangdong High Court after he placed third in the country on an examination in 2003. In 2007 he reportedly volunteered for a call for recruitment to do SPC Death Penalty Review. After strict screening he bested 100 other applicants and was brought on board. He eventually became head of unit three of the SPC Criminal Division remained there until his untimely death in 2018 (Renmin Fayuan Bao 2018). Third, the SPC recruited some university graduates to become judges. For example, Judge Lu Suxun was part of the first cohort recruited for death penalty review directly out of college in 2005. He and 18 other students prevailed out of 400 applicants. Recruits out of university were first sent to intermediate courts for one year of work experience, followed by six months of work experience in a high court before taking up positions at the SPC in 2007 (Lu 2015).

Finally, a small number of lawyers and academic experts were invited to apply to be judges. The process was competitive and multi-staged. Some of the recruitment was nomination-based. Academic experts on the death penalty were forward for SPC positions [X73]. One reason that academics were invited on board was that the SPC faced a training challenge. Even experienced provincial court judges did not have sufficient experience with capital cases. The SPC also had to bring in legal scholars and experts from the Ministry of Public Security to provide extensive professional education to make sure that the new judges were up to snuff (Qian and Zhang 2015).

It is worth noting that most of the original judges who joined when the death penalty review process was established seem to have stayed put [X69]. Although judges are rotated *within* the death penalty review division with a different geographic purview every three years (much like traditional magistrates), very few have left the division. This is the case despite long hours, low salary and typically dull work, and even as the judiciary is facing attrition overall (Economist 2015). Nonetheless, SPC death penalty review judges reportedly have professional pride (*zhiye de rongyugan* 职业的荣誉感), believe the work to be important [X69] and of course enjoy the perks of government employment, a stable profession and state housing in the nation's capital [X73].[5]

The Organization of SPC Death Penalty Review

The Criminal Division, which handles reviews, now has five units (*ting* 庭), all of which are located in the Death Penalty Review Building. Each unit has overlapping substantive and geographic responsibilities. So, for example, the Number Four Unit handles review of cases from Heilongjiang, Jilin, Hebei, Guangdong, Guangdong, Guangxi and Hainan provinces. The unit also has responsibility over subject matter questions in intentional homicide (*guyi sharen* 故意杀人) cases. The Number Five Unit has geographic purview over Beijing, Tianjin, Liaoning, Shanxi, Nei Menggu, Hubei and Hunan, as well as subject matter expertise in drug crimes. The Number Two Unit, which is smallest and handles the fewest cases, seems to have the most sensitive and political docket. It handles cases from Hong Kong, Macau and Taiwan and foreign affairs, cases from Xinjiang, crimes involving government officials and endangering state security (that is, political) crimes (Ren 2014).

Within each unit, judges are organized into large and small collegial panels (*heyi ting* 合议庭). Collegial panels are a common organizational form throughout all levels of the Chinese judiciary. Typically, collegial panels are comprised of either three judges or two judges and a lay assessor. One judge serves as the presiding judge (*shenpanzhang* 审判长), who takes symbolic lead of the case. Another judge typically serves as the responsible judge (*chengban faguan* 承办法官) who actually manages the case, writes the opinion and is legally responsible for the decision. In their study of trial court collegial panels, socio-legal scholars Kwai Hang Ng and Xin He argue that although the collegial panel provides a veneer of consensus, in fact the case is typically in the hands of the responsible judge, while the other members of the panel show little engagement and go along with the decision (Ng and He 2017, 42-43).

The responsible judge in a case will produce a case report. The other judges on the panel will review the report and may write their own. The panel will come to a decision on the case by a majority (full consensus is not required). Disagreements do occur, and when this happens the

[5] Although few judges leave, it is not clear that those who do leave are being replaced. One judge noted that in his decade of service in unit number three, personnel fell from 80 to 60. Judges that left were not replaced (Lu 2015).

views of the opposing judge will be recorded [X39]. The panel will then submit the decision to the president or vice president of the unit. The decision will ultimately end up on the desk of the court president. If the decision is to uphold the verdict the president will sign the execution warrant, which will be sent back down to the local jail and the order will be carried out. Throughout this process, troublesome cases may be sent back down the ladder for further consideration or forwarded to a trial committee for additional review (Ren 2014).

In theory the Supreme People's Procuratorate (SPP) also has a role in death penalty review. As in other states influenced by soviet law, the Chinese SPP is more than a prosecutorial office. The SPP formally holds the same legal status as the SPC and has wide-ranging oversight powers in the court. However, my interviews indicate that the SPP does not play a role in routine capital cases. The SPP typically only intervenes in a case if the SPC decides not to approve the execution.

It is worth pausing here to review the various ways that the SPC may decide a death penalty review case. The most common disposition in death penalty review cases is an affirmation (*hezhun* 核准) of the sentence of immediate execution, in which case an execution warrant will be issued and the condemned person will be put to death. In cases where the court does not affirm the verdict, it has a couple of other options. It may choose not to affirm (*bu hezhun* 不核准) the verdict and to instead to revoke (*chexiao* 撤销) the verdict and remand the case for retrial in the lower courts. Alternatively, the SPC may revoke the verdict and issue a new sentence directly.

As I discuss in more detail in the next two chapters, we have only partial and biased data on SPC dispositions, so we do not know precisely what portion of sentences are affirmed, but affirming the verdict is clearly the typical outcome. To give some general sense, Amnesty International (2017) produced an analysis of a partial dataset of SPC review cases dated between 2011 and 2016. The dataset contained 701 affirmed death sentence, seven remands for retrial in the lower courts and two new sentences issued directly by the SPC. If these data were representative, it would mean the SPC upholds the death sentence in nearly 99 percent of cases. Although the SPC acknowledges that the rate of reversal has been higher in the past and interview data suggest that the number of reversals may be higher than one percent today, triangulation of available sources and interview data confirm that sentences of immediate execution are nonetheless affirmed in the vast majority, perhaps the overwhelming majority, of cases.

The Work of the Judges

SPC judges are administrators, which means that most of their work is paperwork. The primary responsibility for most judges is generating reports with recommendations on each capital case. These reports range anywhere from a dozen pages to a few hundred pages (Ren 2014). A 2018 story on Judge Wang Fengyong, who presided over one of the death penalty review units, notes, for example, that he reviewed more than 700 files and wrote more than 660,000 words of reports in one year (Renmin Fayuan Bao 2018).

In order to generate a recommendation on a lower court verdict, the responsible judge must review the case records (*yuejuan* 阅卷). A death penalty review case may contain dozens or hundreds of volumes, so many in fact that transporting them may require multiple trips with a handcart (Qian and Zhang 2015). Judges also have access to the full internal record (*neijuan* 内卷) which contains a trove of information from the police and procuratorate that is inaccessible to defense counsel. As one source notes, "the trial materials in a case are limited but the internal records are much more full" [X22].

In addition to generating the report, the responsible judge has a few additional responsibilities. For one, the judge must meet with the condemned defendant. Not surprisingly, views differ on how seriously judges take this obligation. Some judges experience personal turmoil in minor evidentiary matters and multiple trips for corroboration from the condemned [X22]. Some lawyers whose clients have experienced these meetings say that the meetings are short and pro forma. Court personnel provide descriptions in line with the lawyers, indicating that these meetings typically last less than an hour. Judges ask basic questions such as "did you do this?" [X39; X40]. One person who was present at one of these meetings noted that the judge persisted in asking these questions even though it seemed the condemned person was mentally unstable and not all there [X39].

In the first years after the SPC regained control over death penalty review, all of these judicial visits with condemned people took place face-to-face. Since condemned prisoners remain confined in local facilities, judges spent quite a bit of time in transit for these meetings. "If you have to go see a defendant in a remote part of Yunnan, you can't even reach that place in an entire day of travel" [X69]. The cost of travel is high. One source speculated that the travel cost of the SPC review visit is more than the cost of the entire trial [X69]. To save time and money sometimes judges travel together and, according to one lawyer I spoke to, interview 20 or 30 defendants in a matter of days [X24].

More recently, the SPC has begun using video conferencing software so that the meetings may be conducted remotely. It is unclear how often video conferencing is now used [X39; X40]. It is clear that video conferencing changes the quality of the interaction. One judge lamented that when on video conference calls, lower court personnel are on the other end of the call, possibly influencing the condemned person's testimony. This judge explained that when he conducted a visit with the condemned, the first thing he would do is dismiss the provincial judges from the room before getting down to business. "After all these [condemned individuals] are people first. I offer them a cigarette. You can't share a cigarette with a defendant over video" [X69]. For this reason, some judges continue to conduct all meetings in person, even when video is available [X22].

If the condemned person hires counsel (see Chapter Four), the judge is also obliged to read the lawyer's written opinion on the case (*lüshi yijian* 律师意见) and meet with the lawyer in person as well. Judges hold a range of opinions as to the value of meeting with lawyers. The most optimistic take, in line with the common law tradition of adversarial legalism, is that that a zealous lawyer will help the court arrive at the truth by sleuthing out the best evidence for a defense [X22]. Nonetheless, judges complain that defense opinions are often shoddy.

> I once sat at a death penalty review meeting where the judges discussed the position of the Supreme People's Procuratorate but not the lawyer's position. I asked why they hadn't looked the material from the lawyers. They said "have you looked at them? It doesn't contain any ideas worth discussing." The entire opinion was less than 1,000 characters long.

Other judges report nearly identical stories (e.g. Qian and Zhang 2015). This is either a common experience or a well-worn anecdote. Most likely, it is not that judges have a principled position on lawyers so much as they are busy bureaucrats who would rather not add more meetings to their calendar. As one source put it, "it is not the judges are unwilling to see lawyers, but it is a pain" [X69].

How Do Judges Decide Cases?

The matter of judicial-decision making, a hot topic in socio-legal studies, is particularly thorny in the death penalty review process because most decisions are unpublished, and those that are published provide only perfunctory explanation. Here I draw on interviews and published accounts to sketch a few seemingly dominant concerns in SPC death penalty review judicial decision-making. Throughout this project I have argued that China's one-party regime faces an ongoing survival dilemma between maintaining tight control over its agents and allowing them autonomy to exercise control and maintain stability over the general population (Magaloni and Kricheli 2010, 126; Minzner and Wang 2015, 340-341). I have argued that centralized death penalty review can be understood as an enduring technique for managing these competing imperatives. Here I show how competing imperatives are represented concretely in the sentencing decisions of death penalty judges.

For SPC death penalty review judges, the most significant concern is avoiding wrongful execution. This concern hangs over every capital judgement and is so ubiquitous that it appears in virtually every research interview and public statement made by SPC judges. As one source put it, "At this point we don't know of a single case in which a case approved for execution was a mistake [that is, a wrongful conviction]. But inevitably we will catch such a case" [X22]. As we saw in the previous chapter, concern over wrongful execution was one of the proximate causes of death penalty reform. On its face this is a straightforward matter of substantive justice. However, as I argued in the previous chapter, wrongful executions in China became an issue in the early 2000s because they were symptomatic of a larger problem: Beijing's inability to regulate local agents. Concretely, wrongful executions are more likely to occur when lower courts respond to incentives that deprioritize evidentiary certainty in capital cases.

Although SPC judges invoke a substantive concern in seeking to avoid wrongful convictions and affirm "ironclad cases" (*tie'an* 铁案), in fact much of their work involves clarifying procedure. Or, more specifically, it involves clearing up inconsistencies in the evidentiary record produced by the lower courts. Where lower court records are contradictory or incomplete, the judge will ask for more information. A high-ranking member of the SPC revealed that in 2013 the court requested supplementary evidence in 39% of capital cases (Ren 2014).

While SPC judges are keen to avoid wrongful executions, it often appears that the core of the SPC's focus is the conduct of the lower courts and not the welfare of the condemned men and women themselves. In this sense the fate of the condemned men and women is a sort of ancillary work product. Recent rounds of revision to the Criminal Procedure Law tighten evidentiary due process requirements in criminal cases. While the SPC may decline to affirm a death sentence where the evidence fails to meet the legal standard, I am not aware of any case in which the SPC has declined to ratify a verdict simply because the legal rights of the condemned defendant were violated.

In addition to wrongful executions, judges must consider the social impact of a capital sentence in ironclad cases. Judges distinguish between capital cases involving violent crime ("red cases") and capital cases involving drugs ("white cases") (Qian and Zhang 2015). Because red cases involve victims, judges face particular challenges in balancing interests to deliver substantive justice. In these cases, judges are under more pressure [X22]. If they affirm a sentence, the family of the condemned may complain. If they do not affirm a sentence, the victim's family may complain. It is not coincidental that legal reform in the Hu-Wen era included both the return of death penalty review and an emphasis on mediation. In the area of capital punishment, this manifests as an emphasis on restitution payment, or so-called "cash for clemency" (Trevaskes

2015). SPC sentencing guidelines encouraged judges to promote restitution payments and hand out suspended execution sentences over immediate execution sentences in cases where restitution has been paid.

Limited evidence suggests that compensation payments are one of the biggest determinants of diversionary capital sentencing outcomes in the post-reform era. In one jurisdiction in 2007 and 2008, more than half of death sentences in first-instance capital trials were reduced to suspended execution sentences after the defendant's family agreed to pay compensation. And more than half of second instance trials in the same jurisdiction were also reduced to suspended execution sentences after a compensation agreement was reached (Trevaskes 2015, 46).

Suspended execution sentences are not subject to SPC review, which means that SPC judges only review cases where lower courts did not already manage to negotiate a restitution agreement that diverted a sentence of immediate execution. Sometimes judges are still able to negotiate restitution payments at this stage. However, the more difficult cases are those in which the victim's family refuses restitution payment and wants an execution [X22]. These victims can put a tremendous amount of social pressure on SPC judges.

For example, one source recounted a domestic violence case in which a husband with a long history of abusing his wife eventually killed her. The couple had a child together. As part of court efforts to reduce the scope of execution, the SPC issued sentencing guidelines indicating that immediate death sentences should not be handed out in domestic violence homicide cases. However, in this case, the victim's family was quite adamant that the husband should be put to death. The victim's sister proclaimed to the court that if the husband were put to death, she would raise the orphan child. However, if the husband were spared, she would not. As a matter of legal policy, the court should have spared the husband, but because the court was concerned about social outcomes the SPC judges ultimately decided to override the policy guidelines and affirm the death sentence [X39].

In other cases, a defendant may not pay restitution and SPC judges may determine that it is inappropriate to affirm a death sentence. In such cases the court is concerned that the family of the victim may put up a fight. Some SPC judges apparently go to great lengths to negotiate a deal. "I've known judges who have gone to talk to the family of the victims repeatedly. I've known judges who have been scolded [*ma* 骂] by victim's family" [X22]. The SPC and local governments apparently have a restitution fund that they can use to pay restitution to the victim's families in such cases. As one source reports, "This is a way to avoid trouble with the victim's family" [X22].

Exemplary Narratives

In the previous section I stitched together my best account of the formation of the SPC death penalty review division and the life and work of the judges in it. That account draws on reportage, academic articles and interviews with judges, lawyers and SPC personnel. Of these sources, one in particular stands out for further consideration: public accounts provided by judges themselves. I have collected about half a dozen such accounts written by and about SPC death penalty review judges since 2007. These accounts take the form of interviews with sympathetic state media outlets such as People (*Renwu* 人物), memorials to deceased jurists posted on official court websites, and autobiographical work by judges themselves. These documents are of course invaluable for their descriptive content: communicating what judges do. But since SPC judges are elite Party-state administrators whose main work products are state secrets (see Chapter Six); anything they say about their work is surely heavily vetted. While this means that these narratives may be scrubbed of some kinds of information, it also means they are imbued with other

information. Namely, these accounts provide information about what judges and Party officials are *supposed* to do (Stern and Liu 2020). These exemplary narratives are normative documents that communicate the priorities and values that the SPC wishes to display to lower courts and the general public. Here I highlight three themes that stand out across these narratives: professionalism, sacrifice and tradition.

The first theme that emerges in these exemplary narratives is professionalism. Judicial professionalization was one of the other major initiatives pushed by the SPC under Xiao Yang in the early 2000s in the same period as death penalty reform. Professionalization dovetails with death penalty reform in its emphasis on accountability to higher authority. The value of professionalism is expressed in these judicial narratives in a variety of ways. Foremost among qualities of professionalism in these exemplary narratives is the trait of care and thoroughness in one's work, particularly in the face of evidence that might signal a wrongful conviction. An exemplary narrative about Judge Li Yong emphasizes that "within the SPC, there are strict procedures for death penalty review. One regulation stipulates that all members of the collegial panel shall read the record" (Wang 2009). The account includes a testimonial from SPC Criminal Division Unit Four Vice President saying that "even if he isn't personally the responsible judge [on the collegial panel] on the case, Li Yong will not relinquish any doubt. If there is any doubt, it must be eliminated to ensure the quality of the case" (Wang 2009). Li's supervising judge in his division recounts a story in which Judge Li reviewed the case record of a man who killed two girls. Although experts and lower court judges had determined that the physical evidence in the crime was clear and conclusive, Judge Li found a number of discrepancies and mistakes in the DNA evidence in the case. He requested additional evidence from lower courts to clear up the confusion in the record (Wang 2009). In another exemplary narrative from 2015, Judge Lu Suxun expresses a similar sentiment, going on at length about the need to carefully examine the case files, including witness testimony and confessions, as "any negligible negligence and omission may lead to irreparable mistakes" (Lu 2015). Judge Lu proceeds to describe a case in which the first and second instance trial courts ignored drops of blood at the scene, which might indicate the presence of other perpetrators. He recommended the case be remanded for retrial.

These narratives all express a perpetual worry about wrongful execution and a fixation on iron cases and unimpeachable records. Yet this concern is typically couched in a duty to meet the expectations of office, rather than a duty to the rights of citizens. Even the counterexamples support this analysis. For example, Judge Wang Fengyong is memorialized for a case in which he became concerned about a defendant's recorded age. He determined that the defendant documented his lunar birthdate and was in fact under age 18 at the time of the crime, making him ineligible for capital punishment. While this story seems to signal a victory for due process (Judge Wang also excluded some evidence in the case) the exemplary narrative also notes that the defendants themselves did not raise the concern over age. Here again the professional narrative locates the error in inattention to detail by the lower courts, rather than in an active violation of a defendant's rights. The overwhelming majority of wrongful convictions involve coerced or problematic confessions (He 2016), yet exemplary narratives never dwell on abuse of detainees. Professionalism does not explicitly extend to the procedural rights and personal dignity of the condemned. Importantly, these narratives never specify cases of factual innocence, nor cases in which mistreatment of a detainee in itself might warrant action by the SPC. Rather, each example of an evidentiary gap leads to a clarification in the record. The outcome either goes unmentioned or affirms the certainty of guilt. This does not mean that judges never acquit, only that such an outcome is not celebrated in exemplary narratives.

Sometimes, although rarely, the focus on professionalism extends to the matter of judicial corruption. This subject is a double-edged sword. To disclaim corruption in the SPC is also to implicitly acknowledge its possibility. Reflecting on a decade of SPC death penalty review, Judge Lu notes that he "has not seen its judgements perverted by corruption and has set up a fair and authoritative image." Judge Lu explains that SPC judges have low salaries compared to judges in other countries, because, as he quotes Xi Jinping, "if you are an official, you shouldn't want to be rich, and if you want to be rich you shouldn't want to be an official." He clarifies that judges are officials too, although minor paper-pushers (*daobi li* 刀笔吏). Lu explains that the SPC death penalty review is free of corruption because judges are out of reach of involved parties, and the review structure also protects against corruption. Nonetheless, he admonishes that death penalty review judges must protect their integrity and maintain constant vigilance against corruption (Lu 2015).

The theme of professionalism in these exemplary narratives often connects to the theme of sacrifice. One exemplary narrative is titled "Working '5+2' Handling Cases 'Day and Night'." The phrase 5+2 refers to the practice of working both weekdays and weekends and is often conjoined with references to day and night (literally "white and black" or *bai jia hei* 白加黑). Both the practice and the phrases are common in urban Chinese courts (Ng and He 2017, 38). This phrase pops up regularly in exemplary narratives (e.g. Wang 2009; Lu 2015). The exemplary narrative of Judge Li Yong describes a man lacking in hobbies and devoted to his work. Li's colleagues reportedly state that if they do not see him working nights or weekends, they think it strange and assume he is in the field conducting interviews with the condemned.

These narratives make note of the physical toll of this work on the judges, including not only time away from family but also physical ailments such as herniated discs and even cancer (Qian and Zhang 2015; Lu 2015). One exemplary narrative recounts how two judges from the same province both got breast cancer. Another judge was diagnosed with throat cancer and had a bed installed in his office so he could work while he convalesced (Qian and Zhang 2015). Indeed, the work is depicted as deadly. When the head of Criminal Division Unit Three died in 2018 at the age of 48, reports stated that he "died of heart disease due to overwork" (Sohu 2018). This arduous work is not lauded for its own sake, however. It is credited to judges' commitment to the service of higher values. One profile notes that the court does not require overtime. Nonetheless, the featured judge continues to work constantly. Why? The article concludes "More time, more effort, more 'iron cases' [that is, cases without evidentiary doubt]. Perhaps behind the huge motivation to work is an endless respect for human life" (Wang 2009).

A third theme that emerges in these exemplary narratives is continuity with Chinese tradition. Jurists connect the current death penalty review procedure to historical practices. So, for example, Judge Lu Suxun (2015) writes that "since ancient times, our country has been cautious in the application of the death penalty." He goes on to recount how in the Tang Dynasty, which is often held up as a high-water mark in Chinese civilization, all capital verdicts were repeatedly reviewed by both the Board of Punishments and the emperor. He notes that in the year 630 the Tang government only executed 29 people, and that this "prudence" "set a standard of peace and prosperity" for later generations (Lu 2015).

Judges invoke PRC history less frequently, but in no less a laudatory way. Death penalty practices in Imperial China and the early PRC were radically divergent. Nonetheless, these exemplary narratives spin together imperial and PRC values so as to present death penalty review as part of a consistent and venerated legacy. Judge Lu Suxun goes from praising Tang Dynasty practice to quoting Mao's dictum that "People's heads are not like leeks; when you cut them off

they will not grow back" (Lu 2015). In a 2007 interview, SPC Vice President Jiang Xingzhang quotes Mao's dictate—originally articulated as part of the effort to moderate capital punishment during the Campaign to Suppress Counterrevolutionaries—that "as for those who might be executed or might not, according to the law they shall not be executed" (*kesha kebushade yilü busha* 可杀可不杀的一律不杀) (Dong 2007).

Regardless of their veracity, these narratives paint a strong normative picture about judicial behavior. According to these stories, SPC judges are upright, dutiful and diligent. They uphold a continuous and venerable Chinese tradition that lower courts should follow.

Mechanisms of Control

The SPC conducts death penalty review. Intuitively, review is connected with discipline. But what precisely are the mechanisms by which actions in the Death Penalty Review Building translate into changes in behavior for lower court agents? Here I show three ways that SPC review functions to keep lower courts in check. These mechanisms are *example-setting*, *investigation* and *case remand*. These three mechanisms are not exhaustive; they are merely sketches intended to indicate the range of ways the SPC exerts control through death penalty review. I lay these mechanisms out from least to most coercive.

Example-setting

The SPC death penalty review process shapes lower court behavior through setting examples and expectations. Example-setting is such a subtle use of power that it is easy to miss (Digeser 1992). Inculcating state-aligned values is one tactic that authoritarian regimes may employ to successfully shape the behavior within courts (Hilbink 2007). The Chinese state employs a variety of tactics to convey professional expectations in the legal field (Stern and Liu 2020, 230). The SPC sets examples for lower court judges through both the conduct of judges and the substance of SPC directives.

As we have already seen, the model behavior of SPC judges is communicated through propaganda such as exemplary narratives. It is also communicated directly in interactions with lower court judges, lawyers and other actors in the criminal justice system. Although SPC judges are often cloistered in the Death Penalty Review Building, they also circulate throughout the judiciary in crucial ways. For one thing, SPC judges meet with every condemned person, sometimes in person, in their local jurisdiction. SPC judges rotate units within the SPC death penalty division every three years, giving them a new geographic mandate (a procedure that bears resonance with the imperial rule of avoidance). These post rotations afford judges opportunities to circulate and homogenize values. Judges also circulate in and out of the lower courts, though it is unclear how frequently. Some sources indicate that once judges get to the SPC death penalty division, they stay put [X69]. But other SPC sources indicate there is more active circulation: as one person put it: "now we bring people up and we send people down" [X22].

One place SPC example-setting seems to have paid off is with lawyers. Death penalty review judges have cultivated a reputation for professionalism that is reported in the legal community. Lawyers who handle death penalty review cases complain frequently about the death penalty review process and case outcomes; it is therefore striking that in contrast to their usual litanies, they profess to hold SPC judges in extremely high professional regard. Typical descriptors include "outstanding" (*youxiu* 优秀), "extremely accomplished" (*suyang feichang bucuo* 素养非常不错, [X60]), "high-quality" [X39] and "professional." According to one defense lawyer, "The

judges who try these [review] cases are exceptionally outstanding (*tebie youxiu* 特别优秀).They are specialists （*zhuanmen* 专门）" …"These judges from a legal perspective are extremely, extremely knowledgeable and professional" [X15]. Another provincial lawyer with death penalty review experience commented, "the judges were all excellent. They were patient in listening to our opinions" [X29].

Even when layers criticize SPC judges, they highlight aspects of professionalism. One defense lawyer complains that SPC judges are hesitant to meet with defense lawyers, even when defense lawyers provide evidence that might make the work of death penalty review easier. When asked why judges would do this, the lawyer explained it is an "occupational sickness" (*zhiye bing* 职业病)［X73］Judges, the lawyer explained, are concerned that lawyers will try to bribe them or manipulate them; judges sequester themselves in response. This comment is particularly striking because even recently, bribery was viewed as a real problem even in the halls of the SPC. In 2008 Huang Songyou, one of Xiao Yang's vice presidents at the SPC, was given an indeterminate sentence (*wuqi tuxing* 无期徒刑) in a major corruption scandal involving bribes and graft during his time both at the SPC and during his tenure as head of a lower court in Guangdong province (Keith et a. 2014, 30-31). Nonetheless, when it comes to death penalty review, lawyers state that SPC judges are above reproach. As one lawyer put it, "once a [capital] case is at the SPC review stage, using non-legal methods to change a verdict is extremely rare." The informant continued, "At the SPC, these high-level loopholes don't exist" [X19].

In addition to setting examples through signals regarding judicial conduct, the SPC also sends direct examples through a variety of policy directives and models. The SPC lacks one crucial power of apex courts: the capacity to formally set precedent through judicial review. But the SPC has established workarounds. Perhaps the best-known workaround is the so called "guiding cases" system, established in 2010. Guiding cases are exemplary cases intended to model SPC responses to disputed questions of law and illustrate correct lower court responses (Ahl 2014; Chen and Li 2020; CGCP 2020). The influence of guiding cases on judicial decision-making is unclear (Zhang 2017). One prominent China law scholar has quipped that Chinese courts are more likely to acquit a defendant than cite a guiding case.[6] Nonetheless, the guiding case system sends signals about what types of cases and legal issues matter to the SPC. And capital cases play a prominent role in the guiding case corpus. Two of the first dozen published guiding cases dealt directly with sentencing in death penalty matters (CGCP 2020).

Less well known but more influential than guiding cases are the SPC's policy documents, which reflect the administrative character of the Chinese judicial system. These documents are sometimes referred to by the court as judicial *normative* documents (*sifa guifanxing wenjian* 司法规范性文件) (Finder 2015). As judicial scholar Susan Finder notes, these documents are not cited in rulings, but courts are expected to rule in accordance with them (Finder 2015). Some of these documents are published; some are not. Since death penalty reform, policy documents are one of the major exemplary levers that the SPC has harnessed to exert soft control over lower court decision-making. One example is the so-called "Dalian Minutes." In 2008 the SPC sought to further reduce the scope of capital punishment in drug transportation cases. The law on drug transportation provides wide sentencing discretion in such cases. At a judicial conference in the

[6] This observation was made in passing by Jeremy Daum at the China Yale Law Center. While the comment was intended to comically illustrate a point, back of the envelope calculations of published citations to guiding cases set against acquittal rates bear out the plausibility of the quip.

city of Dalian in 2008, the SPC laid out a series of mitigating factors that lower courts were expected to consider in these cases. The minutes of this conference were circulated to lower courts. Although not legally binding, the minutes served as powerful normative policy guidance to lower courts (Trevaskes 2016, 154-55).

Investigation

Exemplary suasion may be the most pervasive form of SPC death penalty review control, but it is hard to measure such subtle effects. Presumably many SPC judges pick up the exemplary signals from above and comply accordingly. But what if they do not? Prior to 2007 the SPC could of course model death penalty policy, but it lacked avenues to monitor compliance. Since reform, if lower courts do not comply with SPC death penalty guidelines or the SPC has concerns, the court may take concrete action through the death penalty review process. The most straightforward action is to request additional information from the lower courts.

The SPC power to request supplemental information on cases is a more active form of administrative power than the judicial review power of other apex courts. In the US, for example, the SCOTUS review is generally limited to matters of law based on the materials already included in the record. By contrast, SPC death penalty review judges have wide-ranging authority to request supplemental information to make determinations on matters of both law and fact. Moreover, these requests exert influence not just on lower court actors, but on state agents in adjacent institutions.

Requests for supplementary information remain common. A high-ranking member of the SPC revealed that in 2013 the SPC requested supplementary evidence in 39% of capital cases (Ren 2014). Trials of the first instance are conducted across about 400 Intermediate Courts in China. If we assume for the sake of argument that capital cases are distributed proportionally across all those courts and that in 2013 China executed a few thousand people (Dui Hua 2020), this would mean that every Intermediate Court in the country fielded, on average, at least a couple requests for supplemental information from the SPC about capital verdicts that year. As SPC Vice President Jiang Xingzhang explained in 2007,

> Judging from the death penalty review work completed so far this year, many cases need to be supplemented with relevant materials from not only lower courts, but also prosecutorial and investigative agencies. It is also increasingly common to require public security organs to investigate and verify defendant reports and expose other crimes. The purpose of these measures is to make death penalty cases "iron cases", prevent the occurrence of wrongful convictions, and make sure that “when in doubt, we do not kill; when we kill, there is no doubt” (yizhe busha, shazhe buyi 疑者不杀，杀者不疑), which can stand the test of history. (Dong 2007)

Judge Jiang goes on to explain that death penalty review can:

> strengthen supervision and guidance on lower court criminal trial work, especially in death penalty cases. Through various channels such as interrogating defendants, supplementing evidence for verification, sending letters to point out problems [with lower court judgements], and conversation and discussion and so on, we should strengthen the focus on professional guidance for high and intermediate courts. This move not only makes the quality of the second instance judgments in death penalty cases more reliable and solid, but also improves the quality of the first instance judgments in death penalty cases as well. (Dong 2007)

We can see from Judge Jiang's statement that the SPC views death penalty review as a sort of trickle-down reform.

Case Remand

When the SPC death penalty review division has set out examples for lower courts and asked for follow-up information from lower courts and still has concerns about a case, the court may decline to affirm the verdict. When the SPC first took back death penalty review in 2007, procedural regulations specified that if the SPC does not affirm the verdict, it shall remand the case back to the lower courts. It may remand to the first-instance trial Intermediate Court or the second-instance trial High Court depending on where the error is located (Fang 2007, 22). The 2012 Amendment to the Criminal Procedure Law regulations specified that where the SPC did not approve the verdict, it may choose to modify the sentence directly, rather than remanding the case to lower courts (Article 239). However, partial available evidence suggests that the SPC still more commonly chooses to remand cases to lower courts for retrial (Amnesty International 2017, 26). When the SPC does remand a case, it reportedly provides lower courts with explicit direction regarding the error in the case and the correct judgment on retrial. There is no ambiguity about the desired outcome. One insider indicates that "if a case is sent back down, the High Court must change the verdict. 100 percent" [X33].

Given that the SPC has already ascertained the desirable outcome in a case, why remand it to the lower court for retrial? One reason given for remand is that it provides an opportunity for lower courts to maintain social stability in resolving sensitive conflicts (Keith et al. 2014, 135-36). The implication is that the SPC has decided on a more lenient sentence, which would presumably inflame victims' emotions. In that case the SPC's choice to remand rather than modify the verdict makes little sense. If the goal is to avoid local tension in sparing a defendant, surely the simplest thing is for the SPC—a distant, anonymous, national institution—to modify the sentence directly. This way, the local court can escape blame. Moreover, if the SPC quietly modifies an immediate execution sentence to a suspended execution sentence (a common diversionary practice in problematic cases), the defendant still receives a nominal capital sentence and quietly disappears from the community for decades. Odder still, the 2007 SPC regulations required that lower courts conduct a retrial in open court, rather than simply modifying a verdict themselves. Again, an open court trial in the jurisdiction of the crime can hardly tamp down tensions in the community.

Remand makes more sense if we consider the impact on the court, rather than on the community. From this perspective, remand is a disciplining tool, a way to put the local court on the hotseat. In cases where local courts are being asked to capitulate to local interests (angry victims, sloppy police, corrupt Party secretaries), the court must publicly disavow local pressure and side with its superiors in Beijing. It must put the judicial hierarchy first. This is the moment where the national rubber meets the local road in death penalty cases.

Local courts do not always follow the directives of the SPC. The Chinese death penalty literature is replete with well-known capital cases that have bounced back and forth as lower courts refuse to yield to higher court directives (Fu 2016, 274-299). Regardless of whether supervising courts are demanding more or less serious sanction, scholars see lower court resistance in terms of the power of penal populism (Miao 2013; Fu 2016). In fact though, popular outrage is simply the most visible external *local* pressure on the court, which also faces pervasive capture by local state agents. Regardless of the local source, SPC remands force local courts to weigh horizontal pressures against vertical pressures.

Case remand remains the exception though. The only official data released from the SPC came in 2008, when a court representative announced that in 2007 SPC had declined to ratify (and therefore presumably remanded) about 15 percent of cases on review (Xinhua 2008). Since that initial period, the rate at which the court declines to ratify has fallen. As noted above, analysis of partial data suggests that in recent years the rate of ratification could be as high as nearly 99 percent (Amnesty International 2007). Although informants suggest the rate of reversal is higher than the partial data suggest, everyone agrees the overwhelming majority of cases are affirmed. While it is possible to view the high rate of approval as a sign that the SPC is rubber stamping, it is also possible to view the approval rate as a sign of high disciplinary success. That is, a spate of remands in the early years of death penalty reform, combined with a decade of exemplary modeling and regular investigations, have brought the lower courts in line to the point where open fights over cases are no longer necessary.

Judicial Sanctions

One final mechanism of control deserves mention, if only to explain its absence. That mechanism is direct sanctions for judges whose cases are overturned. Intuitively, we might expect that formal sanctions on individual judges would be the most pervasive form of top-down SPC control in capital review. And previous research has suggested that, in other contexts, judges face individual consequences for wrongly decided cases (Minzner 2009; Stern 2016, 105-6). Judicial sanctions have also been directly linked to the imperial use of law to regulate local officials (Minzner 2009). I was therefore surprised to find that sanctions of individual judges do not seem to be a major form of top-down SPC control in death penalty review. While the SPC death penalty review process exerts a tremendous amount of pressure on both its own judges and the lower courts, this pressure manifests through normalization, exhortation and supervision, rather than penalization. The judicial hierarchy calls on its agents to cohere to example, work harder, produce more information and correct verdicts on remand. These are processes of positive and negative reinforcement, not direct punishment. While judges and other agents are widely subject to disciplinary and penal sanctions for corruption, I found little evidence of formal adverse consequences for SPC remand in capital cases. One informant stated directly that "a reversal doesn't have an effect on individual trial court judges" [X33].

One reason that reversals in capital cases may not lead to direct sanction of individual judges is that capital verdicts are by nature sensitive, so verdicts are the outcome of collective lower court decisions that involve a wide range of local court actors. A capital trial will be tried by a collegial panel. Any capital verdict will also surely pass through an adjudication committee, which includes top stakeholders in both the local court and the local party (Ng and He 2017, 83-87). Before reaching the SPC, this process will have typically happened twice: at an intermediate and a high court. When the SPC remands a case, it is therefore not delivering a rebuke to a particular legal decision by a single person. Rather, it is challenging a complex chain of decisions and priorities that run through a line of administrators. Local courts may also pre-emptively ask for guidance in how to review cases, thus insulating themselves somewhat from later top-down penalties (Minzner 2009). In any case, the operation of formal sanctions seems to play a surprisingly muted role in SPC oversight of the death penalty.

Conclusion

China and the US both pursued death penalty reform through the judiciary. In both cases, death penalty regulation mattered not only to the apex court's relationship to other players in the

field of national politics, but also to the relationship between central authorities and lower jurisdictions. In the US federal system, the SCOTUS was uniquely positioned among federal agencies to impose constraints on state use of the death penalty through a capital jurisprudence of guided discretion. Ironically though, these constraints resulted in more variation in state death penalty practice, rather than more conformity. The SCOTUS's power to intervene through review of individual cases has proved unsuited to the enterprise of producing consistency across diverse US jurisdictions. As a process of regularization, American death penalty reform is a failure (Zimring 2003, 71).

Compared to the US case, judicial death penalty reform in China was grander in scope: death penalty reform in China altered not just legal procedures in death penalty proceedings, but also the very structure of the court. As an administrative agency, the SPC was already better positioned than its US counterpart to regulate capital punishment. Moreover, the SPC drastically expanded infrastructure, personnel and expertise in order to make use of its newfound review power, drastically growing its capacity for the work.

In this chapter I also endeavored to draw back the veil to reveal what the SPC Death Penalty Division work looks like. What I show underneath is a bureaucratic auditing agency: more IRS than RBG. SPC judges work long hours on thick cases. They are concerned about ensuring that lower courts deliver a consistent work product, and they have the tools to demand it. I identify three tools in particular: example-setting, investigation and case remand. For the most part, the soft end of these tools is sufficient, and the SPC does not resort to direct demands. Overall, evidence suggests that the SPC is remanding fewer cases than it once did. If this means that lower courts are sending more uniform verdicts to the SPC, this is an indication that Chinese death penalty reform succeeded where American death penalty reform did not.

Chapter 4: Lawyers

As witnesses giving testimony and historians creating a narrative of the present, death penalty lawyers stand between the present reality of law's violence and the beckoning call of Justice.

– Austin Sarat[1]

I don't think I ever met a lawyer whose opinion on a case was helpful.

– Chinese judge, commenting on death penalty review proceedings[2]

Introduction

Who did China's death penalty reforms affect? Obviously, death penalty reform mattered most for criminal defendants, thousands of whom have been spared over the last decade. As I argued in the previous chapter, reform also mattered for China's judges, many of whom now focus solely on capital punishment review. In this chapter I show how death penalty reform mattered for a third group as well: lawyers. Lawyers were neither the catalyst for, nor the focus of, death penalty reform. Nonetheless, just as the SPC's 2007 centralization of death penalty review reshaped the judiciary, so also it reshaped the legal profession.

Of course, Capital legal defense pre-dated death penalty reform. Since 1996, China's Criminal Procedure Law (CPL) has mandated that defendants have legal representation in all capital trials. This means that all capital defendants have a lawyer at the intermediate court trial of the first-instance; it also means that every defendant who is found guilty in the first instance and requests an automatic appeal has a lawyer at the high court trial of the second-instance as well.[3] But in a legal system where the acquittal rate in criminal trials is less than 0.2 percent overall (Clarke 2020) even the best legal representation can only do so much. And the structure of the legal market and the state legal aid system have meant most people don't get the best legal representation. The lawyers who traditionally handle capital trials are local general practice attorneys with little interest, experience or expertise in death penalty defense [X44].

Death penalty review adds a third layer of judicial procedure at the SPC in Beijing. Unlike for trial proceedings, universal legal representation is not mandated at death penalty review. Nonetheless, condemned people that wish to do so may hire private counsel to represent them

[1] "Between (the Presence of) Violence and (the Possibility of) Justice: Lawyering against Capital Punishment" (1998), 338.

[2] Interview with author.

[3] A defendant in a criminal case may appeal a verdict within ten days of a judgment (CPL 2018, Articles 227, 230). Criminal appeals are common, because as a rule a second-instance courts do not issue more severe sentences on appeal (Dui Hua 2019). And of course there is no sentence more severe than death in any case. The prosecution may also counter-appeal judgements. All final trial sentences of immediate execution are automatically reviewed by the SPC, regardless of whether they come directly from a first-instance trial or from a second-instance trial (CPL 2018, Article 247). A common outcome in second-instance capital trials is that the High Court will pronounce a lighter sentence of suspended execution. The SPC does not review suspended death sentences.

during final review in the nation's highest court in Beijing. The efficacy of legal counsel in the death penalty review process is unclear, but the impact of this new criminal procedure on the legal profession is immense. Death penalty review provides the first ever national legal forum for Chinese lawyers to develop a death penalty defense practice. Indeed, it is the first national forum for lawyers to develop any criminal defense practice. And it also creates the potential for a new professional class of national death penalty lawyers to fill this practice.

In this chapter I tell the story of the lawyers who handle death penalty review cases in China since reform. Who are the attorneys who take these cases? What work do they do and how and why do they do it? How does their death penalty review work fit with capital trial defense? Do they identify as death penalty specialists? How do they feel about capital punishment?

The answers to these questions illustrate that death penalty reform has stakes that go beyond those envisioned by its architects. To show why this is the case, I first look at the emergence of death penalty lawyering in the United States. I explain how the Supreme Court's intervention in US death penalty cases beginning in the 1960s didn't just change the legal practice of the death penalty, it also changed the US defense bar; over time, the lawyers who emerged through this process in turn changed the course of capital punishment in the United States. After providing the US context, I go on to show how capital punishment reform in China has led to professional developments that are similar, but not identical, to the US case. I go on to explain what Chinese death penalty lawyers do, who they are, what obstacles they face, and how they feel about their work.

Death Penalty Lawyers in the United States

Today in the US it is rare to hear a story about the death penalty without a lawyer at the center of it. Death penalty attorneys are cultural icons who write best-selling memoirs (Stevenson 2014), found advocacy groups (Scheck and Dwyer 2000) and provide defense in high-profile cases that make national headlines. Classic American stories like *To Kill A Mockingbird* suggest that the "cultural life" of the lawyers handling capital cases is timeless (Sarat and Scheingold 2008, 1). However, even in the United States, the concepts of a death penalty specialist and the death penalty bar—i.e., the notion of an individual or collective identity as death penalty lawyers—are relatively recent developments. The model of Atticus Finch, a local lawyer who takes on a local capital case, may have been around for some time; Judy Clarke, the legal specialist who makes a practice representing capital defendant after capital defendant across the country (from the Unibomber to the Boston Marathon Bomber) is a new legal identity and a product of the late 20th century. This identity is significant because specialized death penalty attorneys do more than provide technical legal counsel to condemned clients. In civic discussion around the death penalty, Specialized lawyers can also serve as key constituents whose influence reaches beyond individual cases to broader public perceptions of both the substance and process of capital punishment as a social movement (Sarat and Scheingold 2006). In the US these lawyers are crucial actors in the shift to what is sometimes termed the late modern mode of capital punishment (Garland 2010, 97-100), a period in which the death penalty became a highly visible, highly salient and highly contested terrain of public discourse in society.

How did death penalty specialization emerge? Explaining the causes and consequences of professional specialization is one of the foundational research agendas in the social sciences (Tocqueville [1835] 2003; Durkheim [1893] 2014; Parsons 1939) and carries an ongoing warrant in the law and society field (Seron and Silbey 2004). Legal specialization affects how, and how effectively, lawyers do their work, and also how lawyers see themselves and how others view

them (Galanter and Palay 1994). Scholars also identify capital punishment as a significant influence on the legal profession in America (Zimring 1993, 15).

The story of the emergence of the death penalty bar in the United States has multiple chapters. In the first chapter, the progressive Warren Court of the 1960s signaled an openness to considering the constitutionality of capital punishment. In the second chapter, politically motivated cause lawyers took advantage of this opportunity to challenge the constitutionality of capital punishment. Finally, in the third chapter a supportive court developed a new body of jurisprudence that established institutional practices that cemented death penalty lawyering, and in particular post-conviction advocacy, as an indispensable legal specialization.

US Cause Lawyers, Courts and Specialization

For most of American history the Supreme Court declined to consider capital punishment administration as a matter of constitutional significance. Of course, the Supreme Court made historic rulings in capital cases,[4] but these rulings primarily concerned constitutional issues arising in cases that happened to carry the death penalty, rather than the issue of the constitutionality of capital punishment itself (Gottschalk 2006, 207). Capital cases were treated comparably to other serious felonies. The Eighth Amendment, which prohibits cruel and unusual punishment, was rarely discussed, and the court rejected constitutional challenges regarding both methods of capital punishment administration and the scope of the penalty for crimes such as arson (Banner 2002, 234-235; Dayan 2007). As late as 1962, the constitutional scholar Alexander Bickel considered the possibility that the Supreme Court would address the constitutionality of the death penalty in the next generation unthinkable (Banner 2002, 239). In fact, though, within a few short years the court was seriously thinking about the constitutionality of capital punishment.

In the 1950s the liberal majority under Chief Justice Earl Warren issued a string of pathbreaking progressive Supreme Court rulings. The Court endorsed desegregation and issued a raft of decisions supporting criminal procedure protections (Rosenberg 2008, 39). Among these, in 1963 the Court responded to a petition for review from Frank Lee Rudolph, a black man sentenced to death for the rape of a white woman. The Supreme Court declined review, but Justice Arthur Goldberg wrote a dissent from the denial. In it, he signaled that he thought the case raised Eighth and Fourteenth Amendment questions about the constitutionality of capital punishment for the crime of rape (Banner 2002, 248-249; Steiker & Steiker 2016, 40-41).

Goldberg's message was not lost on America's progressive bar. Indeed, the mid-20th century is also viewed as a highpoint in American cause lawyering, particularly around the civil rights movement (Bliss N.P.). The NAACP Legal Defense Fund connected death penalty administration to issues of racial discrimination in the South. Although lawyers in earlier eras had attempted to raise constitutional questions about death penalty administration, the Legal Defense Fund was committed to challenging the constitutionality of the practice itself. After initial failed attempts to contest the death penalty on due process grounds of racial discrimination, the lawyers ultimately found traction under the Eighth Amendment (Banner 2002, 250; Steiker and Steiker 2016, 78-89). In *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976), the Court determined that the death penalty is qualitatively different from other sorts of punishment and requires unique procedural protections. These cases ushered in a new reform era in US capital punishment.

[4] For example, in *Powell v. Alabama* (1932) the Court reversed the capital sentences of eight young African-American men accused of rape who had not been afforded due process in securing legal counsel.

US death penalty reform under *Furman, Gregg* and their progeny offer jurisprudential and political lessons about the legal profession that have implications for our study of China. The main jurisprudential take-away from these and related decisions is that "death is different" (*Gregg v. Georgia* 1976, 188); that is, capital punishment is qualitatively different from other types of punishment in both its finality and severity, and therefore demands unique legal procedures and protections. The most notable difference is the procedure of the bifurcated trial, where the jury is first asked to determine guilt in an adjudication phase, then asked to determine whether the offender deserves the death penalty in a separate sentencing phase (Abramson 2017, 119-21). A corollary is that when the courts establish a different or special legal process, they create an arena for the development of different and specialized expertise. The death penalty cases of the 1970s also offered a political and strategic take-away—one constitutional challenge invites more. Since opening the floodgates in *Gregg,* the Supreme Court has heard numerous cases on the particulars of the bifurcated guilt and sentencing schema. Process scrutiny is also not limited to trial. The Supreme Court has waded into questions about input from victims (e.g. *Payne v. Tennessee*), metrics for determining mental fitness for capital punishment (e.g. *Hall v. Florida*) and methods of execution (e.g. *Baze v. Rees*). There is, in some sense, no endpoint to this process of tinkering with unique jurisprudence of the death penalty. So long as capital punishment is different, that difference may be litigated ad infinitum.

Along with new law, American death penalty reform in the 1970s produced a new type of lawyer: the death penalty lawyer. As Carol Steiker and Jordan Steiker observe, "constitutional regulation effectively created the profession of capital defense work, and that transformation ensured that capital litigation would never be the same" (Steiker and Steiker 2016, 198). Reform produced new roles in two ways. First, it created a unique bifurcated capital trial process, one that calls both for trial lawyers to assert legal defense for the crime and mitigation experts with specialized expertise to make a case that a defendant found guilty does not deserve a capital sentence (Stetler 2018, 58-63). States that retain capital punishment set unique professional standards for lawyers who seek appointment in capital cases and since 1989 the American Bar Association has also published "Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases" (Stetler and Wendel 2013; Gould and Barak 2019, 21). Second, the increasing divide between matters of guilt and punishment in capital jurisprudence has led to a raft of legal issues that can only emerge post-conviction, such as whether someone whose mental state has diminished after trial may still be executed (e.g. *Madison v. Alabama*). This in turn has created structural changes in post-conviction review that also demand a different specialization in the capital post-conviction context (Kovarsky 2017, 453-60). Steiker and Steiker note that "[b]y conferring a right to paid counsel for death-sentenced inmates, state and federal habeas proceedings ultimately became a central part of the capital appeals process. For the first time in American history, a new group of lawyers emerged with expertise in litigating in the habeas context" (Steiker and Steiker 2016, 202).

The specialization in death penalty practice that the Supreme Court catalyzed in "death is different" caselaw has since been entrenched in a variety of secondary institutions. Lawyers who specialize in death penalty law find a sympathetic constitutional forum and plenty of state and federal compensation for that work. Beyond the work of individuals, legal institutions have established sites that replicate this collective identity. Many law schools now offer death penalty clinics, where new generations of aspiring lawyers form professional identities as anti-capital punishment crusaders. After graduation, these lawyers can go on to work at organizations primarily or exclusively devoted to death penalty law, such as the California Appellate Project, the Louisiana

Capital Assistance Center or the Equal Justice Initiative. These lawyers meet and bond at death penalty sections of annual conferences such as the National Legal Aid and Defenders Association and enjoy program support from the American Bar Association. In short, American judicial death penalty reform produced new legal actors and institutions who advocate not just for criminal defendants, some of whom happen to be facing the death penalty, but also for capital defendants and the condemned as a legal class.

Although the contemporary death penalty lawyer is now an identifiable actor within a specialized bar, the boundaries and politics of this group both remain open for debate. In one influential study of death penalty lawyers, the socio-legal scholar Austin Sarat finds a group of lawyers who are committed to abolitionism, though often because of doubts about practicalities of death penalty administration, rather than out of a moral objection to state killing (this position is sometimes referred to as the "new abolitionism") (Sarat 1998; Sarat 2001, 252). Sarat conducted interviews with appellate and post-conviction lawyers (1998, 319). He was interested in the ideological sensibilities of these men and women, who he describes as cause lawyers who hold "a widespread belief in the importance of political commitment and the importance of linking death penalty work to such larger narratives" (1998, 325). Sarat's attorneys are "lawyering for a losing cause" (331) and so refine success downward to include keeping clients alive another day.

In another major study on death penalty lawyers, Jon Gould and Maya Barak examine a slightly different sample: capital trial lawyers. They describe a community that is more heterogenous than those described by Sarat. Gould and Barak's lawyers typically oppose the death penalty, but are not cause lawyers. Rather, they are "proceduralists, very much at the border between conventional and cause lawyering" (2019, 70). Many are drawn to the work for the professional challenge or describe themselves as just falling into the field (2019, 4, 10). Gould and Barak also note that snowball sampling methods and researcher bias lead social scientists to interview the most driven and talented super lawyers in the field, thus painting a picture of a committed and political bar. They note that this description may not in fact capture the variation of the capital bar, which also includes its fair share of 'bad' lawyers, who are often solo practitioners who receive appointment from local judges (2019, 47-49).

The same process legal structure that produces capital lawyers also produces variation in the field. This variation is notably pronounced at the state level, where administrations have interpreted federal requirements in widely divergent ways. In their study of US Supreme Court regulation of the death penalty, Carol Steiker and Jordan Steiker identify Texas and California as states at two ends of this spectrum (Steiker and Steiker 2016, 116-53). Steiker and Steiker show that California's robust qualifications for death penalty representation and relatively substantial compensation select for a particularly skilled community of capital lawyers; on the other end of the spectrum, Texas sets a low institutional threshold for constitutional capital defense. Attorneys have been known to present no evidence, make no argument and even sleep through capital trials (Steiker and Steiker 2016, 126, and generally 116-53; Hood and Hoyle 2008, 225). State-level responses to death penalty reform show that a central court intervention in capital punishment can shape a capital bar in markedly varied ways depending on how the reform is implemented.

US Supreme Court regulation of the American death penalty carries important implications for the study of death penalty reform in China. First, courts that create specialized jurisprudence also create specialists in that area of law. Second, that specialization may in turn institutionalize political identities. And third, the precise implementation of capital defense structures produces notable differences in these identities. How has death penalty reform shaped the legal profession in China since 2007?

The Legal Profession in China

In the US death penalty reform produced the identify of death penalty lawyer. One of the major questions in this chapter is whether this identify applies in China. An inquiry into this question must start with an examination of the legal profession in China more generally. As we saw in Chapter One, China has a long legal history, but that history does not center on lawyers. Where the US legal tradition celebrates the "lawyer statesman" (Kronman 1995), the Chinese tradition instead celebrates the "scholar bureaucrat" (or *shi dafu* 士大夫; Chen 2012, 32). Officials occupied the top rung of late imperial Chinese society and magistrates were responsible for adjudication. Scholars who were unsuccessful at obtaining civil service posts in the Qing Dynasty sometimes made a living assisting litigants in civil cases or advising a local official as a legal secretary or a sort of in-house counsel (Macauley 1998; Hegel 2009, 8; Chen 2012). Nonetheless, criminal justice proceedings were inquisitorial and did not include anyone in the role of defense counsel (Hegel 2012, 12-13).

In the 20th century China has fostered a legal profession as part of the project of development—and that process has not been linear. As we saw in Chapter Two, after some initial support for socialist legality in the 1950s, Mao Zedong obliterated the legal profession—along with most legal institutions—during the Cultural Revolution. As China opened up to its markets beginning in the late 1970s, legal institutions returned, and lawyers returned with them. Initially lawyers were defined as state "legal workers" (Lubman 1999, 154). The 1997 Lawyers Law released lawyers from the work of the state and set them free in the free market. The profession has grown rapidly since then. Today China has prestigious law schools, a bar association, and about 300,000 lawyers (Xinhua 2017). Nonetheless, the status and safety of the legal profession in China remains uncertain. The Chinese state recognizes and encourages lawyers where their interests are politically state-adjacent (Liu and Stern forthcoming), and also periodically cracks down on lawyers who challenge state interests (Pils 2015).

The growth of the legal profession in the PRC has been uneven across practice areas and regions, and criminal defense has lagged behind other segments of the profession. Professional segmentation in free-market legal environments is not unusual. The sociologists John Heinz and Edward Laumann famously identified "two hemispheres" in the American legal profession. One hemisphere caters to large, corporate clients and enjoys high status, prestige and compensation; the other hemisphere caters to individual clients and receives less professional and economic renumeration (1982). In the United States most criminal defense attorneys occupy this second-class hemisphere. In China, the political and social dynamics make this divide even more acute. Commercial and transactional practices developed rapidly alongside economic liberalization, especially in China's wealthy and developed east coast cities. Corporate practice in particular is lucrative, cosmopolitan and technically specialized, and China now boasts some of the largest firms in the world. However, as we saw in Chapter Two, even as China's leaders encouraged market reform in the 1980s and 1990s, they also pursued illiberal strike-hard campaigns in the area of criminal justice.

China's criminal justice system further constrains the role of the criminal defense lawyer. The criminal justice system is made up of the 'iron triangle' of the police, procuracy and courts (Liu and Halliday 2008, 7-8; Liang, He and Lu 2014). The courts are the weakest of these three agencies—and lawyers are the weakest actors in the court. The 1979 Criminal Procedure Law that defined the ambit of these three agencies left little space for defense attorneys. Although the law established a right to counsel in principle, that right was both legally circumscribed and practically resisted by the agencies of the triangle (Chen 2013, 78-79). At the time of the 1979 Criminal

Procedure Law defense attorneys were state employees whose work was seen as redundant (Liu and Halliday 2008, 4). Under strike hard, the iron triangle expanded, while the prominence of defense lawyers correspondingly shrank, especially in capital cases (Liu and Halliday 2008, 5-6; Chen 2013, 56-57). The Criminal Procedure Law was revised in 1996 (and again in 2012) creating incrementally more space on paper for defense lawyers. Nonetheless, surveys indicate that until recently less than half of criminal defendants had legal representation (He 2014, 140).

One reason for the low rate of criminal representation is that lawyers don't want to do this work (Liu and Halliday 2016, 75). Defense work in China is low status, low pay, high stress and high risk (He 2014, 142-144; Liu and Halliday 2016) and lawyers in a market-based economy are apt to screen out the types of cases that aren't worth the time (Michelson 2006). The most thorough ethnographic study of criminal defense lawyers in China comes from the socio-legal scholars Sida Liu and Terence Halliday. Like Sarat, Liu and Halliday are particularly interested in the relationship between lawyering and political change. With this in mind, they map out an ideal typology of Chinese lawyers who handle criminal cases. On one axis they identify political liberalism—a commitment to a cluster of values including core civil rights, core political rights and basic legal freedoms (2016, 3-4). On the other axis they identify "political embeddedness," which is "a spatially bounded relational concept that emphasizes lawyers' proximity to the state as the way to get clients, facilitate their practice, and reduce difficulties in their everyday work" (6-7).[5]

Liu and Halliday find that the lawyers who do survive and thrive in criminal defense work are typically politically embedded (Liu and Halliday 2016, 75). This finding makes sense, as successful defense lawyers must navigate the dangers and headaches of the iron triangle in order to provide defense. Defense lawyers often have a professional background in the iron triangle and rely on it for work (Liu and Halliday 2016, 75-88). Most of these lawyers pursued criminal defense practice because it is profitable or professionally challenging, and fewer than one in five report political liberalism as a motivation for this work (Liu and Halliday 2016, 80). One of Liu and Halliday's core findings is that there is an inverse relationship between political liberalism and political embeddedness among Chinese defense lawyers—most criminal lawyers, and indeed most successful ones, are embedded lawyers who are not pursuing political change.

Legal Representation in Death Penalty Cases

How do death penalty lawyers fit into the Chinese defense bar? Indeed, does it make sense to talk about *death penalty* defense lawyers as a group distinct from defense lawyers in China more generally? To answer these questions, it is helpful to delve more deeply into the legal structure of capital representation in China, which diverges in some notable ways from criminal defense in other types of cases. As we saw in Chapter Three, capital cases in China typically proceed through three stages: a trial of the first instance, which takes place at an intermediate court, a trial of the second instance at the provincial high court, and death penalty review at the Supreme People's Court in Beijing. Since 1996 all defendants facing capital charges in China have been legally

[5] Liu and Halliday's work is part of a wide range of research that identifies embeddedness as a core feature of lawyering in China. See, for example: Michelson 2007; Liu and Halliday 2011; Givens 2013; Ng and He 2017; Lu et al. 2019.

guaranteed representation in first and second instance trials. Death penalty reform did not change this fact.

Defendants may obtain representation at trial in one of two ways. First, The Criminal Procedure Law establishes that capital defendants have the right to hire trial counsel themselves on the open market, at their own expense (CPL 2018, Article 33). Because death penalty statistics are a state secret in China (see Chapter Six) we do not know what portion of defendants in capital trials hire their own lawyers. Estimates and anecdotal data from one city suggest that 50 to 80 percent of capital defendants hire private trial counsel themselves (Yin 2018; X7; X53). There are also reasons to believe that many defendants in capital cases in China do not hire their own lawyer at trial. Most capital defendants in China are poor (Finder 2014; X69). As I discuss further below, most cannot afford attorney fees. Many defendants may also believe that legal representation simply isn't useful in a system with a conviction rate of over 99 percent (He 2014, 145; Clarke 2020). Still others may choose to spend limited resources in other ways, such as on compensation to a victim's family (Trevaskes 2015). Even for defendants who can pay, however, they may not be able to find a qualified lawyer to represent them. Like Chinese lawyers in other practice areas, defense attorneys are private lawyers who screen cases (Michelson 2006). Qualified defense lawyers may determine that capital cases are too difficult and dangerous, and therefore simply not worth the money for many of the same reasons that lawyers don't handle criminal case in general.

Capital defendants who do not hire their own lawyer are appointed a lawyer. This has been the law in capital cases since 1996, when the Criminal Procedure Law was amended to specify that "if a defendant may be sentenced to death, and such person has not appointed a defender, the people's court shall appoint an attorney who provides legal aid to serve as his defender" (CPL 34(3)). China has no dedicated public defender system, and so legal aid attorneys are all appointed from the private bar through a legal aid office. There are currently no guidelines regarding qualifications for legal aid appointment of lawyers in capital cases [X73].[6] All attorneys in China are obliged to handle multiple legal aid cases per year. Capital cases are not uncommon. As one veteran put it "capital cases are so frequent that practically every lawyer has done one" [X19]. In speaking of his work doing defense work while teaching at Zhejiang University, the well-known jurist Lu Jianping casually remarked, "a part-time lawyer inevitably takes some cases, and of course some of those are capital cases" (Lu 2015).

The local legal aid office makes determinations about how legal aid cases are doled out [X46].[7] It is common for the legal aid office to assign a case to a firm, rather than designating an individual lawyer within that firm [X46]. The firm in turn typically passes the case on to its most junior lawyers. Many firms do this legal aid work for the social connections it brings—an example of embedded lawyering—and the firm does not bother to collect state compensation (Yin 2018). The fees provided by the legal aid office vary by location and are minimal everywhere. One study suggested legal aid compensation is less than one tenth of what a typical lawyer charges in a capital

[6] One person with inside knowledge suggested that a qualification will likely be implemented eventually, and that qualification will likely set a threshold based on years of practice [X73]. See also (Finder 2014).

[7] Most lawyers I interviewed, including those directly involved in local legal aid administration, indicated that two legal aid cases are allocated to each lawyer per year. One rural lawyer reported, however, that in his district the requirement is three cases per year [X63]. Presumably the requirement is dependent on both the number of lawyers and the number of cases in the jurisdiction.

case (Yin 2018). Beijing is reportedly the highest paying legal aid venue for capital cases and compensates 2,000 rmb for a case [X7; X19]. For context, seasoned defense lawyers in Beijing can charge a thousand times that amount or more [X3; X6; X13].

Because compensation is low and attorney buy-in is minimal, legal aid lawyers typically put very little time into capital trial preparations. One regional defense lawyer suggests a legal aid lawyer will only spend 3 to 5 hours prepping a capital case, plus time in court. Even so, the legal aid compensation is considered too low for all but the most unscrupulous or hardscrabble lawyer. A study of appointed counsel in second-instance trials in Shandong Province in 2014 and 2015 shows that a handful of appointed lawyers do handle large numbers of these cases (Hu and Zhang 2017). One lawyer was appointed in 31 capital cases over the two-year period. Surprisingly, in many cases these lawyers affirmed the soundness of the capital sentences in their own defense statements (Hu and Zhang 2017, 68). As one scholar put it, the system *has* (*you* 有) legal defense but not *effective* (*youxiao* 有效) legal defense (Zhang 2013).

A person given a sentence of immediate execution at trial now also undergoes a final level of SPC review. Counsel is permitted to participate in the process, but legal aid is not provided (see Chapter Six), so defendants who want representation must hire (and pay for) counsel themselves. There is reason to believe that the dynamics of death penalty review provide a different legal environment for death penalty practice than at the trial level. For one thing, the market structure for lawyers representing clients in death penalty review is different than at trial. Whereas capital trials occur across hundreds of jurisdictions with different locally embedded actors, centralization of death penalty review brings all of these cases before the SPC annually, creating a large pool of national cases that can theoretically sustain lawyers in full-time work.

Death penalty review also geographically centralizes this process in Beijing, a city that is conducive to the emergence of legal specialization. Not only is Beijing the capital, it is also home to a large percentage of China's lawyers and to one of the most developed legal markets in China. It also contains the nation's top law schools, where elite professors write on narrow and technical areas of criminal law. For these reasons, many of the obstacles to defense practice that Liu and Halliday identify in their work are obviated or mitigated in the SPC review process in Beijing. At the trial level, lawyers must navigate hostile members in the iron triangle and rely on embedded connections in the jurisdictions where they practice (Michelson 2007; Liu and Halliday 2011; Givens 2013; Li 2016). By contrast, these local agents are absent from the Beijing-based death penalty review process. Lawyers only engage with judges.[8]

As discussed above, The US case shows that central court regulation of capital punishment can create a sympathetic legal opportunity structure that can drive the development of a capital defense bar. Is this happening in China? In this rest of this chapter, I take up this question through the insights of lawyers who represent clients in the SPC review process.

What Do Defense Lawyers Do at the SPC?

SPC death penalty review provides a novel legal forum for lawyers to work. The role of the lawyer in this forum is structured by both the legal and practical eccentricities of China's death

[8] Theoretically, the procuracy has power of final oversight in the death penalty review process. However, interviewees indicate that the procuracy almost never exercises that power. The only exception is in the rare instances when the SPC reverses a decision. In those cases the procuracy may choose to engage.

penalty procedure. The SPC review is a comprehensive review. Whereas the United States and other common law systems distinguish between the judge as arbiter of law and the jury (or judge) as finder of fact, in the Chinese system the judge plays both roles simultaneously. Just as the Chinese trial of second instance is a new re-hearing on both the substance and the procedure of the case, so too the SPC review is all-encompassing—addressing the facts of the case, the adherence to the law and the appropriateness of the sentence. In fact, when the SPC first retook its review authority, many commentators hoped it would establish a full open-court (*kaiting* 开庭) third-instance trial procedure [X7]. That did not happen. Yet some elements of death penalty procedure, such as a requirement that a judge conduct a final live interview with the condemned, are more robust than would occur in a mere "paper review."[9] In practice the process is perhaps best understood as something between a trial and a documentary review. One lawyer with extensive capital experience says that SPC review is not a hearing in open court (*kaiting* 开庭) but it is a "conversation" (*tanhua* 谈话）[X52]. In this conversation, defense lawyers have two formal avenues to advocate for a client: a written opinion to the court, or a face-to-face meeting with the presiding judge (Tian and Chen 2013, 310; X15).

Before a lawyer can prepare an opinion and meet with a judge, counsel must complete some preliminary steps. First, since only a defendant or a defendant's family may legally retain counsel for death penalty review, a lawyer who takes a case must obtain verification of the relationship and submit it the SPC. Thereafter, the attorney is entitled to copy records of the case. Reading the records is a crucial first step for a lawyer to understand the logic underlying the sentence [X2]. One lawyer described working without case records as like driving in a fog where one can't see the road [X67]. Getting records is not always easy. To start, the lawyer must determine where the case is being processed. As discussed in the previous chapter, the SPC death penalty review division is a massive bureaucracy with hundreds of judges and staff located in its own ten-story office building in a separate location from the rest of the SPC, occupying a large chunk of a block in central Beijing (Ren 2014). The bureaucracy is separated into five divisions that that split cases based on a combination of geography and type of case (Ren 2014). Assessing which division has the case and which judges have been assigned, a preliminary step in obtaining the record, is itself a major task. One lawyer from outside Beijing said he tried for over a year to determine which division was handling his case before giving up [X42]. In response to these types of complaints, in 2013 the SPC issued new regulations mandating greater access to case files. Lawyers report the situation has somewhat improved since then [X24].

In addition to reviewing the record, a lawyer will also meet with the client. This apparently simple task can also be quite onerous. Just as in imperial China, condemned prisoners remain housed in local jails, even as their cases are transferred to the capital for review. Unless the lawyer retained by the family is local, meeting with a client may entail a multi-day journey to a rural backwater in a distant part of China. Lawyers do not know how long the SPC will review a case and many lawyers are anxious to visit early. Older lawyers, particularly those that took cases before death penalty reform, share stories of being retained by family members and travelling to rural

[9] There is legal ambiguity about whether SPC review is classified as a trial (*shenpan* 审判) or an adjudication (*shenhe* 审核)（Li 2014, 26). This seemingly arcane distinction matters because trial procedures would trigger provisions of the Criminal Procedure Law, such as mandatory legal representation, that are not practiced the death penalty review process.

jails to meet with a client, only to be informed upon arrival that the client was already put to death [X7].

Once a lawyer reviews the record and meets with the client, the next step is to submit a written lawyer's opinion (*lüshi yijian* 律师意见) to the SPC. The law does not specify the form or substance of the lawyer's opinion (Sun 2014, 51). Although the Criminal Procedure Law establishes counsel's right to submit an opinion (CPL, Article 240), this has not always been so easy in practice. For example, recounting his experience as a lawyer, the famed defense attorney Tian Wenchang describes an SPC review case in which the only way he could be sure the court received his opinion was to send it registered mail and retained the delivery receipt (Tian and Chen 2013, 313).

In addition to the written opinion, according the Criminal Procedure Law and judicial interpretation, the lawyer is entitled to a meeting with the presiding judge in the case (Sun 2014, 51). The face-to-face meeting with the judge is the defense lawyer's single opportunity to argue a death penalty case in person at the SPC. On this process, one young lawyer said:

> A judge once kept telling me he would meet with me, but wouldn't set a time. After two or three weeks of this I finally told him outright that he would either meet with me or tell me he would not. We set a time and met. The judge told me he felt the case was already decided. I asked why he met with me. He told me he wouldn't feel right if he didn't meet with me. [X24][10]

This same lawyer recounts that another judge insisted on meeting in a particular division of the court building: "This was a problem because there was a rule that a person could only visit there once every three months. I pointed out that if I handled two cases in quick succession, I would not be able to meet with him [because I couldn't enter the building twice]" [X24]. Other lawyers evince a sense of futility in setting up meetings: "We wait for judges to call us. We can't call them" [X42].

Nonetheless, lawyers do successfully meet with SPC judges. This short meeting, which typically lasts about an hour [X15], usually involves four people: the presiding judge, a court clerk, a defense attorney and an assistant [X15]. As with the lawyer's opinion, the format of the meeting is open-ended, giving attorneys wide latitude to challenge a client's guilt on factual grounds, claim procedural deficiencies, or plead for mitigation. One young lawyer working on his first review reported to me that he prepared a PowerPoint for the meeting. In the middle of the PowerPoint, wedged between legal content so it could not be avoided, he included a slideshow of pictures of his client's family and daughter amidst stirring background music and a voiceover of the daughter, a pitch for mercy [X15].

Beyond written opinion and the audience with the presiding judge, some lawyers also assert a third avenue of intervention: public opinion. Occasionally lawyers will publicize details of a case in order to galvanize support in the hopes of swaying a decision. For example, in the high-profile case of Jia Jinglong, a rural worker who had killed an official he blamed for illegally demolishing his house, well-known legal scholars published open letters opining that the SPC should not ratify the death sentence (Mai 2017). While Jia was ultimately executed, his case is a powerful example of the viral power of popular outrage in contemporary China. A few lawyers have had success publicizing cases, but most lawyers are contemptuous of this approach, arguing that it was both personally risky and in principle exceeds the limit of the law [X42, X43]. Indeed, a 2016 revision

[10] The lawyer notes that this incident occurred prior to 2013, when new regulations were issued. Since then, lawyers report it is somewhat easier to meet with SPC judges.

to the Administrative Measures for the Practice of Law by Lawyers now formally prohibits most types of public action by lawyers that might galvanize public opinion in ways that are critical of state decisions (Stern and Liu 2020, 236).

Who Are the Lawyers Who Handle SPC Death Penalty Cases?

Who are the lawyers who represent clients in the SPC review process? This is of course a descriptive question: are these lawyers mostly men or women? Do they live in Beijing or elsewhere? And it is also a theoretical question: do these attorneys identify as specialists? As cause lawyers? And in China it is also a practical one: How does a researcher identify lawyers who have handled these cases?

The first time I became aware that lawyers are involved in SPC death penalty proceedings was through an accidental encounter. I attended a law talk in Beijing on the 20th anniversary of the O.J. Simpson trial. While there, I met a lawyer who worked on death penalty review cases. After this encounter, I tried a variety of approaches to systematically identify similar lawyers. Those methods are discussed in Appendix A. It turns out than in a legal regime where capital punishment data is a state secret, information on the lawyers who handle these cases is hard to come by. Ultimately, I met other lawyers the way I met the first one—through networking.

Thirty five of the 75 interviews I conducted for this project were with lawyers who had undertaken capital defense in some phase of adjudication.[11] About half of these lawyers had handled at least one death penalty review case; a few had handled dozens.[12] I spoke to a couple of lawyers (who I sometimes refer to here as death penalty review "super lawyers") who had handled hundreds of death penalty review cases—more than the rest of the sample combined.[13] About half the interviews I conducted took place in Beijing, and they were overwhelmingly with men (30 out of 35). The lawyers included solo practitioners, as well as lawyers in both boutique firms and large corporate offices. The death penalty review "super lawyers" I identify are all middle-aged men in Beijing or younger male attorneys who work with them.

Because data on both the death penalty and legal representation in capital review cases is a state secret (see Chapter Six), I have no way to independently verify the representativeness of my snowball sample. There was, however, a large amount of inter-informant reliability in my

[11] In 35 of my interviews I spoke with a defense lawyer who handled a capital case. This does not mean that precisely 35 lawyers in my sample had handled a capital case. My count includes both a small number of repeat interviews with the same lawyers and a small number of interviews that included multiple lawyers at once. The 35 interviews referenced here excludes interviews with people who handled capital cases in roles other than that of defense counsel (e.g. judges and prosecutors).

[12] This number is approximate for two reasons. First, some lawyers I spoke to didn't specify whether the capital case they handled was a review case or a trial case. Second, some circumstances do not fit neatly into one category. A few trial lawyers had, for example, handled a review case together with another lawyer, or handled a review case when the process was still conducted by provincial high courts prior to 2007.

[13] This number is rough because lawyers who have handled a small number of cases are very precise about the number, whereas lawyers who have handled many cases speak in generalities. For example, one lawyer reported handling "tens" (*jishige* 几十个) of death penalty review cases per year [X2]; another spoke of 20 to 30 cases per year [X13].

sample of "super lawyers." There was also a consensus among these lawyers that some portion of death penalty review cases are one-off cases handled by general practitioners. It is likely that there is also some segment of Chinese lawyers who are similar to the substandard US lawyers described by Gould and Barak (2019, 49)—we might call them "sketchy super lawyers"—that I could not capture in my sample. Because the death penalty review process is opaque, these lawyers could conceivably make exaggerated claims about their abilities that clients cannot verify [X24]. For example, during an internet search I identified one lawyer who referred to himself as a Beijing death penalty review lawyer and maintained a webpage on the subject. I reached out to this lawyer multiple times. He indicated repeatedly that he was unavailable to meet, was away on business and that he "didn't do theory" (*lilun* 理论). No other lawyer I interviewed for this project had heard of this lawyer.

How Do These Lawyers Feel about the Death Penalty?

As I described earlier, death penalty lawyering in the US context is closely linked with cause lawyering. American NAACP lawyers committed to systemic change brought litigation that reshaped the American death penalty, and the capital bar that emerged in response views the death penalty as a political matter. In so far as the death penalty is a political matter in China too, one might expect that the Chinese cause lawyers who feature so prominently in Western media would represent a significant portion of SPC death penalty attorneys. The high profile of some well-known Chinese cause lawyers can easily magnify this conception. For example, Teng Biao, a dissident human rights lawyer now living in exile in the US, founded China Against the Death Penalty, a seemingly one-person operation that claims to be "the first NGO that aims at promoting the abolition of the death penalty in mainland China" (Teng 2012; Lu et al. 2019, 370).

In fact, however, the lonely prominence of Teng Biao's nascent NGO underscores that there is very little overlap between cause lawyers devoted to death penalty as a political agenda, and the lawyers who undertake most capital cases. Lawyers such as Teng Biao receive considerable international attention, but there are perhaps only a few hundred cause lawyers in China, and they represent only a small portion of China's sensitive cases (Givens 2013, 765; Pils 2015). Teng Biao himself is currently located in the United States and so is not handling Chinese cases. Meanwhile, most of the sensitive legal cases handled in China in domains including environmental law, administrative law and criminal law are done by routine practitioners whose political views are more nuanced and ambivalent (Stern 2013, 152-53; Givens 2013; Liu and Halliday 2016). If anything, capital punishment work in general, and SPC review work in particular, draws far fewer cause lawyers than other sensitive areas of law. In this project, I only interviewed one attorney who actively identified as a cause lawyer. I was introduced to that lawyer precisely because the lawyer had handled one particularly high-profile capital case that received national attention for political reasons that would have held even if it were not a capital case.

If death penalty lawyers aren't cause lawyers, what are their views on capital punishment? The answer is: they vary. Many lawyers who handle capital cases at the trial and SPC level are explicitly agnostic about the death penalty. One attorney who has handled around 15 capital cases insists she doesn't support abolition, doesn't take these cases out of commitment to a cause, and doesn't know any lawyers who do. She continues, "to be specific, maybe [opposition to the death penalty] could be a small factor in doing death penalty cases, but it is not the main factor. The main factor is extensive experience or because the lawyer enjoys it."

Another young lawyer had a slightly different take on abolition. He considers himself an abolitionist—among the most outspoken I interviewed—and says most lawyers who do these cases

oppose the death penalty, but only become so *after* doing this work [X60]. This lawyer's view is a sort of practitioner-level view of the famous hypothesis put forward by Thurgood Marshall in *Furman*, namely that as people learn more about the death penalty they are more likely to reject it (Sarat and Vidmar 1976).

While some lawyers I interviewed did develop opposition to the death penalty through practice, not all responded with increased commitment to death penalty defense. Some simply stopped taking these cases. One prominent defense lawyer told me he handled three SPC death penalty review cases in his career. In all three cases he believed that although his clients were guilty, there was no legal basis for a capital sentence. All three of his clients were executed. He was dismayed by these outcomes and after the third case he stopped taking SPC review cases [X7].

On the other end of the spectrum, some lawyers who handle SPC cases still believe in the death penalty and continue to endorse it. One lawyer I spoke to considers himself a death penalty defense expert and says he handles about five SPC death penalty review cases a year. He also succeeded in saving a client on review, an extremely rare feat. Yet he also supports capital punishment as a matter of principle out of concern for public safety. He explains his position simply: "Our lawyers are also our citizens" [X28].

What is Success for SPC Lawyers?

Death penalty review work is not attractive to most people. A Beijing lawyer who focuses on capital drug cases had this dismal take on death penalty review practice: "Lots of lawyers don't want to do these cases. The pressure to save a life is high. Also, the status is low. And the influence of these lawyers on the outcome of the case is low." He continued, "You do a lot of work for very little result. A life is not spared…Also, the people who are sentenced to death are poor" [X37].

As we saw in the US, death penalty lawyers must define success downward. For seasoned American death penalty trial lawyers, the goal is a plea bargain and a non-capital sentence (Gould and Barak 2019, 41-42). For American capital appellate lawyers, the goal is most often simply procedural delay (Sarat 1998, 332). Like US death penalty lawyers, Chinese attorneys who handle capital cases almost universally insist that "there is only one definition of success: If the person isn't executed" [X19; see also X2; X6; X28; X32].[14] For trial lawyers, this typically means that their client receives a suspended execution sentence, rather than an immediate (or actual) death sentence [X45]. For SPC lawyers, this typically means the SPC sends the case back to the trial court, which thereby receives a strong signal to return a new penalty of suspended execution. The SPC may also modify a sentence directly. It is hard to know how often lawyers in death penalty cases "succeed" for their clients in this way—or how often condemned individuals without representation are spared on SPC review, primarily because death penalty data is a state secret (see Chapter Six). The SPC has only issued one conclusive data point on this issue—the Court announced that in the first year of review in 2007 it returned 15 percent of capital verdicts to lower courts for retrial (Xinhua 2008). The high rate of reversal that year was surely anomalous though,

[14] A provincial lawyer who had handled six death penalty cases prior to 2007 recounted a seventh capital case that went to the SPC in the first year of review. It was a drug case in which the drugs were seized in multiple batches and quantities were not clear. The evidence was not deemed clear and convincing so the SPC reduced the sentence. This lawyer did not represent the client on review, yet he indicated that "This case was my greatest success (*chenggong* 成功). But to tell the truth it wasn't *my* success. If not for the SPC review there would have been an execution" [X50].

a strong and early policy signal that trial courts tighten criteria for capital sentences. Since then the SPC has not released figures on SPC reversals of lower court death penalty verdicts.

As I discussed in Chapter Three, partial published data suggests that the SPC may affirm capital sentences in perhaps nearly 99 percent of cases. However, seasoned death penalty review lawyers indicate that their rate of success is higher than the partial SPC data would imply. A well-known Beijing lawyer who focuses almost exclusively on capital cases reported that he had obtained ten or more reversals or sentence modifications at various stages of capital cases over the preceding year. Another prominent lawyer claims similar successes. The head of a provincial law firm that claims to be one of three firms in China that specializes in criminal practice says that his firm has handled 200 to 300 capital cases and saved 10 to 20 people during the review stage.

Assuming these lawyers' reports are accurate, there are at least two ways to square testimonials of success with the dismal numbers in the SPC data. The first way is to explain this discrepancy is through case screening. The handful of lawyers who report success have already built a reputation for success in this area. Because of their relative prominence, they interview large numbers of prospective clients. A large client base provides two mutually reinforcing tools for continued success. First, lawyers have the luxury of picking winners. With a large pool of clients, they may select for the cases where they think they can succeed. Where these lawyers believe they can succeed, they will often take the case pro bono. At the same time, because these lawyers have a reputation for success, individuals with unwinnable cases may still be willing to pay a premium for their services, which gives these lawyers the financial flexibility to continue to take and win pro cases. One prominent lawyer with a major capital defense reputation explained that if he didn't think a case was worth his time, he would pass it on to another lawyer who might do it for less, including one who does not focus on criminal defense work.

It is also possible that the SPC does not publish the cases it reverses, perhaps because these cases are embarrassing evidence of procedural and substantive mistakes. Other sources report they are certain that the rate of reversal is higher than published cases suggest [e.g. X22]. A restriction on publication of reversals is more than just a statistical problem, of course. It also starves lawyers of the opportunity to learn by example from successful cases. For this reason some voices in the judiciary advocate that even if the SPC will not publish all capital case verdicts, it should at least commit to publishing all cases in which it does not uphold the death sentence [X22].

US lawyers can produce systemic legal change through constitutional litigation. In contrast, China's SPC does not wield the power of constitutional review, so formally the most a death penalty review lawyer can hope for is help for an individual client. Nonetheless, death penalty lawyers do occasionally speak with pride about death penalty cases they have raised that have compelled the SPC to make policy changes in capital punishment. For example, a provincial lawyer at a prominent defense firm recounted a story about a client who had been given a suspended execution sentence. At the time, the law stated that if the offender did not commit any new intentional crime during the reprieve period, the death sentence would be converted to an indeterminate prison sentence at the end of the two-year period. However, "If it is verified that he has committed any intentional crime, the death penalty shall be executed with the approval of the SPC" (1997 Criminal Law, Eighth Revision 2011, Article 50). This lawyer reported that in the first month of the suspended execution observation period, this client had an altercation with another inmate, who had dental abnormalities that caused his teeth to break during the scuffle. The case was sent to the SPC for approval of the death sentence. Instead of ratifying the execution order, the SPC remanded the case to the high court, which remanded to the intermediate court. Shortly thereafter, the law on suspended execution was changed to call for execution only in cases

where an intentional crime was committed under "heinous circumstances" (1997 Criminal Law, Ninth Revision 2015, Article 50). This lawyer argued that the client's case prompted the revision.[15]

Another lawyer cited the case of Wu Ying, an entrepreneur who was sentenced to death for fundraising fraud in 2009. The case caused a national debate and the SPC did not affirm the death sentence and instead remanded the case for retrial. At the time, media suggested that the SPC remanded the case in response to popular backlash (Yip 2012). The death penalty was subsequently eliminated for the crime of fundraising fraud in 2015. One lawyer I interviewed credited counsel in the Wu Ying case for doing more than saving her life; he also suggested that the work influenced the SPC and encouraged the subsequent legislative amendment to the law [X37]. These lawyers do not see the work as impact litigation, but they do see that success may include shifts in law and policy beyond the outcome for an individual client.

Variation in SPC Representation

Do lawyers who handle SPC cases handle all death penalty review cases the same way? Do all cases get handled by the same lawyers? In this section I consider two important factors in SPC representation: geography and type of offense.

Variation in Representation: Capital and Province

China has a unified bar, which means that in some sense all lawyers in China are national lawyers. And yet, previous research on lawyering in China—and defense lawyering in particular—highlights the degree to which defense lawyering remains a local retail practice (Liu and Halliday 2016). Aside from the practical realities that criminal cases are distributed throughout the country, and that it is convenient to be close to one's client, local attorneys who are embedded in the regional legal community face significant advantages in safety and access in their defense work over non-local counterparts (Liu and Halliday 2016, 44-64). This circumstance helps explain why a disproportionate number of defense lawyers have a background in other sectors of local criminal justice, such as police work.

Local embeddedness is a crucial attribute for most defense lawyers because most criminal defense practice takes place in lower level courts, where legal actors (as well as the defendants, victims and their families) have strong social ties, repeat encounters are common, and local interests and personal relationships hold sway. By contrast, the SPC death penalty review process is carried out in the capital under elite judges from outside the community where the crime took place. Prosecutors and police are not present. Does this mean that the bonds of localism are shattered in SPC defense work, paving the way for national practice?

Lawyers report that local embeddedness remains an important attribute for lawyers in death penalty review proceedings, but it is an attribute that must be balanced against the advantages conferred by geographic proximity to Beijing [X7]. A defendant begins legal proceedings in intermediate court with a trial lawyer, either appointed through legal aid or hired independently. A legal aid lawyer is always appointed from the jurisdiction in which the case is being tried, and so will be local. Previous research indicates that local attorneys enjoy advantages in criminal trial proceedings generally (Liu and Halliday 2016, 78). Both local and Beijing-based capital lawyers

[15] Other scholars indicate the revision was likely already in the works before this case. Nonetheless, this lawyer viewed success in the case in terms of meaningful legal change beyond the outcome for the client.

confirm that local lawyers retain advantages in first instance capital trials due to the strength in regional social networks, though defendants with resources may sometimes retain both local counsel and outside counsel in order to take advantage of local social networks and the prestige and expertise of nationally renowned defense attorneys (Sun 2014, 22; X3).

The social network advantage of local lawyers becomes less pronounced as defendants move up through capital proceedings, both legally and geographically [X3]. Defendants sentenced to death at a first-instance trial may appeal for an automatic second-instance trial at the provincial high court (CPL 2018, Article 227, 230). Participants at this level are less likely to have personal relationships with the community where the events leading to arrest took place, a fact that affects the legal defense strategy. Defendants who receive legal aid at the second instance trial will be assigned new counsel at the provincial level. At this phase, defendants who retain private counsel typically representation from a different attorney than the one who represented them in their trial of first instance, including more prestigious counsel with a regional or national reputation. The reason for trading-up at the second instance trial is two-fold. First, at the larger jurisdiction of the provincial level court the relative value of local connections is diminished, while legal technical expertise and national prestige carry more weight. Second, a defendant who received a capital sentence and is facing a second instance trial lost the first time around; this defendant is unlikely to have much faith that the same counsel will do better with a second bite at the apple.

If the second-instance court affirms the death sentence, the case will be sent to the SPC. By the time it gets there, at least two different defense lawyers have likely already been involved in the case. The condemned defendant will not be assigned legal aid, but may elect to hire private counsel. Defendants who retain a lawyer for the SPC face a choice shaped partially by geography: while the review takes place in Beijing, the defendant remains in a local jail. As such, unless the client was arrested and tried in the capital, a lawyer may be near the client or near the court, but not near both at once.

Being close to the client carries some advantages. Lawyers who have handled earlier phases of a case point out that they have earned the client's trust. They are also familiar with the case record, which matters a great deal in an environment in which getting a complete record from either the courts or trial attorneys can be contentious. Meanwhile being close the SPC also confers advantages. But being "close" to the SPC can signify at least three things. First, it signifies convenience. Much of the legwork for an SPC lawyer involves interfacing with the SPC. A lawyer in a mid-sized provincial city articulated that "the reason I haven't done any death penalty review cases is that we are far away from Beijing" [X45]. Beijing lawyers have more engagement (*goutong* 沟通，*jiaohuan* 交换) with judges [X26]. They run in the same circles, and because they are in the same city it is easier to link up their schedules [X26]. For this reason, one author estimates 80 percent of lawyers in SPC review cases are from Beijing (Sun 2014, 22).

Closeness to the SPC can also signify something shadier: inside dealing. Corruption is an intractable problem in China, and death penalty reform was carried out in part to break the local dynamics that produce it. Most lawyers are emphatic that while outright pay-to-play corruption may still exist at the lower courts, SPC judges are not corrupt. A few lawyers suggested that they could not verify that were no "black" or "grey" relationships, but nonetheless said they had not personally heard evidence of one. Indeed, rather than complain about untoward influence, experienced lawyers instead expressed frustration at their inability to reach judges for perfectly mundane reasons, such as confirming receipt of a document.

Ironically, lawyers who insist they don't rely on inside connections often have a hard time convincing their clients of this fact. The forces of corruption and local influence in China are so

prevalent that potential clients assume they hold for SPC review as well. Lawyers report that clients seek to select Beijing lawyers because they assume that Beijing lawyers must have extra-legal influence in a proceeding in Beijing. None of the lawyers I spoke to claimed—either in person or in any written promotional materials—that they had untoward connections. A Beijing lawyer who has handled around ten death penalty review cases said that "[i]n cities such as Beijing and Shanghai the rule of law is entrenched. So in these cities a lawyer who says he relies on connections (*guanxi* 关系) is basically a swindler. (*xiangdangyu yige pianzi* 相当于一个骗子). It's different in small places" [X24].[16] Nonetheless, lawyers suggested that there are likely unscrupulous lawyers who tell clients that they can peddle influence [X19]. Some even say they can deliver an outcome directly for a fee. If the lawyer does not prevail—as most death penalty verdicts are affirmed on review—family members of the defendant have little recourse.

Variation in Representation: Drugs and Murder

Although the substantive law in capital cases doesn't vary much by level of criminal procedure, it varies widely by offense. This point, while self-evident within China, is not intuitively obvious for many observers from outside China. That's because China's death penalty regime isn't just exceptional for the number of people put to death; China is also exceptional for the breadth of crimes that can carry the death penalty. Whereas following US death penalty reform capital punishment in the US is now restricted to homicide cases,[17] China's Criminal Code enumerates 46 capital-eligible offenses, including non-violent crimes.

Although the criminal law includes dozens of capital eligible offenses, most capital sentences are likely meted out for two classes of crimes: violent crimes and drug crimes (Xiong 2016, 225) [X37; X50]. More narrowly, most death sentences are handed out, probably in roughly equal proportion, for either "intentional homicide" (*guyi xiaren* 故意杀人，i.e. murder) or one of four drug crimes (smuggling, trafficking, transport or production) (Xiong 2016, 225; Trevaskes 2016, 159). While these two types of crimes are both tried through the same legal procedure, they differ radically in how they are policed. As I indicated in Chapter Two, they also differ in the way judges adjudicate them. And, crucially, they differ in the manner they are defended at both trial and death penalty review.

Intentional homicide captures the lion's share of attention when it comes to discussions of capital punishment in China, owing to the sensationalism of murder cases. The nature of the crime of intentional homicide informs defense strategy both at trial and during death penalty review.

---

[16] A lawyer in a mid-sized provincial city said much the same thing. He indicated that in the past lawyers might promise that if a client pays enough the lawyer can guarantee victory. He said that this is less common than in the past, and that many lawyer who makes such a promise is a swindler (*pianzi* 骗子). One legal scholar I spoke to did mention a well-known rumor that a nationally renowned and well-connected law professor handled a death penalty review case for 2,000,000 rmb. Supposedly it was widely understood that the professor received this fee because of his inside pull with the SPC. I could not corroborate this story.

[17] In *Kennedy v. Louisiana* (2008) the Court found it unconstitutional to impose capital punishment for crimes against an individual other than homicide. The court noted that the holding did not apply to crimes against the state, such as espionage, treason and drug "kingpin" activity. Under the Trump administration former Attorney General Jeff Sessions encouraged prosecutors to seek the death penalty in drug kingpin crimes (Dui Hua 2019).

Homicide cases usually produce lots of physical evidence, notably a body, and also DNA and a murder weapon, as well as aggrieved parties, usually family members of the victim [X54]. Factual guilt is therefore hard to contest. By contrast, much of homicide defense consists of mitigation.[18] Common strategies are to raise sympathy for a defendant and ameliorate animosity on the part of the victim's family through payment, sometimes wryly dubbed "cash for clemency" (Trevaskes 2015). Judges take aggrieved family members—and the social instability their grievances may provoke—seriously. One lawyer conducting SPC defense reported that his client had killed his wife, leaving behind a child. Normally the SPC would be inclined to spare a defendant with a young child, but the victim's family would not be placated by apology or restitution; they made clear to the court that they would take care of the child, but only if the defendant was put to death. Ultimately the client was executed.

Although capital sentences may be on the decline overall in China, the proportion of death sentences handed out for drug crimes seems to be increasing, and, indeed, some people believe that the total number of executions for drug crimes may be on the uptick as well [X19, X21, X37, X43]. While intentional homicide cases make the news, drugs are in fact the big story in capital punishment in China today. The drug epidemic in China has ballooned in recent years. Consider the following figures from China's National Anti-Drug Committee Office: In 1991 China reported 148,000 drug users; 5,2085 people were sentenced for drug crimes in 8,395 "cracked" cases and 1919 kilos of heroin were seized. In 2014 China reported 29,550,000 drug users; 109,692 people were sentenced in 145,900 "cracked" cases and 9.3 metric tons of heroin were seized (Zhuo'an 2016). Methamphetamine use has eclipsed heroin use, and production of synthetic drugs has spread into China's heartland. As one defense lawyer put it, "In China, everyone's a chemist" [X37]. The state has made a policy choice to continue to use capital punishment to combat the epidemic, including handing down death sentences to multiple defendants in a single case [X19].

While in intentional homicide cases capital decisions are shaped by victims, and, perhaps, fears of public opinion, in drug cases the apportionment of culpability is often technical rather than normative; in other words, driven by national policy rather than moral opprobrium. In these cases, there are no victims and very little evidence aside from large amounts of drugs and sometimes cash. "Determining the facts in drug crimes is a real headache (*mafan* 麻烦). This gives defense attorneys some space" [X54]. Lawyers in these cases are not primarily concerned about restitution payments, or the possibility of a dead person coming back to life. Rather, lawyers may contest the quantity and purity of the drugs seized, the criminal role of the defendant and the relative culpability of various members of the conspiracy [X28]. The Criminal Law specifies that the smuggling, trafficking, transport or production of over 1,000 grams of heroin or 50 grams of meth is a capital-eligible offense (Criminal Law, Article 347). In fact, however, the drastic expansion in production has radically increased quantities regularly seized, rendering the thresholds in the criminal law obsolete. One lawyer in Sichuan told me that, "In 2010 a kilo [of meth] was a lot. Today 10s [*ji shi* 几十] of kilos is common to see in a case" [X60]. The SPC has responded by issuing memos that raise the drug threshold for capital punishment and vary it by province, with border provinces such as Yunnan and Sichuan where narcotics are trafficked in larger volumes

[18] In their work on US capital lawyers, Gould and Barak find that the division of labor is sharply gendered. Mitigation is seen as client-centered, emotional labor, and mitigation specialists are overwhelmingly women (2019, 192). As the Chinese system does not so neatly differentiate between the guilt and sentencing phases of death penalty procedure, I did not observe a division of labor along gender lines.

granted a higher quantitative threshold for capital punishment in drug cases. These memos provide room for attorneys to maneuver. One lawyer in a border province described how his client was charged for the weight of the whole marijuana plant seized, rather than the weight of the bud. He was able to get the weight reduced and so reduce his client's sentence [X33].

Lawyers can be more successful in capital drug cases than capital murder cases because "the standards [for quantity etc.] are so beneficial" （*biaojun tai youli* 标准太有利）[X58]. Lawyers who specialize in drug cases sometimes arbitrage their knowledge of internal court policy on drug weight to gain clients and broadcast success. Such lawyers will show prospective clients the law on the books regarding sentencing according to drug quantity, which will indicate that based on the weight of drugs seized the penalty for the prospective client is death. They will show the prospective client a clipbook of similar cases where the lawyer's clients have received non-capital sentences for similar weights. Prospective clients will take this as evidence of the lawyer's prowess, rather than a signal of the gap between public and internal weight thresholds. A lawyer who handles drug cases in a rural jurisdiction explains,

> Lines 347 and 348 of the criminal law specify death for 50 grams of heroin or a kilo of ice [meth]. In fact, judicial interpretation makes this quantity much higher, but lawyers still point to the law and say "see! your loved-one will be executed." They can command a high salary, even though they know that according to judicial interpretation the client will not be executed. [X63]

The disjunct between drug and homicide capital representation to some extend shapes these lawyers views of capital punishment. Lawyers who focus on homicide cases tend to maintain more support for the death penalty in principle. These lawyers describe the graphic crimes their clients committed and point to retributivist justice. While defending their clients, they do not describe them in sympathetic terms. These lawyers can also point to concrete victims. By contrast, lawyers who deal mainly with capital cases involving drugs describe a capital punishment system driven by policy directives that put to death offenders for arbitrary technical reasons that are attenuated from moral culpability. One lawyer stated that because drug-related executions are based on drug weight, and the average weight trafficked by individuals can vary wildly, "the rate of death sentences for intentional homicide is stable; the rate of death sentences for drugs is not" [X37]. A law professor who also does pro bono death penalty work opined, "I can understand using capital punishment for drugs from the standpoint of politics, but it won't stand from the standpoint of law" [X33].

Drug trials can involve many defendants. In these cases both culpability and sentencing harshness are ranked in descending order by the courts. For example, one attorney represented a client in a drug case with 50 defendants and told me that his client ranked fourth out of 50 in terms of culpability. Another attorney described how his client was prosecuted for drug distribution as part of a large, multi-defendant case. Internal court guidelines indicated that only two offenders were to be given capital sentences in such a case, leading him to believe his client would be spared. Later the criminal prosecution split the drug conspiracy into two separate cases, doubling the number of offenders eligible to receive a death sentence for the crime. This technical change made it far more likely that his client would be executed, he explained. "Death is an extremely important matter for an individual defendant, but as to whether someone is sentenced to death, that can be swayed by something as simple as whether the case is split in two" [X51]. Another lawyer who handles capital drug cases recounted a similar situation. His client was part of a capital drug case with multiple defendants. According to guidelines only two people should be sentenced to death

in such a case. His client was considered the third most culpable in the crime, but the most culpable individual was not apprehended. He wondered at whether it is fair that his client faces a death sentence simply because the more culpable person was not apprehended. Arbitrary distinctions such as this are one reason that this lawyer personally opposes the death penalty [X37].

Drug lawyers are also particularly aware of the politics of drug cases. One lawyer who I interviewed in May said that he hoped that no verdicts were issued in his clients' cases on June 26. June 26 is International Day Against Drug Abuse and Illicit Trafficking. On this day courts in China typically issue harsh verdicts in drug cases that get wide publicity in state media. Despite recognizing this dynamic, this attorney supports the death penalty, stating "In China, up until now, the level of development, of people's perspective on life, requires the death penalty as a deterrent" [X50].

With some exceptions [e.g. X63], lawyers who handle drug cases also speak more sympathetically of their clients. I asked one experienced lawyer—who is from a border province, focuses on drug defense and has handled about 30 capital cases at various levels of procedure—to describe a case that made an impression on him. He narrated a case involving a mother with two young daughters who had been convicted of drug transportation. This lawyer handled the woman's SPC death penalty review and says that the SPC judge met with him and with his client. Ultimately her sentence was affirmed and she was executed. "Regardless of her crime, she is also a mother," he recounts [X27]. This lawyer expresses personal concern for the livelihoods of children whose parents are executed for trafficking. He and his firm will sometimes provide financial assistance to the families or look for opportunities to help them with employment. So far, the position espoused by drug lawyers in China such as this one is the closest thing one can find to a group opposition to the death penalty: "even though these people have caused great social harm, do they deserve to die?" [X60]?

The Emergence of a Capital Bar

It is a truism that the structure of a legal system shapes the role of the lawyers within it. The centralization of death penalty review under reform certainly restructured China's legal system, concentrating all of the nation's death decisions in Beijing, one of China's most robust legal markets. Crucial disincentives to defense lawyering generally—low status, personal risk, weakness relative to other state actors and reliance on 'embedded' connections—are diminished or absent in the SPC death penalty review process. As one lawyer states, "[at the SPC] there are no opponents. Nobody objects. Nobody argues with you" [X15]. At the same time, SPC death penalty procedure provides the opportunity for lawyers to gain repeated exposure to capital punishment cases, honing expertise and focusing practice. How are these factors influencing the professional identity of the lawyers who handle these cases?

Contrary to my expectations, most lawyers I interviewed deny that there are any death penalty review specialists in China. [e.g. X29; X48]. This was even true among the death penalty review "super lawyers". To some degree, these lawyers simply don't see the legal profession in China as very specialized overall. "It's not like medicine, where there is internal medicine practice and OB-GYN etc. Lawyers are all merged together" (*rongru* 融入) [X55]. There is particular skepticism about death penalty review specialization, though reasons for this skepticism vary. Some lawyers, especially those outside Beijing, say that there simply isn't enough work to sustain anyone doing these cases full time. One lawyer who handles criminal cases for a provincial branch office of a large law firm said "the city is small. Nobody can say they are just focused on one type of case… just specializing, it would be impossible to make ends meet" (*chibubao* 吃不饱) [X43].

Another said the demand is low because "everybody gets married, not everyone commits crimes" [X60]. Others point to qualifications: neither the state nor other professional associations have yet set out any formal requirements that would set these lawyers apart. As one lawyer who leads a branch of the All China Lawyer's Association in a provincial capital explained, there are people who say they are experts (*zhuanjia* 专家), but they are not, because there are no professional qualifications for this title [X26]. Another lawyer put it succinctly "There is no credential for death penalty review" [X53]. In a similar vein, some people insist that even if there are lawyers who do have the expertise to identify as specialists, there is no way to prove it because there is no open court hearing [X43]. A death penalty review lawyer cannot publicly perform defense for a client or an audience, as one might in a trial, so "there just aren't any way to show your skills" [X29]. Another lawyer explained that in most death penalty review cases lawyers aren't successful and "If you aren't successful you can't get clients" [X68].

One paradox in the field of Chinese death penalty lawyering is that even though lawyers deny the existence of experts and specialists in death penalty review, when asked who is known for handling these cases, informants consistently mentioned the same handful of death penalty review "super lawyers." How can this be? The answer is that the same factors that informants identify as barriers to specialization also ironically produce feedback loops that give these "super lawyers" serious competitive advantages.

Death penalty review super lawyers enjoy visibility in an information-poor legal economy. The right to counsel during death penalty review is not well publicized. One legal scholar states "most defendants don't even learn there is [an SPC death penalty] review process" [X21]. Another lawyer relates having a client who was a college professor. The professor did not know he was allowed to hire counsel for SPC review. If even a college professor doesn't know he can retain counsel, this lawyer mused, how could the average farmer? [X67]. In fact, information about death penalty review is so hard to access that when Beijing's most well-known criminal defense firm launched an initiative to provide a year of pro bono counsel in SPC review cases in order to better understand the process, they had trouble drumming up more than a handful of clients. Speaking about this pro bono work, one lawyer wondered, "if I were a poor villager from Guangdong, how would I know about this program?" [X24]. In such an information-poor environment, defendants or their families must therefore overcome a knowledge barrier in order to contemplate hiring an attorney for the process. With so few lawyers willing to take these cases, individuals seeking counsel, though small in total number, are unusually likely to latch-on to death penalty review 'super lawyers' who have some reputation.

The steady stream of clients creates a feedback loop of success among the most prominent lawyers in the field. One the one hand, they can pick winners. From a large pool of potential cases, they may identify the ones that might be reversed, *even in the absence of counsel.* Lawyers can afford to represent these clients for free, and if they prevail, they can spread word of success, furthering boosting their reputation. On the other hand, because these lawyers have established a track-record for success in an information-poor field in which the stakes are life and death, clients who can afford counsel will pay dearly for it. This means that death penalty review super lawyers are in a powerful position to demand substantial fees. These lawyers reportedly command fees of up to 500,000 rmb to 1,000,000 rmb for a death penalty review case [X26]. Attorneys may be prone to exaggeration when it comes to money, but a super lawyer did produce documentation that he received 800,000 rmb for work on two cases [X52]. One super lawyer insisted he already had more money than he could spend in a lifetime [X63].

Towards a Specialized Drug Bar

While lawyers were often hesitant to describe these SPC super lawyers as specialists, many lawyers were quick to identify specialization in substantive areas of capital criminal law—notably drugs or homicide [X15, X19, X37, X60, X63].[19] One Beijing lawyer who works on drug cases explains, "I think expertise is established in a type of case law, not in a stage of the criminal process…from the standpoint of the lawyer, we see that the field is developed by [expertise in] type of case" [X37]. This is particularly true in drug cases. Capital drug lawyering is more lucrative than homicide lawyering. Across the world, the death penalty disproportionally impacts the poor (UN Experts 2017). The SPC admits that capital defendants are socially disadvantaged and cannot afford counsel (Finder 2014). Partial public data suggests that most of China's condemned have no more than a middle school education and more than two thirds of defendants are either farmers or unemployed (Amnesty International 2017, 32-33). Death penalty lawyers unsurprisingly report that Chinese defendants are also disproportionately poor. But death penalty lawyers also report that capital defendants are not *equally* poor. Drug crime defendants sometimes put away rainy day money to pay for counsel [X60]. And even when they do not—as in the case of drug mules—the drug network sometimes pays these fees. Overall, the lawyers who handle drug cases don't ask their clients directly where the money comes from [X60].

Capital drug lawyers also benefit from a regional concentration of cases, particularly in the Southwest. Southwestern provinces are near the "golden triangle" of Laos, Myanmar and Thailand that produces much of the world's heroin. The Wa State, a semi-autonomous province of Myanmar, also reportedly manufactures large quantities of synthetic drugs that get smuggled into China. Opioid cases in this region are so common that at one meeting a lawyer began by presenting a plastic take-out container of fresh poppy bulbs as a prop for a mini-lecture on drug trafficking. Compared to the relatively even distribution of homicide cases throughout the country, the concentration of certain types of capital drug cases such as trafficking in border regions provides a steady stream of clients for some lawyers in these areas.

The regional concentration of drug cases encourages not just individual expertise, but firm-level expertise as well. Lawyers who identify as criminal defense attorneys say that only a handful of firms concentrate primarily on criminal cases. Yet among these firms that advertise criminal practice, firm-level branding in drug case expertise is notably prominent, especially in regions with a reportedly high concentration of drug cases. One firm that advertises as specializing in criminal law practice also publishes materials on drug defense. One firm claims that "wherever there are drug offenses, you will find our defense there" [X27]. A number of these firms have recently formed a network under the umbrella of the Chinese Drug Crime Defense Alliance, which holds national conferences on best practices.

The professional dynamic between SPC lawyering and defense lawyering for drug offenses is symbiotic. Even when provincial drug lawyers don't see SPC super lawyers as specialists, they do network with them, collaborating on cases, sharing strategy and passing along business. SPC lawyers are natural nodes connecting the practices of drug lawyers with practices that are otherwise focused at the provincial level. SPC lawyers stimulate conversation about both case similarities across provinces and case variation across the country. In this way, the participation of lawyers in

[19] Lawyers interviewed in one economically prosperous coastal province reported specializing in corruption cases (literally "duty crimes," *zhiwu fanzui* 职务犯罪) [X45]. Corruption remains on the books as a capital offense. See Chapter Five.

death penalty review may be viewed as a mediated driver of national professional identity formation for an emerging death penalty bar.

Chapter 5: Punishments

There are experts who say that Mao Zedong invented suspended execution; Xi Jinping invented life without the possibility of parole.

– Chinese Criminal Defense Lawyer[1]

Deng Xiaoping didn't adopt capitalism, but he called for socialism with Chinese characteristics. Life without the possibility of parole is the same.

– Chinese Criminal Defense Lawyer[2]

Introduction

If we cease to use capital punishment, what will replace it? This supposed quandary has been termed "the oldest of all issues raised by the two-century struggle in western civilization to end the death penalty" (Bedau 1990, 481). If we wish to see the death penalty with fresh eyes, particularly in cultures and jurisdictions other than our own, we can learn an immense amount (and dislodge our own assumptions) by analyzing not just the process of execution itself, but also the particular constellation of punishments that are adopted, adapted, rejected and innovated to supplant it.[3] In the early years of the 21st century China underwent the most drastic capital punishment decline in recent global memory. What other penalties were in play in this reform, and what can these penalties tell us about the contradictions of capital punishment in China today?

In this chapter I tell the recent histories of a pair of sanctions—suspended execution and Life Without the Possibility of Parole (*zhongshen jianjin* 终身监禁，or life-long custody; hereafter "LWOP")—two sentencing alternatives to actual execution in a capital case. These two penalties share such a close family resemblance in the formal law that a casual observer could mistake them for siblings. Indeed, technically LWOP is a subtype of a suspended execution sentence and can only be applied once a suspended execution verdict has been rendered.

But appearances can be deceiving. Although these two punishments have a close formal likeness, they are also so different from each other in history, identity and prominence that they might as well be complete strangers. As we have seen, the first sanction, suspended execution is a quintessential feature of Chinese penality. It is strikingly similar to the deferred death sentences of late imperial China (discussed in Chapter One) and is a foundational element of the PRC's death penalty practice from Mao onward (see Chapter Two). In the reform era, it is the primary sentencing mechanism by which China's courts have reduced executions across all 46 capital-eligible crimes in the Criminal Law. It has diverted execution in many thousands of cases and is likely the most widely handed down capital sentence in the largest legal jurisdiction in the world today.[4] Because suspended execution is a nominal capital sentence that doesn't result in death,

[1] Interview with author.

[2] Interview with author.

[3] Some sociologists go so far as to insist that the *only* time we can identify the relations of social phenomena is when they are shifting or being reassembled (Latour 2005).

[4] Amnesty International tracks both death sentences and executions. In 2019 Amnesty International reported that the country with the most documented death sentences was Pakistan, with 632+ (2020, 11). Amnesty does not provide an exact figure for China, as that information is

commentators have dubbed it the "death penalty that isn't," and an "honorary death sentence" (Trevaskes 2013, 222; Zimring and Johnson 2012, 195). It is, in effect, the standard Chinese replacement for an immediate death sentence (*liji zhixing* 立即执行), which is the sentence that typically results in an actual execution. In sum, following death penalty reform, suspended execution has become the norm, the rule, the established Chinese diversionary alternative to death.

By contrast, LWOP—a more familiar sentence in the West—is a novelty in China. Although China has long had an indeterminate sentence (*wuqi tuxing* 无期徒刑) which is often inaccurately translated as a *life sentence* in English, the indeterminate sentence is in fact not life-long, and typically results in a shorter prison sentence than a suspended execution sentence. The current LWOP statute was introduced by the legislature only in 2015, quite late in China's death penalty reform, and for only one non-violent capital crime—corruption. At the time of writing, the punishment has been imposed in just three published cases. In short, LWOP is the exception, the trouble-case, the anomalous Chinese alternative to death.

When set in contrast, the rule (suspended execution) and the exception (LWOP), raise a series of paired questions for Western observers about alternatives to the death penalty in China. How did the judiciary reduce executions so much using an alternative that was already on the books (suspended execution), and, given that this approach worked, why did the legislature bother to introduce a new alternative (LWOP) so late in the game? Why was it deemed necessary to introduce LWOP to permanently confine one small group of non-violent offenders—corrupt officials—while it is still typical for murderers sentenced to suspended execution to be released within decades? Why come up with a special sentence for only one of China's capital crimes? What about the other 45?

The answers to all these questions bring us back to the central theme of this dissertation: The Chinese state's reliance on death penalty administration as a means to discipline its agents. In this chapter I show that both the norm (suspended execution) and the exception (LWOP) serve as methods for state control over its representatives. To draw these conclusions though, we need to first examine the tradition of alternatives to the death penalty that inform assumptions in the West. Once these assumptions are clear, we can see the Chinese system with fresh eyes.

The Challenge of a Suitable Replacement

As death penalty abolition has become a worldwide phenomenon, so too have stories about how that process takes place. In fact, nations move away from the death penalty in a variety of ways, yet the Anglo-American experience nonetheless has shaped the narrative, which we might call the Standard Western Thinking on alternatives to the death penalty. The noted death penalty scholar Roger Hood distills this narrative in his work "The Challenge of a Suitable Replacement," a contribution to a 2015 book on the death penalty worldwide. He writes:

> [M]ost countries that have abolished the death penalty have put in its place a system where an indeterminate life sentence is available for the worst of the worst murders, in nearly all

---

a state secret (see Chapter Six). However, it is estimated that China executes 1000s of people per year (Amnesty 2020; Dui Hua 2020). Each execution first requires a sentence of immediate execution (*liji zhixing* 立即执行). In 2007 the Supreme People's Court announced that for the first time in its history it had handed down more suspended execution sentences than immediate execution sentences (Xinhua 2007). Assuming this proportion still holds, it follows that China's courts hand down thousands of suspended execution verdicts per year.

> instances subject to review by the executive through a Parole Board or similar body. The expectation is that the prisoner will be fit for release after serving a minimum period of time in custody to mark the seriousness of the crime, but that in a few cases the offence may be so outrageous and the offender so likely to be dangerous that he or she will have to remain in custody, possibly until death. (501)

Hood's observation is empirical, but lurking behind it is a series of claims, which be rephrased as the propositions that: The abiding problem with ending the death penalty reduces to a concern about a small subset of murderers, who constitute the "worst" criminal offenders. Abolishing the death penalty for these offenders is problematic because it raises the specter that these criminals might re-offend, and the solution must be a prison sentence that manages to restrain dangerous offenders and assess them for dangerousness without committing the same sorts of human rights violations produced by the death penalty.

China diverges from this narrative in nearly every regard. First, China's death penalty regime *does not* explicitly mark murderers as the worst offenders. The law on the books designates a range of crimes, including both violent and non-violent crimes, drug offenses, economic and political crimes, and, until recently, even some seeming cultural crimes like tomb robbing, as capital-eligible offenses. While we lack good data on the death penalty in practice, it appears that the executions for the crime of murder constitute only a minority or at most a bare majority of all executions in China today (drug crimes appear to make up about half of all executions; some small portion of executions are for the crimes of rape and assault) (Xiong 2016 and see previous chapters). Second, the risk of re-offense does *not* seem to be a driving concern about the worst offenders in China. Re-offense does not feature prominently in the scholarly and policy conversations about the death penalty immediately prior to reform (see, generally, Cohen and Zhao 2008). Nor have worries about re-offense taken pride of place in more recent popular conversations about the suitability of capital punishment for violent offenders (see e.g. the depictions of motivations for popular calls for execution in controversial cases such as the Yunnan case of Li Changkui; see Hualing Fu 2016; Trevaskes 2015). The sentence of suspended execution, which is the standard alternative to death in serious violent crime, does not hold violent offenders in permanent custody; meanwhile, LWOP, which *does* provide life-long custody, is only available for non-violent offenders.

Why is Hood's description of the problem so at odds with the Chinese experience? Certainly, as Hugo Bedau suggested, replacing the death penalty is a long-running preoccupation in the West (Beccaria [1764] 2009). But the current Standard Western Thinking on alternatives to the death penalty is not fixed. The so-called first wave of death penalty abolitionism that began to sweep through Europe and America in the 18th century was framed very differently from the talk today. In Europe, Robespierre was primarily concerned with capital punishment for political crimes, not murder (Derrida 2014). And in the US, Benjamin Rush articulated an abolitionism based on republican ideology and liberal theology that championed the anti-monarchical and redemptive power implicit in the end of capital punishment (Masur 1989, 66). When Daniel Tompkins, a Columbia College student, penned an already shop-worn college essay on the topic of abolition in America in 1793, it was Rush's arguments that he surely rehashed. The first raft of jurisdictions to abolish the death penalty—places like Michigan and Portugal—did so without fixating on permanent custody and community safety. Through the 19th century and well into the 20th, abolitionist debates drew on questions of God, redemption and morality (Masur 1989; Friedman 1993; Banner 2009). Thus, even in the West, the substance of debate on alternatives to the death penalty is quite mutable. So where did the current issues of contention—murderers as

worst offenders, dangerousness as primary concern, incapacitation as sole effective response, and life-long imprisonment as emerging human rights issue—come from? The particular set of talking points about alternatives to the death penalty today have a young, new world pedigree: late 20th century America. So, in order to understand the Chinese case, we must first dive a little deeper into the US story in particular.

American Executions, American Alternatives

In the mid-twentieth century it was not obvious that the US model of death penalty would be the outlier that would shape conventional wisdom. For two centuries leading up to the 1970s, US capital punishment practice was generally congruent with continental Western norms (Garland 2010, 11). In the wake of World War II Europe began the march towards abolition and so did the US. But then something unexpected happened. While European nations abolished capital punishment, the US judiciary flirted with abolition in *Furman v. Georgia* (1972), and then, instead, in *Gregg v. Georgia* (1976), embarked on a program of death penalty retention and reform. America's death penalty reform—which ushered in the modern era of US capital punishment—continues to frame the terms of capital punishment *and therefore its alternatives.*

The US death penalty in the modern era is fixated on dangerousness. In the 1960s, the US underwent a crime wave. The homicide rate nearly doubled between 1964 and 1974 (National Research Council 2014, 128). The increase in real crime was a major contributing factor in the rising fear of crime in the US in the second half of the 20th century (National Research Council 2014). Rising fears of crime in turn ushered in a new era in crime control in which risk of offense—both for individuals and populations—became the paramount consideration. This emergent danger-focused view of crime typifies a new penology of risk-assessment and actuarial justice (Feeley and Simon 1992). While capital punishment is only part of this larger story of transformation in American criminal justice, its centrality in the narrative is hard to overstate (Gottschalk 2006; Simon 2007, 111-141; Garland 2010, 244; Steiker and Steiker 2016).

The US death penalty in the modern era also serves as a referendum on trust in government and legal institutions. While the death penalty in the US prior to reform was a topic of low political salience, in the post-*Gregg* period capital punishment has become a high-visibility issue that has pitted a variety of American legal institutions and actors involved in the "pathological politics of criminal law" in America against one another (Stuntz 2001). As David Garland writes, "from the late 1970s, the question of capital punishment functioned as a litmus test for law and order commitment in the same way that 'abortion' tests for conservative commitment. To ascertain if a judicial nominee or an aspiring politician was sound on law and order, one asked if he or she supported the death penalty" (Garland 2010, 244). Court actors were the political losers after *Gregg*; so-called elite lawyers and activist judges both became increasingly politicized targets (Simon 2007, 111-127). While the Supreme Court Of The United States (SCOTUS) asserted review power over the death penalty, national and state legislatures aimed to yoke the courts on issues of non-capital criminal justice. Mandatory minimums and determinate sentencing became popular techniques to rein in supposedly wayward judges. The Comprehensive Crime Control Act of 1984, for example, abolished the US Parole Commission and instituted federal sentencing guidelines that curtailed the ability of judges to elect appropriate sentences (Petersilia 1999, 495). The political winners in this post-*Gregg* landscape were tough-on-crime politicians, including legislators, governors and local law enforcement, particularly those appealing to the sensibilities of crime victims (Simon 2007; Lynch 2016). The politicized language of fear and the promise of

law and order in late 20th century America has been termed a strategy of 'governing through crime' (Simon 2007).

Incapacitation has become a primary criterion for any alternative to the death penalty in the modern US. As the rhetoric of risk society and the political incentives that accompanied it became entrenched in the 1980s and 1900s, "American penal policy came to be shaped by a strong version of general incapacitation that is the primary purpose of punishment" (Simon 2014, 284). Before that, the American sentencing landscape had been dominated by early progressive views about the transformative power of the prison under the direction of penal expertise. American prison sentences were overwhelmingly indeterminate and (by present standards) short in duration. The harshest non-capital sentence was a traditional life sentence of indeterminate length subject to conditional release (Harvard Law Review 2006, 1839). Indeed, for roughly a century between 1870 and 1970, the penal rationale governing even the harshest non-capital sentence in the US was rehabilitation and release. In many states lifer prisoners were presumed fit for parole at their first hearing. In the early 20th century, a life sentence in the federal system meant 15 years (Harvard Law Review 2006, 1839). The situation was similar at the state level. In Louisiana, for example, until the 1970s a life sentence for a prisoner with good behavior typically meant release after ten years (Nellis 2009, 3). (This system very much resembled the system of life sentencing in place in China today.)

But during the same moment that the SCOTUS was reformulating modern death penalty jurisprudence, the penal field was undergoing a crisis of expertise. The crisis centered on the rehabilitative ideal, which had held sway in corrections through much of the 20th century (Allen 1981). The underlying suppositions of the rehabilitative ideal were that criminals were capable of reform and experts were able to assess this reform. The release and subsequent re-offense of criminals challenged this assumption across the country. Meanwhile in academic circles new empirical evidence led to an emerging consensus that parole did not reduce recidivism (Petersilia 1999, 493). Incapacitation is the only solution left standing following the conclusion that nothing else work (Zimring and Hawkins 1995). The hope that prisons could reshape human behavior was supplanted with the grim belief that the best that prisons could hope for was containment.

By the end of the 20th century, general incapacitation had become the ascendant ideology for the entire American penal field (Simon 2012, 284), and a major driver of mass incarceration. This ideology is so pervasive that it has become a form of "waste management" (Simon 2007, 142) and "total incapacitation" (Simon 2012), premised on permanent exclusion and wholesale banishment (Dolovich 2012).

Under these particular American conditions, LWOP has suddenly become the commonplace alternative to death. After Furman, states began looking for alternatives to the death penalty. In 1974 the SCOTUS heard *Schick v. Reed*. President Eisenhower had commuted the sentence of Schick, a murderer sentenced to death, but also imposed an LWOP provision on his commutation. Schick argued that in imposing the condition Eisenhower has exceeded his commutation powers. The court, however, upheld the LWOP sentence, creating judicial precedent and a blueprint for the policy-makers fixated on what to do with criminals in an execution-free era (van Zyl Smit 2002, 54). In quick succession a number of states passed LWOP statutes in direct response (Nellis 2009, 3).

In 1976 the SCOTUS affirmed the constitutionality of capital punishment in *Gregg v. Georgia*, but in a post-*Gregg* landscape prosecutors and criminal justice hardliners, shaken by the recent period of abolition and facing new legal hurdles to securing a death sentence, began agitating for LWOP. Not only would the new sentence provide an alternative sanction for death

penalty sentencing, but where capital punishment was still technically available but practically difficult to pursue, LWOP could also be serve as a tough concessionary plea bargain sentence. And, for serious crimes LWOP could serve as a "consolation prize" for prosecutors (Zimring and Johnson 2011, 745).

For capital punishment abolitionists, meanwhile, new LWOP sanctions appeared to be a compromise to ensure an end to the scourge of state sanctioned killing (Harvard Law Review 2006, 1841; see also Ogletree and Sarat, eds. 2014). Abolitionists were particularly buoyed by evidence showing that public opinion of capital punishment, which enjoys support among both voters and jurists, shrinks drastically when LWOP is presented as an alternative.

For both pro- and anti- capital punishment partisans, the arguments in favor of adopting LWOP have also been identical: incapacitation. Prosecutors, not surprisingly, tout the harshness of LWOP. Take for example the case of Texas, one of the nation's most prolific executioners. Until 2005 Texas did not have an LWOP statute. Instead, the harshest sentence below death was a 40-year minimum life sentence. Although functionally a whole-life sentence, prosecutors preferred this sentence to LWOP because they could suggest to a sentencing jury that a defendant might someday be released and pose a threat to society. This argument strengthened their case for death. Only after capital punishment for juveniles was deemed unconstitutional did conservative Governor Rick Perry sign an LWOP statute into law. The sentence was intended not to reduce incapacitation, but to increase it for minors (Harvard Law Review 2006, 1843).

The incapacitation value of LWOP was also embraced by abolitionists. Consider the arguments put forth in support of California's 2012 SAFE Campaign, a ballot initiative that would have replaced the death penalty with LWOP in California. The initiative was based on the premise that the death penalty is not working in California: taxpayers spend an outrageous amount of money but no one is actually executed. But, the campaign suggested, abolition would introduce the specter of release and re-offense by the worst of the worst. By replacing the death penalty with LWOP, Californians would address the fundamental worry behind abolition—dangerousness—and save money. The initiative did not pass but received 48 percent favorable votes (Bowen 2012).

Despite the drive to introduce LWOP throughout the US, there is little evidence that in practice LWOP has worked as a "replacement" (Nellis 2017, 24). Certainly many capital prosecutions have resulted in LWOP convictions, rather than the death penalty. Some of these convictions are no doubt the result of sentencing juries choosing life without the possibility of parole over death, and in so far as this is a victory for death penalty abolitionists, they may claim the credit. Many other LWOP convictions, however, are plea bargains stemming from the threat of capital prosecution, a bargain struck in the shadow of death. It is less clear what the outcomes of these cases would be absent LWOP statutes: a capital conviction, an acquittal, or a plea to a lesser sentence. Finally, the proliferation of LWOP statutes now reaches beyond traditional death penalty eligible crimes, including non-violent offenses. A study comparing capital convictions and executions in states with and without LWOP suggests that the sentence is correlated with a small decrease in capital sentences and has no significant effect on executions carried out. The reduction in executions over last two decades may also be the result of lower crime rates, less public support for capital punishment, and more robust post-conviction remedies (Harvard Law Review 2006, 1846).

What is incontrovertible is that LWOP has flourished in this political landscape. In 1972, only seven states had life without parole statutes (Hood and Hoyle 2015, 478). By the mid-1990s LWOP was available in roughly half of US states. Today the sentence exists in virtually every state (Hood and Hoyle 2015). America now has the largest LWOP population in the world. There

are over 50,000 prisoners serving LWOP sentences. This is in addition to roughly 100,000 prisoners serving indeterminate life sentences, the vast majority of which are at present best understood as probable terms of natural life. Add to this figure the large and uncounted number of prisoners serving long term of years sentences that exceed natural life (e.g. 200 years) that are effectively LWOP sentences, and there are as many as 200,000 people currently incarcerated in America who can expect to die in confinement (Nellis 2017, 7).

The American experience is both the world outlier and the world template. It is the outlier in so far as LWOP has not proliferated with nearly such virulence in any other place in the world. Only about 20 percent of countries worldwide have adopted LWOP (University of San Francisco 2012, 25). And indeed, LWOP draws serious rebuke in many quarters, especially in Europe, where it is deemed a human rights violation by the European Court of Human Rights. And yet despite America's exceptional status with regard to capital punishment and LWOP, the US has also become the de facto exemplar for the debate about capital punishment and its replacement.

China's path—death penalty reform without worries over incapacitation, the use of capital punishment for serious crimes that are non-violent, and the introduction of LWOP for corruption and corruption only—seems inexplicable in part because it deviates so much from the American blueprint. And yet within the Chinese experience this penal unfolding is thoroughly explicable. It is China's experience to which I now turn.

China's Alternatives to Death

When China's Supreme People's Court (SPC) initiated death penalty reform in the early years of this century, it embarked upon a radical, central intervention in capital punishment that was at least as transformative as the SCOTUS's engagement in *Furman* and its progeny cases. Yet while the US judicial decisions produced a heated American conversation about alternative sentences that has become the new Standard Western Thinking on the subject, the SPC's intervention did not follow this template. How did the Chinese alternatives to death come about, and why do they differ so much from alternatives in the West? Both the norm (suspended execution) and the exception (LWOP) show us the political stakes for death penalty reform in China.

The Norm: Suspended Execution

When the SPC stepped into its new supervisory role in national death penalty review in 2007, it did so with a ready-made alternative in place: suspended execution. The SPC's expanded use of suspended execution as an alternative to immediate execution is perfectly congruent with centuries of Chinese death penalty administration. In Chapter One I explained that deferred execution during the autumn assizes was an integral part of the Qing imperial state's criminal justice system. In Chapter Two I showed the origin of the modern suspended execution sentence during as a central government effort to control executions during the Campaign to Suppress Counterrevolutionaries and highlighted its inclusion in every subsequent iteration of the Criminal Law of China.

Incomplete data sets suggest that the ratio of suspended to immediate executions has fluctuated by both time and place, but prior to death penalty reform most capital sentences were still immediate execution sentences (Huang 2007, 97-116). A study of one intermediate and high court indicates that in the early 2000s, directly prior to death penalty reform, suspended executions sentences fluctuated at between about ten and thirty percent of capital sentences (Huang 2007, 115). In the first year of central review, suspended execution sentences overtook immediate

executions for the first time in modern Chinese history; immediate executions dropped by 30 percent that year (Xinhua 2007; Xinhua 2008).

How did the SPC manage to drastically alter the make-up of suspended and immediate death sentences without a change in the criminal law? The black letter law spelling out the distinction between suspended execution and immediate execution is notoriously vague. Article 48 of the Criminal Law simply indicates that the capital crime must be "extremely serious," leaving a tremendous amount of interpretive space to judicial discretion. Rather than a bug, however, this indeterminacy has been a feature. The SPC has capitalized on this indeterminacy to remold judicial decision-making on capital cases.

As a practical matter, the SPC used a variety of direct and indirect tools of administration and governance to accomplish this task and send signals to judges about how to interpret "extremely serious" crime. These tools include example-setting, investigation and case remand (discussed in Chapter Three). Investigation and case remand are both tools that the SPC uses when it reviews death penalty cases. Unlike immediate execution sentences, suspended execution sentences are *not* reviewed by the SPC, but instead by the provincial high court. This means that in addition to any example-setting policy guidance from the SPC, lower courts have incentives to pass suspended sentences, so as not to endure follow-up investigation and remanded cases.

The degree to which the court can shift sentencing directives without a change in law is important for understanding both capital punishment and the role of the judiciary generally in China. Susan Trevaskes, in her analysis of judicial activity in the reform era, argues that this behavior signals "an intimate connection between the Criminal Law and criminal justice policy in China" (2016, 127), whereby policy reigns supreme (Trevaskes, 2013, 488). If we look to Chinese history, we can push these positions even further. Since imperial times the quest for clarity in when to take and when to spare life in capital cases has forced local administrators to submit to the central administration and provided higher authorities with a conduit to send signals to the periphery. Indeed, the ambiguity may be productive and encourage care from the lower courts.

Revisiting Our Assumptions in Light of the Norm of Suspended Execution

When we return to the challenge of a suitable replacement for the death penalty in light of the norm of suspended execution, China's divergence from the Standard Western Thinking comes into clearer focus. First and foremost, if death penalty reform in China is part of an historical continuity of administrative reform involving long-standing practices such as suspended execution sentences—rather than a clash of governmental institutions or a front in a culture war—it is not clear that finding a new capital punishment alternative is a goal or even a concern. For China, a suitable replacement may be no challenge at all. Indeed, many of the other features of the Standard Western Thinking on the death penalty—fixation on violence and murder as apex offenses, fear of offender risk, and the elevation of incapacitation as overriding penal ideal—all fall away.

Murder is not a uniquely grave crime in China. The vague capital criterion of "extremely serious" as sentencing threshold for immediate execution is available for all of China's 46 capital crimes. While immediate execution is reportedly only applied regularly for a few types of capital crimes, it has not been restricted exclusively to homicide crimes. Although the SPC has reduced executions by radically circumscribing the conditions under which a capital crime is considered "extremely serious" and merits immediate execution, this exercise has not simply done so by collapsing the category of seriousness into murder or restricting capital eligibility to homicide (as is the case in the US). Rather, China has left open the possibility that a wide range of actions might be considered extremely serious.

The tight narrative connection between offender violence and public safety that has shaped Standard Western Thinking is not pronounced in China. This is in part because the particular US experience of collapsing faith in both penal expertise and judicial accountability during American death penalty reform did not unfold in the same way in China. In the years preceding death penalty reform, it was wrongful executions, not failure to control dangerous offenders, that supposedly threatened court legitimacy (He 2016; Miao 2013).

This does not mean that the post-reform court has not received public scrutiny for its verdicts. There has been backlash about the court's decision not to execute. The story of Li Changkui is a case in point. Li killed his former girlfriend and her three-year old brother after she rejected his marriage proposal. Li, who was 18 years old at the time of the crime, turned himself in and also offered compensation for the victim's family. Court sentencing guidelines indicate these should be mitigating factors in capital cases involving domestic disputes (Trevaskes 2015, 43). Although he was sentenced to death with immediate execution at the trial of the first instance, the Yunnan High Court reduced his sentence to suspended execution at the trial of the second instance. The court's leniency produced a groundswell of public outrage; more than a quarter of a million posts on the topic appeared on the online social media platform Weibo (Miao 2013, 243). Ultimately, the Yunnan High Court bowed to public pressure, using a legal technicality to re-sentence Li to immediate execution.

The Li Changkui case is typically cited as an example of a lack of independence of the Chinese judiciary from the dictates of central government (e.g. Miao 2013; Trevaskes 2015; Fu 2016). The Li Changkui case also showcases a different point: lack of concern about risk management. Calls for Li's execution were overwhelmingly grounded in retributivism. The public did not, however, seem to be particularly concerned that if Li were given a suspended execution sentence he would eventually pose a risk of dangerousness to the public once again. Even if Li is counted among the worst of the worst murderers, the question of his punishment does not turn on dangerousness in the popular imagination.

The court's expanded use of suspended execution has also drawn some criticism from legal scholars, but these scholars aren't concerned about dangerousness either; instead, scholars worry about proportionality (e.g. Liang 2017). A common slogan in the early 2000s was "death sentences are too harsh, life sentences are too lenient" (*sixing guozhong shengxing guoqing* 死刑过重生刑过轻) (Wang 2016, 46). When death penalty reform was first enacted in 2007, a prisoner sentenced to suspended execution might conceivably have served less than a decade in prison (Wang 2016, 41). According to national statistics cited in one source, the typical period of incarceration following a suspended execution sentence at the time of reform was less than 20 years (Wang 2016, 39-40). And the average difference between a suspended execution sentence—nominally a capital sentence—and an indeterminate life sentence was reportedly less than two years (Wang 2016, 41). A study of serious and repeat offenders reveals that for offenders from Beijing Municipality released from prison in 2006, the longest time served was for a suspended execution sentence: the offender served 22 years. The study indicates that the average time served for a suspended execution sentence was 18 years and the shortest was 14 years (Wang 2016, 42). The problem here was not deemed to be the release of murderers, but the punitive gap between adjacent punishments.

It was the judiciary, not a competing institution, that agitated for longer custodial sentences to fix the perceived disparity between immediate and suspended execution. In the first half of 2007 the SPC began pushing central authorities for a legislative fix. The NPC Standing Committee Working Group on Rule of Law began to draft legislation in the second half of 2009. The drafting

included input from every major judicial organ. Between March and July the Working Group convened at least three symposiums of experts to solicit input. In 2010, draft legislation was publicly released and received widespread scrutiny (Wang 2016, 47-49). One of the most contentious points of the proposed amendment was a strict prohibition on sentence reductions for repeat offenders. Commentators argued that the recidivism rate for offenders sentenced to suspended execution, indeterminate life and long determinate sentences was already less than one percent (Wang 2016, 51), far below the re-offense rate for recidivists with short sentences, indicating that rehabilitation for long-term offenders was working. Restricting sentence reduction and release, they argued, would countermand China's stated penal goal of rehabilitation, and also increase state expenses (Wang 2016, 51). Concern about restriction on sentence reduction was so strong that the proposal went through three drafts. The final legislation ultimately removed the most restrictive language on determinate sentencing contained in the initial proposal (Wang 2016, 55-57).

The final version of the Eighth Amendment that was introduced in 2011 raised the minimum period of incarceration following suspended execution, making the lowest possible period of incarceration 14.5 years (Miao 2015, 8; see also Wang 2016, 28). The eighth amendment also introduced a provision in cases involving repeat offenders. For reoffenders who have committed certain types of crimes, judges may impose a restriction on sentence reductions. These offenders will have to serve all of either a 20 or 25-year sentence (Wang 2016, 28).

The substance and process of the Eighth Amendment revisions are all significant. First, the debate itself is noteworthy for its focus on proportionality. Legal scholars were most concerned with rationalizing and systematizing the Criminal Law. This debate is in sharp contrast to US debates over sentencing and death penalty reform in the late 20th century. In the US, public safety trumped concerns about proportionality. Rehabilitation was off the table. When risk is the sole criterion for punishment, proportionality is irrelevant. There is logically no limit to the additional restriction that might be placed on an offender to secure a marginal decrease in risk to the public. In process, sentencing reform in the Eighth Amendment is significant because it was long and public. As we shall see, the years of draft proposals, expert symposia and comments that went into the Eighth Amendment are absent from the Ninth Amendment LWOP legislation.

It is not surprising that incapacitation was a low salience theme in debate about sentencing reform in the run up to the Eighth Amendment. Incapacitation is not a major topic of academic debate in criminology and penology in China. In their seminal work on incapacitation in America, Zimring and Hawkins (1995) conduct a literature review on the topic. Their point was that incapacitation became an overweening policy directive in late 20th century America *absent* broad support in the academic literature. Still, an examination of the Chinese literature is instructive. I conducted a similar review of the academic literature on incapacitation in China. I first consulted multiple criminologists, who were conspicuously unable to identify the precise Chinese equivalent for the term incapacitation. I selected *boduo nengli* (剥夺能力, which literally means deprivation of capacity). A search of China's major academic database, CNKI, produced fewer than 100 hits on *boduo nengli* by either subject or keyword. By contrast, a Chinese CNKI search for "criminal deterrence" yielded 12,618 hits in the title, 33,690 hits in subject, and 6,540 hits in keywords. It is also significant that academics who do consider LWOP in the Chinese context come out emphatically against it. For example, the well-known criminal law scholar Zhang Mingkai, who wrote one of the few Chinese articles specifically on the topic of LWOP, states that "the point of this article is: in the process of reducing and abolishing the death penalty, China does not need

adopt, nor ought it adopt, a whole-life sentence as a replacement for the death penalty" (Zhang 2008, 90).

To sum up the foregoing, in the 21st century China restricted its use of capital punishment through the judiciary by increasing the reliance on a traditional alternative—suspended execution—in capital cases. The rise in suspended execution sentencing did produce concerns about proportionality, which the National People's Congress (NPC), prodded on by the SPC, took up in the Eighth Amendment to the Criminal Law. The Eighth Amendment does lengthen the minimum period of incapacitation following a suspended execution sentence. It also places new restrictions on repeat serious offenders. Overall, the legislation is modest, thoughtful and well-calibrated to address a particular concern: proportionality. Risk and dangerousness are largely absent from both popular and scholarly debates about death penalty reform. Popular cases such as that of Li Changkui incite retributive outrage, but do not enflame public fears about a crime wave. Criminologists and penal administrators remain loosely committed to the ideal of rehabilitation and hesitant to curb sentencing discretion or impose mandatory minimums.

The Exception: Life Without Parole

The SPC pursued death penalty reforms for nearly a decade without turning to a whole-life sentence as an alternative to immediate execution. There was no popular pressure to institute LWOP. And a whole-life sentence was largely opposed by the Chinese legal academy as well (see e.g. Zhang 2008). So it is surprising that in 2015 the NPC revised the Criminal Law to include the punishment of LWOP. More surprising still, this novel sentence was introduced with no public discussion as punishment for a single, non-violent capital crime: corruption. LWOP doesn't fit neatly with the larger arc of death penalty reform in China. Moreover, LWOP *for corruption*—a non-violent crime for which the risk of re-offense for a disgraced official is effectively nil—doesn't fit with the Standard Western Thinking on death penalty diversion either. So what's going on?

Corruption

The story of LWOP is a story of punishing the government's own representatives. When Xi Jinping ascended to power in 2012, five years after the introduction of death penalty reform, his signature initiative, articulated in his inaugural address the 18th Party congress, was an anti-corruption campaign. The alarm Xi raised was not new, of course. As discussed in Chapter One, corruption has always been a vexing issue for the Chinese state. Since dynastic times, the central state has employed a relatively small number of representatives to govern a large and heterogeneous territory. These agents have been given few central resources, lots of day-to-day autonomy, and a mandate to manage and deliver results on behalf of the central state. Cash starved and loyalty-poor administrators have always had to accept some grey money just to raise the cash necessary for duties of the job such as hiring local staff. But whenever local agents took too much or rose too high, they risked the charge of usurping the power of the throne.

The problem of corruption did not go away in Maoist China, but in conditions of extreme economic deprivation and thoroughgoing social surveillance opportunities for corruption were limited. Although it has been argued that corruption in Maoist China was subjectively worse for peasants, because the mediums of exchange were more intimate and personal—notably sex—Maoist cadres were rarely in a position to expropriate a mine, sell off farmland to developers or otherwise foment a wider threat to state and social fabric. As China pursued economic liberalization after Mao's death, however, the problem of corruption came roaring back. The turn to markets, the rapid privatization of public goods and the mandate for economic growth over all

else set the conditions for massive graft. The problem has gotten worse in recent decades. Corruption is now perceived as an existential threat to stability that threatens both state and Party (Pei 2007; Kroeber 2016, 203–08; Li 2019).

In response to this perceived threat, Xi has launched the most vigorous anti-corruption campaign in at least a generation. Under a slogan of "capturing the tigers" and "swatting the flies" Xi has not hesitated to pursue corruption targets at both the bottom and the top of the Party. Measures to seek out and combat corruption under Xi led to 182,000 investigations in one year, a 30 percent annual increase (and a considerable number of flies) (Qian and Wen 2015). Xi has also gone after the tigers, such as retired Politburo Standing Committee Member Zhou Yongkang, breaking well-established norms against prosecuting officials in China's top echelon of power.

There is considerable debate about whether Xi is truly concerned about corruption or is simply using it as a handy cudgel with which to bludgeon his political rivals (Lockett 2016). But the two motivations are not mutually exclusive. The Party is facing a corruption problem that threatens its legitimacy. If the problem is not addressed, Party rule is not secure. Nonetheless, corruption is also a convenient tool to purge political opponents. The political structure of the Party-state ensures that virtually every official has some dirt under his or her fingernails. The charge of corruption is therefore always available at any time against any political actor (Li 2016, 473).

But even if we take Xi's campaign as a good-faith effort to root out criminality in the ranks of Chinese leadership, we must still acknowledge that corruption is not like other capital crimes in China. It differs from other capital crimes because corruption is *always* a crime of public office, which means that offenders are *always* Party officials. And while party officials are sentenced and punished according to the Criminal Law, they are detained and investigated under a parallel party disciplinary process. Until recently this process took place through the Central Commission for Discipline and Inspection (CCDI) (see the Conclusion for a discussion of the replacement of the CCDI with a more powerful National Supervisory Council). The CCDI is a Party organ that has virtually unlimited power to internally investigate, detain and question Party officials (Sapio 2008; Li 2016). Only after CCDI investigation is complete will the case be handed over to the Procuratorate for prosecution through the criminal justice system. Given both the overweening power that the Party exerts over the criminal justice system and the fact that less than one percent of prosecutions result in acquittal in China (Clarke 2020), legal due process for Party officials in corruption investigations is essentially nil. As I discuss in the Conclusion, in 2018 the CCDI was radically expanded and restructured, further entrenching the Party hold on extra-judicial discipline within its ranks.

Of course, a Party official accused of any capital crime—murder, drug trafficking—could be investigated through Party disciplinary mechanisms. But because it is a crime for which Party membership is a necessary prerequisite, *corruption is the only capital crime for which every suspect is investigated and detained through an extra-judicial Party process.* This fact marks corruption as an exceptional crime that we should consider apart from other capital crimes.

But the exceptional quality of corruption does not mean that it has been entirely exempt from the debates about death penalty reform that have been taking place over the last decade. The years since death penalty reform have essentially seen a moratorium on capital punishment for corruption. There have been no publicly disclosed cases of capital punishment for corruption since 2011 (Shan et al. 2017). During debate about the Eighth Amendment to the Criminal Law the legislature entertained the prospect of abolishing the death penalty for corruption entirely (Liu 2013), but ultimately retained the punishment after a public outcry. Public support for keeping

capital punishment on the books for corruption remains strong. A 2015 *China Daily* online survey, for example, found that while 50 percent of respondents agreed that the number of capital-eligible crimes should be reduced, 70 percent supported retaining the punishment for the crime of corruption.

The Adoption of LWOP

LWOP was introduced on August 29, 2015, as part of the Ninth Amendment to the Criminal Law. All Chinese criminal law is contained in this document, and revisions are comprehensive and undertaken only once every few years (Lu et al., 2016, 31). Comprehensive revisions to the Criminal Law developed in response to the piecemeal approach to crime legislation that dominated in the 1980s, which was criticized as an incoherent approach to codification (Liang 2017).

Given concerns about coherent legislation, the structure of the new legislation is surprising. Rather than introducing LWOP into the General Part of the Criminal Law, where overarching changes to the structure of penalties would normally be inserted, LWOP was introduced as a specific provision, or a one-off. By contrast, suspended execution is a general provision available to judges when sentencing an offender for any of China's capital-eligible crimes. Rather than adding a punishment of LWOP to the General Part of the Criminal Law, the new amendment is added directly to Article 383, the statute on corruption, and structures LWOP as a proviso to the sentencing options available to judges when handing down a suspended execution sentence for the specific crime of corruption: if the amount of money involved is extraordinarily large, the court may, in light of the circumstances of the crime committed, sentence the offender to life imprisonment without possibility of reduction or parole upon expiration of the two-year period. In other words, to implement LWOP, a judge must first pronounce a capital verdict, then pass a suspended death sentence, and finally make a selection of LWOP as a condition of that suspended death sentence.

The statute's introduction was not transparent. Although there had been sporadic discussion of LWOP in China before the Ninth Amendment, the last-minute insertion of the new provision on LWOP into the Chinese Criminal Law surprised many scholars. In fact, this new provision on LWOP did not appear at all in the first and second review drafts of the Standing Committee of the NPC. For undisclosed reasons, it was inserted into the third review draft and passed five days later, after the Standing Committee's third review. Moreover, the legislative procedure may have violated Article 29 of the Legislation Law, which requires that any legislative draft put on the agenda of the Standing Committee should undergo three review stages. In addition, unlike many other new provisions in the Ninth Amendment, including those regarding defense lawyers and capital punishment, 'cults,' and protestors, the LWOP provision was not subject to public consultation. Rather, it was a midnight addition.

Official Explanations of LWOP

Why was the new LWOP provision passed? According to law, the introduction of an amendment first requires review. The NPC broke with tradition in not providing for a period of public comment on this legislation. This unorthodox move itself remains unexplained. Those searching for an explanation are left with only three official documents.

The first is the 2015 "Report on the outcome of deliberations on the draft Ninth Amendment to the Criminal Law of the PRC" (*Guanyu zhonghua renmin gonghe guo xingfa xiuzheng an jiu cao'an shenyi jieguo de baogao* 关于中华人民共和国刑法修正安九草案审议

结果的报告, hereafter "Report") that was released along with the Amendment. Typos in this document suggest that it was produced hastily. Only one paragraph is devoted to the new LWOP provision. It states that the new punishment was proposed by members of the Standing Committee and is intended to "safeguard the impartial administration of justice, to prevent the occurrence of the judicial practice of these types of offenders [e.g., powerful officials] using channels to serve exceptionally short sentences, and to fulfill the policy of balancing leniency with severity." The last phrase refers to a policy used to moderate the use of the death penalty (Trevaskes 2016).

This analysis is supplemented by the latest edition of an explanation of the Criminal Law of the PRC produced by the Legal Affairs Committee of the Standing Committee of the NPC (*Zhonghua renmin gonghe guo xingfa shiyi* 中华人名共和国刑法释义, hereafter "Explanation"), a document that may be seen as quasi-official (Lang 2015). The Explanation runs to several pages and offers a fuller description than the Report. The commentary opens by referencing the Third Plenum of the 18th Party Congress, the 2013 political session in which President Xi Jinping emphasized the Party's commitment to rooting out corruption.

The commentary indicates that the new LWOP provision was promulgated to address excessive leniency by the courts in sentencing corrupt officials. The author claims that since sentence reduction and parole are imposed too frequently by the courts, the actual term served by many offenders sentenced to suspended death or an indeterminate sentence for serious crimes is too short; this has created the huge discrepancy between suspended execution, indeterminate sentences and immediate execution. To make matters worse, the commentary opines, incarcerated corrupt officials will usually deploy their power, social connections, and money to enjoy the privilege of sentence reduction or medical parole.

The third official document is a joint explanation of revisions to the criminal law on corruption issued by the "Two Supremes" (the Supreme People's Court and the Supreme People's Procuratorate) in April 2016, six months after the new Criminal Law went into effect (*Lianggao guanyu tanwu huilu xingshi anjian de jieshi* 两高关于贪污贿赂刑事案件的解释，hereafter "Two Supremes"). The Two Supremes covers a range of issues related to corruption. It defines an "extraordinarily large amount" (*shu'e tebie juda* 数额特别巨大)—a threshold for an LWOP sentence—as over three million renminbi (about half a million US dollars). While this is a lot of money, it is not in fact extraordinary. High-ranking officials are regularly accused of accepting multi-million-dollar bribes. The Two Supremes also clarify that the LWOP condition is to be imposed on the offender's term at sentencing, rather than after the two-year suspended execution period.

Taken together, these explanations provide a starting point to understanding what LWOP might be about and, importantly, what it might not be about. First, it is important to note that it is not explicitly about a larger debate about incarceration or the death penalty outside China. None of the official materials make reference to the US or any other foreign jurisdiction. That is, there is no formal acknowledgement that LWOP is a sanction employed elsewhere, or that its use elsewhere might bear on the Amendment.

Second, LWOP is not being deployed for the purpose of incapacitation. In other words, LWOP is not being introduced to prevent re-offense by a penal population that must be permanently isolated because nothing else works. The legislative documentation does not highlight incapacitation as a primary concern. And incapacitation is not a purpose of punishment well-suited to corruption. After all, graft in China is enabled by public office. Individuals convicted of this crime will not be permitted to return to government service and will therefore never have an opportunity to reoffend.

Third, the Report and Explanation both indicate that LWOP is related to capital punishment, but not as a straightforward substitute. The documents instead focus on sentencing disparities. But the Party had previously worked specifically to make sure that corrupt officials didn't get off easy. A document issued by the Party Central Committee of Political-Legal Affairs in 2014 requires that corrupt officials sentenced to a suspended death penalty should serve at least 22 years in prison before release. It would therefore be an easy task to impose a tough mandatory term of imprisonment for corrupt officials without introducing LWOP (Chen 2016, 201). And, as discussed above, China's legislature worked hard to fix sentencing disparities in punishment in the Eighth Amendment. By any measure, the new LWOP provision for corruption appears to be a step backward in addressing sentencing disparities. Instead of considering further structural solutions for discrepancies in corruption punishment, the legislature has produced ad hoc legislation. The new LWOP provision introduces proportionality within sentencing for the crime of corruption, but it comes at the expense of disproportionality in sentencing across offenses through the larger criminal justice system. The legislature has now introduced a harsher alternative to death for corruption—a non-violent crime—than alternative punishments to death available for violent crimes.

Oddly, the LWOP provision for corruption does not address one sentencing issue that stands out for corruption: influence peddling. As the Report accompanying the new criminal law makes clear, influence peddling is seen as a serious problem in sentencing of corrupt officials. But the structure of the legislation itself does not fix this problem. There is currently no requirement that a court impose LWOP. Moreover, the problem identified—excessive leniency—is manifest through sentence reductions, which are enacted during the custodial term, not during sentencing. Getting to the root of the problem therefore more likely involves strengthening the conditions for granting parole privileges. In fact, as the legislative Explanation indicates, the Supreme People's Court published two interpretations concerning sentence reduction and parole in 2012 and 2014, both of which strengthened the conditions and procedures for approving sentence reduction and parole ("Parole" 2012; "Parole" 2014).

In sum, while the official pronouncements about LWOP are rooted in well-covered social and policy debates in China, the legislation itself seems poorly tailored to the articulated goals. Of course, there are plenty of reasons legislation might nonetheless be passed, including symbolic ones. However, the symbolic value of passing legislation seems at odds with the clandestine manner in which this legislation was implemented. With legislative intent unclear, we turn then to practice.

LWOP in Practice

After the passage of the Ninth Amendment it was unclear how the new statute would actually be used. Some scholars suggested that courts were waiting on guidance from the Supreme People's Court before beginning to sentence using the statute. Following the release of guidelines by the "Two Supremes" in 2016—six months after the passage of the Ninth Amendment—setting a clear monetary threshold for LWOP, it seemed that the courts were nominally empowered to begin imposing LWOP. And yet, after the "Two Supremes" directive was issued, two high profile grafters who met the monetary threshold were given lesser sentences.

High-ranking official Ling Jihua was convicted in the summer of taking bribes worth 77 million RMB, well above the threshold for LWOP. Yet he received an indeterminate sentence (*wuqi tuxing* 无期徒刑), a punishment less severe than suspended execution and proportional to the sentence imposed on previously ousted Zhou Yongkang and Bo Xilai (Wong 2016). At nearly

the same time, Guo Boxiong, the most senior military official ever convicted of corruption, was also handed an indeterminate sentence (Buckley 2016). These two cases suggested that the new provision was either symbolic or dead on arrival. Senior Chinese criminal law scholars and criminal lawyers interviewed at the time by the authors were split on whether the provision would be used.

Then, nearly a year after the introduction of the new LWOP provision, in October 2016, courts began to use LWOP. In the course of two weeks, three high-ranking officials were given the new punishment. Bai Enpei, a former provincial party chief, was convicted of corruption for having accepted 247 million yuan in bribes (Yan 2016). In short succession two other top Party members, formal energy official Wei Pengyuan and former state-owned enterprise leader Yu Tieyi, were given the same sentence. At the time of writing, these three officials are the only individuals who have publicly received LWOP. Even though Zhu Mingguo, the former head of the Guangdong Provincial Political Consultative Conference, was found guilty of taking bribes totaling 141 million yuan in November 2016, he was given a suspended death sentence but not LWOP.

Conclusion

Chinese LWOP does not fit with the Standard Western Narrative: corrupt officials are low risk offenders who do not need to be locked down. Nor does Chinese LWOP fit with the larger project of death penalty reform in China: executions have been diverted just fine using the traditional suspended execution sentence. And Chinese LWOP doesn't fit with the explanations provided by the legislature: the sentence does not reduce disproportionality in sentencing or put an end to influence peddling.

LWOP was introduced because it is response to a problem for which other templates don't apply. In its messy drafting, secret rollout and sporadic application, LWOP shows all the marks of a one-off compromise composed to deal with a crisis—a *political* crisis—that stands apart criminal justice policy or legislative norms. If recent death sentencing policy is a success because capital cases are the oil that lubricates the machine, the adjudication of corruption—state agents sentencing state agents—is a wrench in the system. Suspended execution can serve the central state as part of a set of processes to make judges comply with central party directives; it breaks down when the officials being sentenced are themselves party representatives capable of sending contradictory singles.

Here perhaps a loose analogy to the US case is surprisingly apt. Death penalty reform in America occurred during a moment of popular desperation: nothing worked and institutions of government—the courts, penal experts—could not be trusted to get it right. The result was a malignant spread of a punishment of last resort: LWOP. In China death penalty reform overall has not been nearly so virulent a political process; on the contrary it has been tonic, fortifying China's legal institutions. And the central diversionary sentence, suspended execution, has worked too. But if what is true for the norm is not true for the exception. Corruption is the cancer cell in China's body politic. It is not at all evident that LWOP offers a cure for this problem, but the treatment—even if ineffective—still gives us indications about what symptoms are arising.

Chapter 6: Numbers[1]

Full and accurate data is vital to policy-makers, civil society and the general public. It is fundamental to the debate around the death penalty and its impact. Secrecy around executions undermines that debate, and obstructs efforts to safeguard the right to life.

– António Guterres, United Nations Secretary General[2]

As far as lawyers are concerned, aggregate numbers don't matter.

– Chinese capital defense lawyer, commenting on China's execution rate[3]

Introduction

When the Supreme People's Court centralized the death penalty review process in 2007, it also centralized China's death penalty data along with it. This is of course the point of reform—China's leaders want to monitor local activity; collecting all of the nation's death penalty cases in one place makes it easier for the SPC to see what lower courts are doing. But this is also a danger of reform—China's leaders want to keep data about the death penalty secret; collecting all the nation's death penalty cases in one place makes it harder for the SPC to conceal these figures. China's efforts to both consolidate death penalty cases for state use and conceal this data from the world presents a contradiction in Chinese capital punishment today.

As I have argued throughout these pages, China's central use of case review to monitor local conditions is not a recent innovation. The state has used capital punishment this way for centuries. What is new is the transformation of death penalty cases into statistics, a part of what Sally Engle Merry terms "indicator culture" (2016, 39–40). Indicator culture is an approach to social management that "places a high value on numerical data as a form of knowledge and as a basis for decision making." Indicators are now not only ubiquitous, but also indispensable tools of institutional, national, and transnational governance (Blanton 2002; Hansen and Porter 2012). States of all kinds use indicators, and in recent years China's leaders have embraced indicator culture in a variety of domestic legal reforms.

Even as China's leaders embrace indicator culture for some forms of domestic governance, they also work hard to keep some legal data—notably capital punishment data—secret. China designates national data on the death penalty as top secret (Human Rights in China 2007); revealing this data may itself be a capital offense (Criminal Law, Article 111, 113). China is one of only a handful of countries that criminalizes the disclosure of statistics about its use of the penalty (Amnesty International 2018). In recent years the international community has become ever more vocal in its calls for China to disclose death penalty data. In response, China has provided a patchwork of sometimes contradictory reasons for its refusal to disclose death penalty statistics: insisting that international bodies do not have a right to this data, that China's leaders do not collect this data themselves, and that China already discloses this data. Death penalty reform—

[1] This chapter is adapted from my article "Body Count Politics: Quantification, Secrecy and Capital Punishment in China" (Smith 2020).

[2] "Remarks on Transparency and the Death Penalty," October 10, 2017.

[3] Interview with author X37.

which formally aggregates capital cases under one roof in Beijing—makes these evasions harder to maintain.

In this chapter I first explain the rise of indicator culture and its relationship to capital punishment, both in the US and globally. I show how China has resisted calls to provide death penalty data to outsiders, even as it has cultivated both data production and indicator culture for domestic governance. I show how this tension produces concrete contradictions in three areas of death penalty reform in China. First, even as China's courts increase publication and aggregation of case data, the prohibition on the publication of death penalty statistics inhibits the release of court records in capital cases, putting secrecy at odds with a wider-circulating judicial concern with legal transparency. Second, although China is working to institute universal legal representation in criminal cases, concern over the disclosure of execution numbers has stymied attempts to provide legal aid during the final crucial review stage in capital cases, obstructing yet another widely touted legal reform. Third, despite a state commitment to criminal procedure reform, death penalty secrecy has prevented courts from notifying legal counsel when a client is executed, blocking a basic mechanism of procedural accountability.

Death by the Numbers

Despite appearances of neutrality, numbers—like other forms of knowledge—are bound up with power (Foucault 1980; Scott 1990; Porter 1995; Hacking 1990; Latour 2005). Far from being objective and unbiased indicators, quantitative data are shaped by the values, choices, and preferences of people and institutions (Lynch 2017). Numbers shape people and institutions as well. Agents modify their behavior reflexively in response to measurement, producing "reactivity" (Espeland and Sauder 2007, 6) and "looping effects" (Hacking 2007, 286).

Because numbers flatten complex social phenomena into standard and commensurate units, they seem to allow for objective comparisons across space and time (Porter 1995; Espeland and Stevens 1998, 314). This logic is typified by the "indicator," "a named collection of rank-ordered data that purports to represent the past or projected performance of different units" (Davis, Kingsbury and Merry 2012, 73–74; Merry 2016). Many indicators are now composites that quantify everything from the rule of law to corruption and transparency (Oman and Arndt 2010). politically sensitive indicators include traditional quantifications of life (for example, population by census) and death (for example, suicide, homicide, and mortality rates) (Durkheim 1951; Prewitt 1987; Hacking 1990; Porter 1995; Foucault 2009) as well as more recent health indicators such as organ transplant statistics (Robertson, Hinde, and Lavee 2019).

Death penalty data are an important indicator. The United Nations (UN) regularly advocates for member states to provide data on capital punishment (Lehrfreund 2013, 29–30). Non-governmental organizations (NGO) make similar demands. Amnesty International, a global human rights NGO, calls on countries to release death penalty data and also publishes a yearly report based on both state-reported data and non-governmental estimates that ranks countries based on their use of capital punishment. The calls of UN member states and reports produced by Amnesty International highlight a subtle contradiction in the use of death penalty indicators that observers of quantification have identified elsewhere in public life (Espeland and Sauder 2007; Merry 2016). On the one hand, indicators such as death penalty numbers are treated as independent facts in the world. From this perspective, changes in human behaviors in response to measurement are problems that distort indicator data. On the other hand, indicators are also treated as benchmarks intended to encourage alterations in activity in response to observation. From this perspective, changes in human behavior in response to measurement are goals that motivate the

collection of indicator data (Espeland and Sauder 2007, 7). Wendy Espeland and Michael Sauder term changes in human behavior as a response to measurement "reactivity" and point out that the divergent views of reactivity as either a problem distorting data objectivity or a goal signifying successful intervention form a contradiction at the center of public measures (1, 7).

While governmental and non-governmental bodies present calls for disclosure as value-neutral requests for objective facts about the world, these groups also request and rank execution data in order to rebuke outliers and induce changes in regimes under scrutiny. As with other indicators, death penalty rankings serve to shame states into changing their behavior (Merry 2016, 46). Amnesty International is up front about this goal, as it actively "campaigns for the total abolition of capital punishment" (Amnesty International 2018, 4).

Roughly one-third of countries in the world that retain the death penalty (Amnesty International 2020, 54); the degree to which they provide information on it varies. The US, for example, is an active executioner whose data is also public. The US executed twenty-two people in 2019. Amnesty International ranked the US sixth in total known executions that year (Amnesty International 2020, 5). While the use of capital punishment in the US remains domestically and internationally controversial, there is little dispute about the veracity of its death penalty data. The US is on one end of the death penalty data spectrum. Data on the death penalty in many other countries remain incomplete. There are a variety of reasons for this incompleteness, ranging from low state capacity and poor record keeping to active state resistance to disclosure (Pascoe 2016, 198).

China's Death Penalty Secrecy

While there is a range of data transparency among retentionist countries, China stands out for its extreme opacity. It is one of only three countries (along with Vietnam and Belarus) that formally classifies death penalty statistics as state secrets (Amnesty International 2020, 2). It also actively subverts international efforts to estimate its executions. In countries with incomplete data, Amnesty International typically publishes a statistic of minimum confirmed executions. However, Amnesty International has stopped doing so for China, "a decision that reflected concerns about how the Chinese authorities misrepresented Amnesty International's numbers" (Amnesty International 2020, 6).

Individual states and transnational bodies began demanding death penalty data from China in the early years of the global campaign for worldwide death penalty abolition, a project that roughly coincided with the growing transnational demand for quantification in governance generally (Blanton 2002). The United Nations Economic and Social Council first requested information on the death penalty worldwide beginning in 1973. Requests have continued regularly since then, most recently during China's 2018 Universal Periodic Review at the UN. China has never answered calls for disclosure (Amnesty International 2017, 18).

China cannot stifle the transnational collection and publication of death penalty data in the service of global abolition, but it can withhold its own data from global rankings and criminalize the disclosure of death penalty data at home. China introduced its first state secrecy law in 1951, soon after the founding of the People's Republic in 1949, but the regulations that most directly restrict the release of death penalty data were introduced in the 1990s, amidst the global rise of indicator culture (Human Rights in China 2007, 9). Secrecy regulations in China introduced to govern courts (1995) and prosecutors (1996) are structured in a manner that prevents the aggregation of quantified data into a national-level indicator that other countries may judge (Human Rights Watch 2007, 138–59). These regulations designate "annual or monthly statistics

on national cases involving the sentencing, ratification or implementation of the death penalty" as secrets generally (146). The level of secrecy corresponds to a jurisdictional hierarchy of aggregation. Death penalty data at the intermediate court level, which correspond to trials of the first instance that take place across hundreds of courts, are deemed "secret." Data from high courts, which correspond to trials of the second instance and include all capital cases throughout a province, are designated "highly secret." National-level data from the Supreme People's Court (SPC), which undertakes the final review of capital cases, are labeled "top secret." Ironically, the release of top secrets (*juemi* 绝密) can itself be a capital offense (Human Rights in China 2007; Criminal Law, Article 111, 113). Simply put, the closer a particular Chinese death penalty statistic approximates the indicator of annual national executions, the more severely its disclosure is sanctioned.

The annual number of executions in China is not only a top secret, but it is also a "shallow secret." A so-called shallow secret is a secret whose existence and rough contours are apparent, even to the people from whom the precise information in question is being concealed (Scheppele 1988; Pozen 2010, 260–61). To use a now iconic American idiom, shallow secrets are "known unknowns" (Pozen 2010, 259). One of the ironies of shallow secrets is that, because their existence is known, they produce more curiosity, confusion, and conflict than deep secrets. People who do not know the shallow secret want to learn it. People who do know the shallow secret make efforts to conceal it. Shallow secrets are also natural research topics, making China's death penalty data an ongoing subject of scholarly inquiry (for example, Lu and Miethe 2007; Johnson and Zimring 2009; Liang and Lu 2016; Xiong 2016). In Chapter Two I discussed the rough contours of execution numbers in PRC history: from an estimated high measured in the hundreds of thousands a year under Mao Zedong, to tens of thousands a year under Deng Xiaoping and eventually falling to an estimated volume of thousands per year through the 21st century. Amnesty International's most recent report indicates that "China continued to execute and sentence to death thousands of people" (Amnesty International 2020, 4), making it the world's leading executioner by total volume and among the most active executioners on a per capita basis.[4] The Dui Hua Foundation, a US-China human rights NGO, publishes an annual estimate that is reportedly based on connections with government sources. In 2018, the Dui Hua Foundation (2018) estimated that China executed two thousand people, down from twelve thousand in 2002. Interviews for this project also indicate a consensus that the annual volume of executions is likely now denominated in the low thousands.

China objects to foreign estimates about its use of the death penalty, but it provides inconsistent explanations for its own refusal to provide data. At some points in the past, Chinese spokespeople have claimed that China does not collect national-level data on capital punishment at all. Prior to 2007, the central government could plausibly argue that because death penalty review was decentralized—handled by the provincial courts—Beijing did not possess precise national data on capital punishment. In fact, one reason that some commentators heralded death penalty reform is that they believed it would force the SPC to release death penalty numbers. A 2007 article on death penalty reform opined:

A senior judge who was recently appointed to the Supreme People's Court to review death

[4] Amnesty International does not publish rates of execution, though the calculation is a straightforward one using available population data. For a discussion of rates of execution in China over time, see Chapter Two. Also see Johnson and Zimring 2009, 21–26, 233–43.

> sentences observed that the Supreme Court has always rationalized its refusal to disclose figures on death sentences on the grounds that nationwide statistics are difficult and complicated, but that [sic] this excuse will become untenable now that the top court has regained the authority to review all death sentences. (Wang 2007)

At some points China has claimed that it does not have data; at other points China's spokespeople have claimed that China *already* releases its death penalty data. The latter claim is formally true but practically useless. Official government statistical yearbooks provide a single statistic on the total number of people who received sentences ranging from five years imprisonment up to capital punishment (for example, SPC 2018). Since capital sentences are included in this statistic, authorities are correct that the information is indeed published, but there is no practical way of ascertaining what portion of sentences of five years or more are capital sentences.

Most recently, Chinese spokespeople have claimed that China does not disclose its death penalty statistics because Chinese citizens would be outraged at how little capital punishment is used. As one SPC judge puts it, "[i]f we made the statistic public, the common people would feel we kill too infrequently, and this also would not be appropriate."[5] While the claim that Chinese citizens would be upset about declining executions may seem farfetched, it points to an important truth: indicators may carry different meanings for different audiences. Because the annual number of executions is a shallow secret, the Chinese state may gain political advantage from keeping the exact figure concealed and then sending different signals to different constituencies, suggesting to a domestic audience that the state frequently executes offenders while hinting to foreign stakeholders that the number is falling. It is noteworthy that, even though international sources suggest that the number of annual executions has been declining for quite some time (Dui Hua Foundation 2018; Johnson and Zimring 2009, 237–38)—a fact that would seem to boost China's international reputation—China nonetheless keeps a veil of shallow secrecy over the number rather than claim credit by publishing its own statistics.

It may be the case that, even if executions have fallen dramatically, China still gains strategic international advantage by engaging in a body count politics of nondisclosure for a number of reasons. First, since the number is likely far larger than that of any other country in the world, China would still face criticism if it disclosed an exact figure. Whether the number is ten thousand or one thousand, China would remain at the top of the rankings. Second, even if the number is currently declining, the Chinese state might decide to increase executions in the future. Because international estimates lack precision, secrecy allows the Chinese state maneuverability in domestic policy with less international scrutiny. China's leaders, for example, could launch another major tough-on-crime "strike hard" campaign premised on capital punishment (Trevaskes 2010) without facing immediate global criticism in response to a documented uptick in executions. Finally, as long as the number remains a shallow secret, the Chinese state retains considerable power to shape public estimates of that figure. Well-placed informants, for example, might confidentially provide a figure that is slightly below the true number or confirm a solid trend line where the indicator actually exhibits more annual variation. China benefits from popular international coverage indicating that executions have fallen drastically in the twenty-first century (e.g. The Economist 2013).

[5] Unpublished interview with Western journalist (transcript on file with author).

Reform in Law and Data

China's efforts to maintain death penalty secrecy, while effective, increasingly work at cross purposes with its death penalty reform measures. Previously, Chinese leaders claimed that the country did not aggregate national death penalty data. Not only has central review made the excuse of unavailable data untenable, it has also surely made the logistics of actual data secrecy harder to maintain. As discussed in Chapter Three, to facilitate death penalty reform, the SPC drastically expanded and centralized its legal infrastructure. The SPC moved its criminal court operations to a separate high-rise office building in downtown Beijing to accommodate this new work. Between 2005 and 2007, the court hired large cohorts of new judges to oversee death penalty review [X69]. Hundreds of judges and administrators now staff the death penalty review division. Since condemned defendants may also hire counsel to represent them on review as part of this new process, thousands of lawyers potentially visit the building every year. The SPC established a single site in order to consolidate death penalty review. In the process, the SPC also consolidated national-level data as a work product.

Centralization has thus produced a court environment of extreme contradiction. Since all cases up for review carry capital sentences, the most basic descriptive statistic from this court—total caseload—is an indicator that China has designated as a top secret. Straightforward work products such as court dockets and decision logs are now repositories of national secrets. On the one hand, death penalty review promotes centralization and indicator culture and increases opportunities for transparency. On the other hand, death penalty review increases the amount of aggregate data that must therefore be kept under wraps. And without aggregate data—most importantly, a denominator—a whole host of other rates, proportions, and disparities are incalculable. Conversely, any rate, proportion, or disparity that might be used in conjunction with a tally to derive a total denominator must also become a secret.

According to SPC sources, the only officials formally privy to the official statistics are the presiding judges (*tingzhang* 庭长) of the five criminal divisions of the SPC or officials of more senior rank [X69]. For all other staff, the files and figures that they encounter daily must be treated as both the quotidian work material of the job and a forbidden secret of the highest order. We know that, when output is quantified, actors and institutions react. What reactions occur when the Death Penalty Division of the SPC must simultaneously carry on the business of capital punishment review in a culture of indicators and prevent disclosure of a statistic that is at the heart of that work? Below I examine this contradiction through three case studies.

Three Case Studies

How does the tension between centralization and secrecy play out in Chinese policy? I examine three examples of this tension across three key dimensions of death penalty reform in China: transparency, legal representation, and procedural justice. The first example concerns a court transparency initiative, including the launch of a nationwide court database in 2013. The second example concerns a legal representation initiative, with a 2018 announcement of efforts to provide universal legal representation for indigent defendants. Finally, the third example concerns a procedural justice initiative, including major amendments to the Criminal Procedure Law (CPL). In each reform initiative, the central government and the SPC have led the rollout. There is no indication that any of these initiatives are unsanctioned, controversial, or opposed by senior Chinese Communist Party leadership. Tellingly, however, capital punishment data secrecy appears to stymy the implementation of each initiative.

Transparency

Case transparency poses a problem for death penalty secrecy: if the SPC releases all death penalty decisions, it also reveals the total number of executions; yet if the SPC releases no death penalty decisions, it undermines its own commitment to transparency.

Access to court documents has historically been limited in China. This was not only the case for overtly sensitive cases such as those involving the death penalty but also for the millions of more mundane civil and criminal cases that take place in China every year (Heilmann 2017, 141–42; Liebman et al. 2019, 5–6). Early in the twenty-first century, advocates encouraged transparency initiatives as a tool to fight corruption (Liebman et al. 2019, 7). Provincial courts began experimenting with the publication of court records, and the SPC eventually built on those initiatives to create a comprehensive national project (7). In 2013, the SPC set up a national central database and website, *China Judgments Online*, to upload decisions from all levels of Chinese courts. Today, the website contains over fifty million legal documents and is reputed to be the largest state repository of legal documents in the world.

Like other experiments in authoritarian legality, the transparency initiative serves a variety of state-centered ends. The publication of local case records helps Beijing keep provincial actors in line with national policy through bottom-up surveillance. And the case database is also a part of ambitious goals for future big data governance in the courts (Creemers 2018). Despite strong central support for the initiative, compliance with the transparency mandate has been uneven. Zhou Qiang, the current head of the SPC, touched on the court's incomplete release of records in 2016 in a report addressed to the National People's Congress on "deepening judicial transparency and promoting judicial fairness" (Qiang 2016). In this report, he referred to the "phenomenon of selectivity in uploading cases" to *China Judgments Online*. How much selectivity is taking place? In their analysis of court documents for Henan province, one group of researchers estimates that about 41 percent of Henan provincial cases appear online, a figure that lines up with other national estimates (Liebman et al. 2019, 13). These researchers were able to assess the extent of missing data for the year 2014 by comparing the total number of cases collected online for that year with an internal statistic of total cases in 2014 obtained from a contact in the court (13). Of course, this assessment was possible for the researchers because the total number of cases in Henan is not a particularly sensitive number and so was at least informally accessible, whereas the total number of capital cases in Henan is a closely guarded state secret.

While the total number of capital cases in a jurisdiction is a state secret, individual capital case documents are not. The SPC (2016) issued provisions that lay out the criteria for the publication of case documents. In general, criminal case documents are to be published. There are disclosure exceptions for certain types of criminal cases. The provisions include exceptions for cases involving state secrets, those involving minors, and a catchall covering "other reasons it is unsuitable to post [a decision] on the internet." There is no blanket exception for withholding publication of judgments in capital cases.

Although death penalty decisions are not categorically exempt from disclosure, as a matter of procedure, death penalty documents are supposed to be released only upon final resolution of the case. Since all capital cases are subject to final review at the SPC, this means, in practice, that all death penalty documents should be released by the SPC, not the lower trial courts. In 2013 the state media featured an interview with a SPC representative who was asked about the criteria for the publication of SPC death penalty decisions. The representative did not say all cases were to be published. Rather, the representative indicated that death penalty review cases that "have guiding significance" (*you zhidao yiyi* 有指导意义) would be published (Xinhua 2013).

While death penalty review decisions are a miniscule portion of the court documents produced across all courts in China annually, they nonetheless comprise a significant portion of the SPC's legal decisions. The SPC is primarily an administrative oversight body, tasked with a wide range of policy leadership and relatively little case adjudication. As noted in Chapter Three, death penalty review is not a marginal judicial activity in China's highest court. The SPC has fewer than four hundred judges overall, and more than a third of the work in the criminal division is dedicated primarily to death penalty review (Supreme People's Court 2020).

The SPC is in a delicate position with regard to the disclosure of death penalty cases. On the one hand, the SPC is the country's model court. Responsibility for final disclosure of death penalty materials now resides solely with the SPC, and it is under pressure to serve as an exemplar and abide strictly by the law. At the individual case level, most capital cases are unlikely to fall under the enumerated exceptions laid out in the SPC's own guidelines and, thus, ought to be disclosed. On the other hand, at the aggregate level, these cases form a corpus that represents the total number of annual capital cases in China, and this number is top secret, so individual cases must be kept secret as well.

Faced with the competing imperatives of secrecy and transparency, the SPC has decided to split the difference. The SPC has posted 674 death penalty review documents—most of them decisions—to its website.[6] The bulk of these decisions fall between the years 2012 and 2014. The decisions constitute more than a token disclosure. After all, the SPC has disclosed more legal documents about the death penalty since 2013 than it has in the previous six decades. But the cases are also an evasion. Unless confirmed as a total disclosure—or provided in conjunction with a denominator statistic—these cases sidestep the main international concern in seeking death penalty information. Given that even the lowest estimates indicate that China executes thousands of people every year, the total documents, which span more than half a decade, represent fewer total records than a single year's full disclosure. And that is precisely the point. The SPC has met a symbolic threshold for disclosure, but it has also avoided providing enough case records to reveal any aggregate data or to even validly estimate the parameters of bias in the data disclosed.

The SPC has also redacted any information that might allow observers to infer anything about the total number of executions from the available documents. The court has never publicly revealed the selection process for the cases it releases. Even SPC insiders either profess ignorance of how the cases are selected or indicate that an SPC office posts cases following certain criteria until a quota is met [X69; X30]. The documents themselves are also conspicuously lacking in classificatory information. Published cases typically include case numbers that may be used to help identify gaps in a published docket, but the SPC death penalty review documents do not (Liebman et al. 2019, 12).

The SPC's partial disclosure shows how, in a regime of quantification, secrecy about an indicator produces secrecy around the release of seemingly qualitative, nonnumeric materials such as death penalty case verdicts. If the court's commitment to transparency (or the appearance of transparency) were completely hollow, it could have carved out an explicit disclosure exception for death penalty cases or, alternatively, declined to publish any death penalty verdicts. The SPC did not take this approach. But the scope of the published documents is also evidence of the limits

[6] Query performed in May 2018. The number fluctuates. The SPC seems to both add and remove decisions without notice. Users also report that cases that previously appeared in search queries related to the death penalty no longer come up in the search process, although the documents can still be accessed if one knows the URL.

on the possibility for reform under the state's mandate prohibiting disclosure of death penalty statistics. In a world where cases are numbers, how might the court plausibly be more transparent in its death penalty decisions while still adhering to state secrecy laws? It cannot.

Legal Representation

Legal representation is a second dimension of reform in which the imperative of numeric secrecy stymies seemingly unrelated efforts at qualitative capital punishment reform. Universal legal representation for death penalty review defendants does not seem on its face to implicate a national secret. However, if legal aid lawyers were provided in all death penalty cases, then the total number of such legal aid assignments would be tantamount to the total number of capital cases. This reform would transpose a national secret onto the legal aid docket.

According to China's CPL, all criminal defendants have the right to hire counsel at trial. However, most defendants either cannot afford a lawyer or do not see value in retaining one. The rate of criminal defense representation in China is low. It is estimated that only about one-third of all criminal defendants have legal representation at trial (He 2014, 79–80; Wu and Guo 2016, 48–49). The CPL also provides for legal aid representation for certain types of indigent defendants, such as the mentally disabled. Importantly, as discussed in Chapter Four, the law also provides for legal aid for all defendants facing the possibility of an indeterminate life sentence or death sentence (CPL 2018, Article 35). In 2018, the SPC and the Ministry of Justice jointly announced an initiative to expand a pilot program to provide legal aid to all indigent defendants. Estimates suggest that the program will provide legal aid in an additional four hundred thousand criminal cases a year (Zhang 2018). In an interview about the new initiative, a Ministry of Justice spokesperson explained that "providing a full criminal defense to accused people—a major incentive to promote judicial reform—has played an essential role in safeguarding the suspects' legitimate rights, and effectively avoids miscarriages of justice" (Zhang 2018).

In Chapter Four I discussed the role of defense counsel in death penalty review proceedings. Condemned individuals may hire counsel, but it is not otherwise provided. Without legal aid, the vast majority of condemned defendants likely stand without representation during death penalty review procedures at the SPC. The question of exactly what percentage of capital defendants have representation at death penalty review brings us back from a seemingly qualitative issue—zealous legal defense—to a quantitative one: the proportion of legal defense. Because there is no complete data set of death penalty decisions, there is no way to calculate the rate of legal representation during death penalty review. In the previous part, I discussed SPC death penalty verdicts. SPC death penalty review verdicts are formulaic and short documents that withhold some information that is standard in lower court verdicts. One piece of information that is withheld in these documents is the names of defense attorneys who represented the defendant in death penalty review proceedings. But if a lawyer participates in the process, this fact is noted with the terse phrase that "the opinion of the lawyer was heard." I analyzed 573 available decisions published online and found that fifty-three indicate the presence of legal counsel, suggesting a lawyer participation rate of at most about 10 percent.[7] A similar study using a smaller number of cases from the same data set finds a lawyer participation rate of 8.8 percent (Wu and Zhang 2017). But

[7] Death penalty review decisions for cases in which a lawyer was involved include a single stock phrase: "The opinion of the lawyers was heard" (*tingqule lüshi de yijian* 听取了律师的意见). Decisions do not include counsel's name, nor do decisions indicate what substitutive arguments, if any, counsel put forward.

what good are these estimates? Since there is no evidence that the set of available cases on *China Judgments Online* is a random sample of the total population of capital cases, we cannot infer that this rate of legal counsel is representative in capital cases.

What do people involved in the death penalty review process say about how often lawyers participate? Most of the people I interviewed were deeply reticent about offering estimates. Indeed, an initial observation about work in a regime of what might be described as quantitative nondisclosure is that it induces reluctance about any quantitative discussion whatsoever. Former SPC judges (individuals who have firsthand knowledge of defense lawyer participation) declined to provide representation rates. Meanwhile, death penalty lawyers who had capital trial experience but not capital review experience regularly stated (incorrectly) that either counsel is not permitted during death penalty review or that all defendants are provided legal aid defense during this process. Trial lawyers are not the only people who made this claim. A prominent criminal procedure scholar in Beijing also incorrectly stated that all defendants have counsel at final review [X66]. Even the SPC itself remains either oblivious or evasive in public comments on this point. As recently as late 2018, a spokesperson for the SPC inaccurately claimed in an interview with a Western journalist that legal aid was provided in all death penalty review cases.[8] When people do venture concrete estimates about representation, they vary. A law professor with some experience estimated that 10–20 percent of death penalty review cases involve counsel [X68]. An extremely experienced lawyer who had handled a large number of review cases suggested that less than one-third of defendants have counsel during death penalty review [X52]. The wide variety of responses may indicate how little information is available, even to participants in the system. Or it may indicate that people are hesitant to share what they know, especially with a foreign researcher.

There are no obvious institutional explanations for the absence of death penalty review legal aid. Certainly, it is not a matter of finances. Under the current system, lawyers are required to occasionally take on legal aid cases. This system currently provides for legal aid in capital cases at the trial level, and the same system could be extended to death penalty review. Nor are there any constituencies that seem opposed to universal legal aid during death penalty review. Every court representative with whom I spoke endorsed universal representation at death penalty review in principle. People expressed bafflement that the reform has not taken place already. In fact, it is reported that the SPC has circulated for years draft plans to provide death penalty review representation (Finder 2014; X67). However, these plans have gone nowhere.

A compelling explanation for the lack of universal legal representation in death penalty review cases, despite the judiciary's larger universal legal aid initiative, is that the SPC fears universal death penalty review representation may lead to the disclosure of the annual aggregate number of executions. One experienced judge put it this way: "There has been discussion of adding a lawyer database [*lüshi ku* 律师库] for death penalty [review] lawyers. But if you release fees for lawyers, you will release the number of executions as well" [X69]. This judge indicates that, although legal representation is not a quantified process, a reform that extends any universal, quantifiable procedural safeguard may become a proxy, and a valid and reliable measure, for the secret statistic. According to another SPC insider, private lawyers currently sign a document when they agree to represent a condemned client during the SPC's review. These signatures could be tallied. Since legal representation at the SPC review is currently not universal, this tally does not presently disclose a state secret. However, if universal legal aid were instituted for review, the tally would become a sensitive statistic [X73].

[8] Unpublished interview (on file with author).

Procedural Justice

Procedural justice is a third area where the imperative to conceal aggregate death penalty data affects death penalty reform in subtle and unexpected ways. People inside China's death penalty system believe that concern over disclosure of state secrets is a primary reason that courts withhold information about capital procedure from lawyers. Critics have long opined that China's justice system falls short in basic due process and procedural fairness protections (McConville 2011). Over the last decade, China's legislature has amended China's CPL multiple times to address perceived inadequacies in due process protections for defendants (Biddulph, Nesossi, and Trevaskes 2017). As with transparency and legal representation, due process initiatives support the state's efforts to establish domestic legitimacy in criminal justice policy. Research shows that perceptions of procedural fairness have a tremendous impact on public views of a justice system, and procedural accountability can boost popular support for a criminal justice system, even where the underlying substantive outcomes in fact may remain unfair (Tyler 2006). High-profile cases of police misconduct and the suspicious deaths of suspects in custody have catapulted due process into national conversations and shaken popular confidence in the law (Dui Hua Foundation 2010; Rosenzweig 2017; Nesossi 2017).

Due process issues in capital cases can make national news and provoke public concern, especially when the defendant is viewed as a victim. In 2013, Zeng Chengjie, dubbed "China's Bernie Madoff," was executed after reportedly defrauding investors in a massive Ponzi scheme. Many people questioned Zeng's guilt and alleged that his conviction was politically motivated. Zeng's case drew popular outrage not just for the imposition of a death sentence but also for the manner in which it was carried out. Zeng's family was not notified before his execution, prompting outrage. When Zeng's daughter Zeng Xian learned about his execution, she launched a high-profile social media campaign, including a hunger strike in Beijing. In Zeng's case, local authorities waffled in explaining why they did not notify the family. The official explanation—that Zeng did not want his family notified and that contact information for the family was not available—strains credibility. Zeng's daughter believes the authorities were trying to hide an injustice. This is of course one of the problems that death penalty review is intended to ferret out. It is shocking that Zeng's family didn't learn about his imminent execution, but couldn't his lawyer have told them? The answer is no. As a matter of criminal procedure law, until 2019, there was no requirement to notify a lawyer of a client's execution.[9] In fact, numerous Chinese defense lawyers recount stories in which a client was put to death and they were not told (see, for example, Tian and Chen 2013, 299–314; see also X7 and X22). One Beijing lawyer recounted an incident in which he was retained by a condemned inmate's family to represent the man on appeal. He flew down to the province to visit his client and was informed at the jail that his client had been executed the previous day [X7].

[9] The SPC implemented new guidelines for the handling of death penalty cases on September 1, 2019 (*Several Provisions of the Supreme People's Court on Protection of Parties' Lawful Rights and Interests During Death Penalty Review and Enforcement Procedures* [Guanyu sixing fuhe yiji zhixing chengxuzhong baozhang dangshiren hefa quanyi de ruogan guiding]). The guidelines indicate that, after the SPC issues a capital review judgment, the lower court is required to send a copy to the lawyer within five days of announcing the verdict (Article 5). Since this regulation was passed after I conducted my fieldwork, I do not have data concerning what lawyers think of the guidelines and their implementation.

Why has the SPC been so reticent to notify lawyers when a client has been executed? It is plausible that prior to the 2007 reform some provincial-level courts did not have the records to notify lawyers. Today though, with all capital decisions running through the SPC in Beijing, records are centralized. Every death warrant is signed by the head of the SPC. As a clerical matter, it would be extremely easy to notify counsel at the same time that the execution order is approved. It is possible that the SPC worries that notification of an impending execution might lead a lawyer to turn to the media as a last-ditch effort at reconsideration. While fighting judicial decisions in the court of public opinion is now effectively illegal (Stern and Liu 2019, 11, see also Chapter Four), some of the most successful death penalty review lawyers count last-minute media campaigns as a vital tool of defense [X1]. Another possibility is that the SPC worries that the news will get back to the condemned, who might commit suicide, causing trouble for the local jail [X63]. Neither of these rationales, however, justifies the SPC's unwillingness to notify lawyers *after* the execution has taken place (X63).

Some judges endorse notification of lawyers following executions, despite the additional scrutiny they may face [X22]. And the SPC has facilitated greater access for lawyers in the death penalty review process in recent years. The resistance to lawyer notification following execution stands out as a conspicuous omission in this trend. As with limits on case record disclosure and legal representation, limits on lawyer notification likely also have their origins in the numerical threat of aggregation.

A lawyer who estimates he has represented between seventy and eighty clients in capital cases explained that judges do not issue execution orders to attorneys out of fear that lawyers will use the notifications to tally executions. If this tally differed from government claims, he continued, it would be embarrassing [X24]. In fact, the lawyers I spoke to are not inclined to calculate execution data. As another lawyer put it, "as far as lawyers are concerned, aggregate numbers don't matter" [X37]. But these statements indicate that lawyers, like judges, believe that, as far as the central government and court leadership are concerned, aggregate numbers do matter, a lot.

Conclusion

States maintain plenty of secrets, but not all state secrets are alike. China's annual execution figure is a secret with certain particular characteristics: most notably, it is a shallow secret—one whose existence and rough dimensions are widely known to all parties (Scheppele 1988; Pozen 2010). Despite international criticism, the Chinese government reaps multiple political benefits from maintaining shallow secrecy over its death penalty data. It can engage in strategic doublespeak, sending different messages about its reliance on capital punishment to domestic and international listeners and crafting mixed signals through strategic opacity. And it can maintain policy flexibility, leaving open the possibility of quietly increasing executions without facing immediate global censure over a rising indicator. These benefits may encourage state leaders to continue a policy of shallow secrecy, even if maintaining secrecy produces tensions with other domestic policy objectives related to law.

China's death penalty statistics are not only shallow secrets; they are also legal secrets. And as China's leaders increasingly turn to legal reforms as strategies to improve social stability, government accountability, and state efficiency, maintaining shallow secrets in the legal domain becomes increasingly difficult. Unlike shallow secrets in other political areas—such as economic production, natural resources, or military capacity—shallow secrets in law stand in direct conflict with the values of legal transparency and judicial responsibility that China's state leaders have recently begun to promote in domestic governance. While scholars of authoritarian legality

traditionally dwell on the theoretical contradictions of illiberal legalism, the body count politics of death penalty secrecy pose a practical, rather than a conceptual, limit on China's ability to harness indicator culture and quantification for instrumental goals in the domestic legal sphere.

Death penalty secrecy poses a unique challenge to legal reform because it is an instance of secrecy about total court outputs. While secrets about individual cases are easy to keep, it is extremely difficult to maintain secrets about institutional statistics in a highly centralized, integrated bureaucratic legal system. Now that the SPC reviews all death penalty cases, national death penalty figures have become aggregated as a matter of course. Simple descriptive data—such as the number of cases on the docket for the death penalty review divisions of the Court—effectively become a top national secret. While death penalty secrecy is a national directive, the burden of implementing opacity falls on the courts, frontline institutions that must operationalize competing policy priorities.

Tracing the contours of secrecy exposes one of the contradictions of Chinese capital punishment today. Publishing a court case, retaining legal counsel, and notifying an individual that an execution has taken place do not appear to be numeric activities. But, in a centralized and uniform legal system, each of these actions is transformed into a data point that may be tallied to arrive at a total. So long as that total is a secret, any new uniform procedure becomes a threat to data secrecy, producing the potential to derive a denominator and, thus, a statistic of social and state significance.

Although the lawyers and judges I interviewed disclaim personal access to death penalty data or knowledge about death penalty policy decision making in the judiciary, they are all aware of the politics of concealment. Legal actors leap to the logic of data secrecy to explain ambiguities, uncertainties, and stalled reforms involving the death penalty. Quantitative secrecy is not just a constraint imposed upon these actors, but it is also a mode of professional conduct and institutional adaptation and reproduction. It explains the unexplained. Reactivity is the phenomenon of human responsiveness to measurement. When it comes to the death penalty in China, people react not just because they know measurements are disclosed, but also because they know they are concealed.

III. THE FUTURE

Conclusion

We have said that the scaffold is the only thing which Revolutionists do not demolish.
– Victor Hugo[1]

Improve the legal system, abolish the death penalty, put an end to torture.
– Chen Duxiu, First General Secretary of the CCP[2]

I have titled this final section of the project "The Future" out of symmetry with the previous sections ("The Past" and "The Present"). This section contains this single chapter of conclusions. Here I aim to provide two things that one typically looks for at the end of a dissertation such as this one. First, many readers—myself included—turn to the conclusion for a summary before reading the book. So, I will do my best here to restate the central contentions put forward throughout the previous chapters. I encourage readers who start here (at the end) to dip back into the body of this work where they see fit. Second, readers look to contemporary social science to conclude with predictions about the future. This is, I think, an unfortunate expectation, as research suggests that social scientists are not particularly good at forecasting (Tetlock 2017). If you want to put money on the future of China, or the death penalty, you might be better off asking a neighbor.

In fact, I will provide here not one set of prognostications, but two. The first set of predictions concerns the future of capital punishment in China. The second set of predictions is about the main themes that I draw together in my analysis of Chinese capital punishment throughout these pages—legality, the self-regulation of the one-party state and social control through punishment. In this text I have argued that the death penalty sits at the center of a governance formation aimed at managing *both* the populace and state actors through judicial review. It is an important site—perhaps the most important site—unifying these themes throughout Chinese history. In the early 21st century it seemed as if these elements might reach even greater fusion in the future as more discipline of state and society became subject to hierarchical oversight through the courts. However, In the Xi Jinping era (2013-), this did not happen. I close this project by pointing to the ways that law, governance and social control outside the arena of capital punishment appear to be on divergent trajectories under Xi.

A Restatement

In this project I have articulated and unpacked a variety of seeming contradictions in the history and practice of capital punishment in China. I self-consciously borrow my title, *The Contradictions of Chinese Capital Punishment,* from a work by Frank Zimring, *The Contradictions of American Capital Punishment.* In that book, Zimring (2003) seeks to explain how it can be that a democracy fixated on the value of restraint of state power through the law can also exercise the ultimate state power—capital punishment—with such caprice. Zimring finds the origin of the American death penalty in the vigilante violence of the antebellum American South. Americans today continue to embrace capital punishment as a form of localist democratic

[1] *The Last Day of a Condemned Man*, [1829] 2009, 29.

[2] The Views of the Chinese Communist Party on the Current Situation [Zhongguo Gongchandang Duiyu Shiju de Zhuzhang], Article 10, Section 9, June 15, 1922.

populism, even though it is also a form of extreme state intervention that runs counter to the American principle of limited government. In short, a deep historical pathology in American capital punishment explains a contemporary phenomenon that appears otherwise incoherent on its face.

In this project I identify a similar (and inverse) dynamic at play in contemporary China. On the one hand, China is a one-party authoritarian state. Over half a century China's leaders, notably Mao Zedong and Deng Xiaoping, didn't hesitate to use unconstrained state execution to directly pursue central political goals. And yet in 2007 this Party-state willingly turned over power over the death penalty to the Supreme People's Court—an institution that readers might associate with values such as rule of law and liberalism. Drawing on Chinese history and the US as a comparison case, I have contended that this seeming contradiction is rooted in a deep political challenge of Chinese governance.

Specifically, I claim that China's rulers have always faced a fundamental existential struggle over how much discretion to give to state agents. Local officials must have enough autonomy to flexibly act and must also face enough constraints that they continue to act in alignment with the goals of higher authorities. This challenge, often referred to as the principal-agent problem, is one of the central quandaries in Chinese statecraft (Edin 2003; Ginsburg 2008; Minzner 2009; Sng 2014; Gallagher 2017, 32-33; Zhang and Ginsburg 2018). It is a dilemma that is most acute in matters of criminal justice, where the rubber of state power hits the road of violence. After all, central leaders need to delegate coercive authority for local officials to control the public and also retain coercive authority to control those same officials and resist a coup. In this context, it makes sense that capital punishment—where the sovereign literally delegates authority over life and death—poses the most extreme version of a coercive dilemma (Svolik 2012; Greitens 2016).

For much of China's history central authorities have found in the penal code an elegant solution to this problem. Criminal law neatly serves a duel function in China. The first function is a familiar one—the law is a schematic of social control for agents to follow. It explicitly lays out how central authorities wish for local agents to apply the power delegated to them to punish offenders and maintain order. The second function of the criminal law, by contrast, is less obvious. The penal code can also be a tool by which rulers may audit local representatives to make sure they follow orders. To be more precise, through use of the administrative review channels embedded in substantive and procedural law, higher authorities don't just monitor the interpretation of the statute, they also monitor the routine activities of the functionaries who apply it. This process was most obvious in the Qing Dynasty, where the emperor reviewed the capital decisions of his officials through an exceedingly complex bureaucratic apparatus (See Chapter One). At its most extreme, the process became so attenuated from actual punishment that condemned people languished for decades in legal limbo while their cases were processed through layer upon layer of bureaucracy in a perpetual audit (Waley-Cohen 1991, 63). In these periods executions slowed to a trickle. If we are attentive to the mechanisms at play in this system, we can see that declining executions are best understood as a consequence of this process, rather than a cause.

At the other extreme is the capital punishment regime employed by PRC leaders in the first half century of Party-state rule (see Chapter Two). Mao Zedong gained a new form of political power by inverting some of the mechanisms of traditional imperial governance. His bottom-up criminal justice policy deputized all citizens as state agents without any moderating oversight or constraint. In the penal realm, this manifest as a campaign style of justice that dismantled any semblance of direct intermediate oversight. Campaign justice produced massive numbers of

executions that made the PRC a global outlier. Although Deng Xiaoping dressed up campaign justice in state uniform during the strike hard campaigns of the 1980s and 1990s, his approach to capital punishment remained decentralized, unmediated and bloody (See Chapter Two).

With this additional context, we can begin to see how death penalty reform in the early 2000s fits within the larger arc of Chinese governance. The Supreme People's Court that was empowered to resume review of all death sentences in the country om 2007 was not necessarily the liberal bastion of rule of law that outside observers might hope. And a central judiciary that has the authority to audit lower court action need not be a central judiciary that can exercise greater autonomy from the state. On the contrary, this newfound discipline is completely consonant with a single-party state anxious to exercise more, rather than less, unified power over its agents at a time when a policy of decentralization aimed at growing the economy was also bearing ugly fruit—including corruption and uneven application of the law and policy set in Beijing.

But this isn't the end of the story. Here the US case is instructive. The US course of death penalty regulation, rather than abolition, produced new and sometimes heightened conflicts and contradictions in a modern US federal system (Zimring 2003; Garland 2010; Steiker and Steiker 2016). This is also true of China. The return of the power of death penalty review to the courts in 2007 may have been a return to form, but it was not a repetition. China's 21st century SPC is not the Qing Board of Punishments. And the contemporary PRC is not a monarchy. In the 21st century, law may be deployed for authoritarian ends, but it cannot be scrubbed clean of all its global meanings, which are also liberal, emancipatory and counter-hegemonic. In short, China's death penalty reform through the courts is inescapably contradictory.

I identified four realms where death penalty reform produced new contradictions. The first is in the domain of the judiciary (See Chapter Three). The court had to expand its capacity in order to handle the workload of death penalty case review. The SPC moved into a second courthouse and hired hordes of judges over three years in order to accommodate the new task. SPC death penalty review judges are bureaucrats who monitor lower court autonomy and homogenize decision making; they are also specialists who foster trickle-down professionalism that inculcates legal values which spread through the lower courts. The second domain is the legal profession (See Chapter Four). Neither central leaders nor SPC elites seemed to have the criminal defense bar at top of mind when death penalty reforms were instituted. But SPC death penalty review has unexpectedly created conditions for the first national criminal defense practice in Chinese history. Against a backdrop of increasing repression of the legal profession, a national death penalty review process has led to a community of lawyers who are talking openly about capital punishment. These lawyers express a variety of individual and collective views about the death penalty; for some of them, this work has excited an antipathy to capital punishment. Others support it. I find that the wide variation in offenses subject to capital punishment in China produces variation in the attitudes of lawyers concerning its application. The third domain is penal legislation (see Chapter Five). In 2015 China's National People's Congress legislated a one-off punishment, life-long imprisonment (*zhongshen jianjin* 终身监禁), as an alternative sanction for just one of China's numerous capital crimes: corruption. In the US life without parole is justified on the grounds that life-long incapacitation is the only suitable alternative punishment for dangerous offenders. Why would China legislate this punishment for a non-violent crime with a low recidivism rate? The explanation lies in a political rationale, not a penal one. The Chinese state is committed to getting tough on corruption. It is also committed to limiting the death penalty for non-violent offenses. It now finds itself stuck between a rock and a hard place in dealing with punishment of malfeasant Party members. It can't execute them, and it can't *not* execute them. To resolve this dilemma,

China's legislature adopted an entirely new punishment that could mediate between the politics of lenience and severity. The introduction of LWOP for a non-violent crime also exposes how the values underpinning capital punishment debates are not fixed or inevitable. In the US, the death penalty debate is dominated by concerns about dangerousness, and this drives the logic of permanent incapacitation that bolsters LWOP as a replacement punishment for violent offenses; in China, where the rationale of incapacitation is more muted, LWOP can take on different meanings and applications for different types of crimes. Finally, I explored a contradiction in the domain of national data disclosure (see Chapter Six). In recent years China has rolled out new court initiatives in transparency, big data, legal representation and due process. China's authoritarian leaders believe that they can harness these legal tools for greater state legitimacy and social control. At the same time, Chinese leaders also want to keep secrets from the world. One of the biggest of such secrets is annual execution data. The SPC has taken the led the way in these initiatives, many of which seem to call for disclosure of death penalty data. Doing so though would violate the secrecy law. The result is that the SPC finds itself pursuing contradictory goals, proffering one hand to present information about its operations, and then snatching that information back with the other hand.

These are some of the contradictions of Chinese capital punishment in the 21st century. They persist, at least so long as capital punishment does.

The Futures of Capital Punishment

What comes next for the death penalty in China? I opened this dissertation with a contradiction. In recent years, China has occupied the place of both leading global executioner and leading global death penalty reformer. One can indeed wear both these mantels at once, just not for too long. Will reform falter and executions rebound? Or will executions continue to decline, eventually leading China to descend from its place atop the chart of high-volume killing states? Is it possible that China will get to zero executions, or even formally abolish the death penalty entirely? Before entertaining these possibilities, I think it is important to once again revisit our comparison case: the United States.

Death Penalty Abolition: the US Experience

The United States is one of the few democracies that has not yet abolished capital punishment; it is also a democracy where the movement to abolish the death penalty first gained traction (Banner 2002). In the late 1700s American thinkers began to initiate calls to end the death penalty. These critics based their arguments in concern over state power, a commitment to humanism and a liberal American theology (Masur 1989; Sarat 2001, 249; Banner 2002, 88-12). Early abolitionist sometimes won the day. Michigan, for example, abolished capital punishment in 1846 (Banner 2002, 134). In other places, notably the South, capital punishment remained vibrant (Banner 2002, 134). Overall, the US capital punishment debate from the country's founding to the mid-twentieth century took place at the state level and was framed as a binary setting retention against abolition.

In the post-war era, nations across Europe abolished capital punishment (Zimring 2003, 19-28); the Supreme Court of the United States (SCOTUS) became the prime federal agency intervening in the capital punishment debate at the national level (see Chapter Three). With its decision in *Furman* in 1972, the court seemed poised to find the death penalty unconstitutional and abolish it outright. Instead, in 1976 the court wavered in *Gregg*, committing instead to a

jurisprudence of guided discretion that permits capital punishment but subjects the practice to episodic and uneven court interventions.

Constitutional regulation of the death penalty had a number of cascading consequences in the US. The first consequence—unforeseen by jurists at the time—is that states jury-rigged divergent workarounds to legal challenges to their capital regimes. As a result, federal regulation of the death penalty ironically produced *more* variation in capital punishment at the state and local level than before reform (Zimring 2003, 71). A second consequence related to the first is that the death penalty in many states is no longer practically functional. Legal costs for constitutional representation in capital cases are astronomical. And in many states court challenges ensure decades of delay between sentencing and execution. The dysfunction is so severe that opponents of the death penalty now advance a new set of arguments ("the new abolitionism") that side-step the traditional moral arguments and contend that capital punishment should be abolished because, in the words of Justice Hugo Blackmun, "the death penalty experiment has failed…no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies" (Sarat 2001, 252).

The final consequence of federal regulation of the death penalty is that national regulation has actually succeeded in kicking the problem back to the states. In navigating constitutional hurdles, the death penalty has become a state problem. Some states are giving up. When the SCOTUS decided *Furman* in 1972, four-fifths of states retained the death penalty; today, if we include state moratoriums, that proportion has fallen to half (DPIC 2020). Overall, executions in the US have been on a decline for decades. After hitting a peak of 98 executions in 1999, that number fell to a low of 20 in 2016 and has hovered in the low double digits since (DPIC 2020). But state paths to abolition have been helter-skelter and uncertain, winding though referendums, moratoriums, state legislatures and state supreme courts (Sarat 2019; Sarat 2005). If indeed the US death penalty is at the end of its rope (Garrett 2017) it is meeting its demise not all at once, but in a thousand increments.

China's Death Penalty Future

China is not the United States. I believe that China and the US face differing abolitionist futures in part because they have differing abolitionist pasts. In imperial China officials at the Board of Punishments hotly debated the application of capital punishment in individual cases (see Chapter One), but these conversations fell short of a dialogue about the overall acceptability of the death penalty as a sanction. Abolitionist arguments were first introduced in China from the West at the end of Qing Dynasty in the late 19th century. Some Chinese scholars were receptive, but interest failed to translate into policy amid the collapse of the dynastic system and the chaos that followed (Yu 2016, 156-58).

Early Chinese Communist Party (CCP) members were aware of calls to end the death penalty. At one of its first meetings in 1922, the Party even declared the death penalty to be a cruel practice and called for its abolition (Bakken 2010, 3). This declaration notwithstanding, in the more than a century since it took place the CCP has yet to make this goal a reality. I believe there are three key reasons that abolitionism has not come to fruition. First, whereas the first wave of Western abolitionism was mouthed by revolutionary Americans who were politically motivated to contain the threat of an overreaching state, Chinese revolutionaries were instead motivated to contain the threat of counterrevolutionary elements that threatened the nascent political movement. This worldview persists. As I argued in Chapter Two, decades of CCP capital punishment was premised on the political significance of the friend/ enemy distinction and the ever-present fear of

counterrevolution (Dutton 2005). Second, the friend/ enemy distinction has meant that discussions about capital punishment in China center not on whether to use the ultimate punishment, but about its scale. The Chinese debate is not a binary of retention and abolition; it is a dialectic of severity and leniency (Trevaskes 2012, 16). Third, discussions of capital punishment in China take place against the backdrop of a revolutionary political teleology: the Party is the vanguard of a movement that leads citizens into a future in which the state withers away. However much this story of the future has been revised over the last century, the Party is still committed to a worldview of progress in which many current ills (poverty, pollution) are unfortunate milestones on the way to a better life. Whereas traditional American abolitionist arguments are implicitly timeless (e.g. state killing *is always* wrong), and so therefore call for abolition now, Chinese debates are implicitly timebound, and so focus instead on whether this is the appropriate moment in historical development for capital punishment to end. In this context, renowned Chinese criminologists have sincere discussions about whether or not it will be possible to achieve abolition *within a hundred years* (Yu 2016, 160). Outlandish though that may sound, on a scale of centuries that begins at the founding of the PRC in 1949, this gradualist perspective fits. In less than one century China's leaders have stewarded the country from a period in which annual executions were counted in increments of 100,000 to a period in which they are counted in the 1,000s. On that trajectory, another century would bring China into the single digits.

It is not clear, however, that incrementalism can ever get China to zero executions. For one thing, the low hanging fruit has already been picked. Available evidence suggests that most death sentences are now handed down for two categories of offenses: drugs and murder (see Chapters Three and Four). The continued use of capital punishment for drug crimes reflects a deep-seated policy stance at the upper echelons of Chinese leadership (Trevaskes 2016, 143-44). Perhaps this will change. As for murder, SPC reforms have already diverted the marginal cases. What are left are the hard cases: homicides without mitigating factors. Abandoning capital punishment for these crimes would require a policy shift not of degree, but of kind. It is possible this will happen, but it will take a political will beyond the gradualism of reforms to date.

The bigger impediment to getting to zero is that unlike American death penalty reform, Chinese death penalty reform worked! It seems to have addressed the proximate concerns of reformers: wrongful execution, high rates of execution and uneven application of legal standards. And if you buy the argument I make throughout, which is that these proximate causes of death penalty reform point to a deeper functional need to restrain local agents, then death penalty reform continues to work as planned. It is likely that on average every intermediate court in China submits at least a handful of capital cases to the SPC for review every year (see Chapter Three). This is probably enough material for the SPC to maintain administrative oversight and spot check consistency across courts. But if the numbers fell much more, it wouldn't be.

Of course, the state could both maintain the function of SPC oversight and abolish capital punishment by simply downgrading the types of punishment reviewed in Beijing. For example, in an execution-free era, the SPC could review all indeterminate life sentences (*wuqi tuxing* 无期徒刑). While this is technically doable, it seems practically implausible. Many of the most important penal shifts in the post-reform era have been built on the scaffold of capital punishment. For example, the most common diversionary sentence, suspended execution, is predicated on the nominal existence of an immediate execution sentence. And China's most recent sentencing innovation, life without parole for corruption (see Chapter Five) is in turn embedded in suspended execution. The current system functions so long as executions are rare, but not extinct. In short, death penalty reform has further embedded the structure of capital punishment in China. Total

abolition today requires more than ending the death penalty. It also requires rethinking an array of other institutions on which it rests.

Coda: Three Divergent Futures in the Xi Jinping Era

Much of what has been written about China's death penalty reform was published within a few years of the 2007 return of SPC review (e.g. Minas 2009; Lewis 2010; Scott 2010; Trevaskes 2012) at the tail end of the Hu Jintao era (2003-2013), a period that in retrospect appears politically moderate. If this dissertation were written in those years, the death penalty could plausibly be seen as part of a larger effort to bring more of the apparatus of state social control and stability-maintenance under the thumb of the criminal law within the purview of the courts. That is, at that moment China might have doubled-down on using the courts to regulate the state through the administration of criminal law, expanding legal review of even more criminal sanctions in order to cast a wider net over state and society. That didn't happen. This dissertation was written in the Xi Jinping era (2013-), a period in which China has pivoted harder towards autocracy than most observers, including this one, could have imagined. In the years I spent researching this project, I watched stability maintenance, Party-state discipline and authoritarian legality increasingly decouple, drifting away from one other in areas outside the ambit of the death penalty. The result is that while I believe the death penalty case review system will persist, the forces that it brings together will increasingly manifest elsewhere singly, rather than as a unit. I close this project by briefly observing the parting trajectories and velocities of these phenomena.

At the end of the Hu era, there were other areas beyond the death penalty where crime control and stability maintenance were placed under the control of the courts. The last such landmark reform was the 2013 abolition of re-education through labor, which dismantled a sprawling punitive system of administrative detention that had enabled public security bureaus to bypass the courts and directly incarcerate minor offenders for years (Cohen and Lewis 2013). Since then, social control under Xi has increasingly split into two divergent channels. In one channel, the legal system has taken on a more central role in regulating penality. For example, the 2018 Amendment to the Criminal Procedure Law subjects the state actors to substantially more constraint under the formal law. Reforms such as this have led some observers to argue that the Xi era is characterized by increasingly legality (Zhang and Ginsburg 2018, 3). In other areas, however, extra-legal penality has expanded substantially, notably with detention of Muslim Uighurs in Xinjiang (Smith 2019). This extra-legal penality falls outside the institutional framework of courts, lawyers, penal sanctions and judicial transparency that were the subjects of chapters Three, Four, Five and Six of this project.

This split between legal and extra-legal penality is increasingly creating a dual state where law matters in areas of punishment that we might term the norm and matters less in cases that what we might term the exception (Fu 2019; Smith 2020). The norm typically holds for non-sensitive cases involving ethnic Han Chinese in heartland cities. The exception typically holds for sensitive cases involving non-Han Chinese in contentious regions such as Xinjiang, Tibet and, most recently, Hong Kong. For these exceptional peoples, places and causes, punishment and social control are more often dispensed outside the law. The exceptional, however, is not necessarily marginal. When one considers that China claims to incarcerate about 1.7 million people nationwide in Ministry of Justice Prisons (World Prison Brief 2020), while the UN credits reports that China is interning a million Uighurs in detention camps in Xinjiang (Nebehay 2018), the exception seems to be subsuming the norm in China's duel state system. While it is not clear that the state is executing anyone under this state of exception, China's secrecy around even legally approved capital

punishment (see Chapter Six) must also prompt us to ask: how would we know? In any case, the broad trend is clear, Chinese leaders has turned to a path of stability maintenance that falls outside the scope of law and courts in some areas.

Just as the Party-state under Xi is leaning into social controls that are decoupled from law and state institutions, so too the administration is also turning to tools outside the criminal law to keep officials in check. Of course the criminal law—and within it the auditing function of capital cases—was always only one tool among many in Beijing's kit. Other tools have ranged from the Censorate under the Qing Dynasty (see Chapter Two) to the Central Commission for Discipline and Inspection (CCDI) in the PRC. In the Xi era, more and more Party-state self-discipline is moving outside the reach of criminal law. In March 2018, the National People's Congress (NPC) established the National Supervisory Commission (NSC)—a massive new anti-corruption body. The NSC is a powerhouse. It reports directly to the NPC, making it a co-equal branch of government with the Supreme People's Court and the Supreme People's Procuratorate. the NSC holds wide penal power, most notably the power of retention in custody (*liuzhi* 留置). The NSC may retain a suspect in custody for six months without counsel or a hearing. The power of retention in custody is codified in a Supervision Law that was passed when the NSC was formed. But this law stands in direct legal tension with due process protections laid out in China's Criminal Procedure Law, China's Constitution and international law (Zheng 2018). The NSC's detention power extends to both Party members and civil servants (eighty percent of whom are members of the CCP) (Ma 2018). The Supervision Law gives the NSC a mandate to investigate public employees and "relevant personnel" including not only officials, but also managers at state-owned enterprises, people engaged in management in public education, scientific research, culture, health care, and sports, and "other personnel who perform public duties in accordance with law." The NSC is part of a push to subject ever more Party-state members to ever more discipline and control beyond the reach of the formal criminal law.

The divergent futures of social and Party-state control, both outside the courts, suggest that while capital punishment review may endure, in matters of punishment in China, as in the US, death is different.

Works Cited

Abbott, Andrew. 2014. *The System of Professions: An Essay on the Division of Expert Labor*. Chicago: University of Chicago Press.

Abramson, Jeffrey. 2004. "Death-Is-Different Jurisprudence and the Role of the Capital Jury." *Ohio State Journal of Criminal Law* 2: 117–64.

Ahl, Björn. 2014. "Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court." *The China Quarterly* 217: 121–39.

Alexander, Michelle. 2012. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: The New Press.

Allen, Francis A. 1981. *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose*. New Haven: Yale University Press.

Altehenger, Jennifer. 2018. *Legal Lessons: Popularizing Laws in the People's Republic of China, 1949-1989.* Cambridge and London: Harvard University Asia Center.

Amnesty International. 2017. "China's Deadly Secrets." London: Amnesty International.

———. 2018. "Death Sentences and Executions: 2017." London: Amnesty International.

———. 2019. "Death Sentences and Executions: 2018." London: Amnesty International.

———. 2020. "Death Sentences and Executions: 2019." London: Amnesty International.

Antony, Robert J. 2016. *Unruly People: Crime, Community, and State in Late Imperial South China*. Hong Kong: Hong Kong University Press.

Bakken, Børge. 2010. "The Norms of Death: On Capital Punishment in China." In *71st Morrison Lecture*. Australian National University, Canberra.

Banner, Stuart. 2009. *The Death Penalty: An American History*. Cambridge: Harvard University Press.

Barkow, Rachel Elise. 2019. *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*. Cambridge: Harvard University Press.

Beccaria, Cesare. 2009 [1764]. *On Crimes and Punishments and Other Writings*. Toronto: University of Toronto Press.

Bedau, Hugh Adam. 1990. "Imprisonment vs. Death: Does Avoiding Schwarzschild's Paradox Lead to Sheleff's Dilemma?" *Albany Law Review* 54: 481.

Bessler, John D. 2012. *Cruel & Unusual: The American Death Penalty and the Founders' Eighth Amendment*. Boston: Northeastern University Press.

Biddulph, Sarah, Elisa Nesossi, and Susan Trevaskes. 2017. "Criminal Justice Reform in the Xi Jinping Era." *China Law and Society Review* 2 (1): 63–128.

Blanton, Thomas. 2002. "The World's Right to Know." *Foreign Policy*, November 11, 2002.

Blecher, Marc. 1979. "Consensual Politics in Rural Chinese Communities: The Mass Line in Theory and Practice." *Modern China* 5 (1): 105–26.

Bliss, John. N.P. "Developing a Contextualized Theory of Property from the Bottom Up." On file with author.

Bodde, Derk, and Clarence Morris. 1967. *Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases (Translated from the Hsing-an Hui-Lan)*. Philadelphia: University of Pennsylvania Press.

Bowen, Debra. n.d. "Statement of Vote, November 6, 2012, General Election." Accessed August 3, 2020. https://web.archive.org/web/20141020120913/http://www.sos.ca.gov/elections/sov/2012-general/sov-complete.pdf.

Brangan, Louise. 2020. “Exceptional States: The Political Geography of Comparative Penology.” *Punishment & Society*. https://doi.org/10.1177/1462474520915995
Brook, Timothy, Jérôme Bourgon, and Gregory Blue. 2008. *Death by a Thousand Cuts*. 1st ed. Cambridge: Harvard University Press.
Bary, Theodore de, and Irene Bloom. 1999. *Sources of Chinese Tradition: From Earliest Times to 1600.* 2nd ed. New York: Columbia University Press.
Buckley, Chris. 2016. “Guo Boxiong, Ex-Top Military Official in China, Gets Life Sentence for Graft.” *New York Times*, July 25, 2016. http://www.nytimes.com/2016/07/26/world/asia/china-guo-boxiong-sentence.html?_r=0.
Buoye, Thomas. 1990. “Economic Change and Rural Violence: Homicides Related to Disputes Over Property Rights in Guangdong During the Eighteenth Century.” *Peasant Studies* 17 (4): 247.
———. 2000. *Moral Economy: Violent Disputes over Property Rights in Eighteenth Century China*. Cambridge: Cambridge University Press.
“CECC” Congressional-Executive Commission on China. 2010. “2010 Annual Report.” https://www.cecc.gov/publications/annual-reports/2010-annual-report.
“CGCP” China Guiding Cases Project. 2020. “Guiding Cases in Perspective.” https://cgc.law.stanford.edu/guiding-cases/.
Chen, Duxiu. 1922. “The Views of the Chinese Communist Party on the Current Situation” [Zhongguo Gongchandang Duiyu Shiju Zhi Zhuzhang]. https://www.marxists.org/chinese/reference-books/ccp-1921-1949/01/007.htm.
Chen, Jianfu. 2013. *Criminal Law and Criminal Procedure Law in the People’s Republic of China: Commentary and Legislation*. Leiden and Boston: Martinus Nijhoff.
Chen, Li. 2012. “Legal Specialists and Judicial Administration in Late Imperial China, 1651–1911.” *Late Imperial China* 33 (1): 1–54.
Chen, Xingliang. 2016. “Guiding Cases for China’s Death Penalty: Analysis and Reflection.” In *The Death Penalty in China: Policy, Practice and Reform*, edited by Bin Liang and Hong Lu, 187–213. New York: Columbia University Press.
China Daily. 2008. “China Sees 30% Drop in Death Penalty.” *China Daily*, May 10, 2008. http://www.chinadaily.com.cn/china/2008-05/10/content_6675006.htm.
———. 2017. “White Paper: Judicial Transparency of Chinese Courts,” February 27, 2017. http://www.chinadaily.com.cn/china/2017-02/27/content_28361599.htm.
Clarke, Donald. 2019. “China’s Legal Non-Construction Project.” Presented at the China’s Legal Construction Project: Towards an Autonomous Legal Sphere Conference, University of Michigan, October 11.
Clarke, Donald C., and James V. Feinerman. 1995. “Antagonist Contradictions: Criminal Law and Human Rights in China.” *China Quarterly*, 135.
Cohen, Jerome A., and Binzhi Zhao, eds. 2008. *The Death Penalty: Judicial Controls and Alternative Punishments* [*Sixing Sifa Kongzhilun Jiqi Zhidai Cuoshi*]. Beijing: Law Press.
Cohen, Jerome Alan. 1968. *The Criminal Process in the People’s Republic of China, 1949-1963: An Introduction*. Cambridge: Harvard University Press.
Cohen, Jerome Alan, and Margaret K. Lewis. 2013. *Challenge to China: How Taiwan Abolished Its Version of Re-Education Through Labor*. New York: US-Asia Law Institute Books, NYU School of Law.
Cook, Alexander C. 2016. *The Cultural Revolution on Trial: Mao and the Gang of Four*. Cambridge: Cambridge University Press.

Cover, Robert M. 1985. “Violence and the Word.” *Yale Law Journal* 95: 1601–29.
Creemers, Rogier. 2018. “China’s Social Credit System: An Evolving Practice of Control.” *Social Science Research Network*, 1–32.
Davis, Kevin E., Benedict Kingsbury, and Sally Engle Merry. 2012. “Indicators as a Technology of Global Governance.” *Law & Society Review* 46 (1): 71–104.
Dayan, Colin. 2007. *The Story of Cruel and Unusual*. Cambridge: MIT Press.
De Tocqueville, Alexis. 2003 [1835]. *Democracy in America*. Vol. 10. Regnery Publishing.
Death Penalty Worldwide International Human Rights Clinic. 2016. “Pathways to Abolition of the Death Penalty.” Cornell Law School. https://www.deathpenaltyworldwide.org/wp-content/uploads/2019/12/Pathways-to-Abolition-of-the-Death-Penalty.pdf.
Derrida, Jacques. 2014. *The Death Penalty, Vol. 1*. Edited by Geoffrey Bennington, Marc Crépon, and Thomas Dutoit. Translated by Peggy Kamuf. Chicago: University of Chicago Press.
Digeser, Peter. 1992. “The Fourth Face of Power.” *The Journal of Politics* 54 (04): 977–1007.
Dikötter, Frank. 2002. *Crime, Punishment, and the Prison in Modern China*. New York: Columbia University Press.
———. 2010. *Mao’s Great Famine: The History of China’s Most Devastating Catastrophe, 1958-1962*. New York: Walker Publishing.
Dolovich, Sharon. 2011. “Exclusion and Control in the Carceral State.” *Berkeley Journal of Criminal Law* 16: 259–339.
Dong, Ruifeng. 2007. “Interview with Supreme People’s Court Vice President Judge Jiang Xingzhang on an ‘Inventory’ of the Return of Death Penalty Review Authority [*Sixing Fuhe Quan Shangshou ‘Pandian’ Zhuanfang Zuigaofa Fuyuanzhang Jiang Xingzhang Da Faguan*].” *Liaowang [Outlook]*, September 4, 2007. https://www.fmprc.gov.cn/ce/ceuk/chn/zyxw/t358568.htm.
“DPICa” Death Penalty Information Center. 2020. “Executions under the Federal Death Penalty.” Accessed July 17, 2020. https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/executions-under-the-federal-death-penalty.
“DPICb” Death Penalty Information Center. 2020. “A Record 120 Nations Adopt UN Death-Penalty Moratorium Resolution.” https://deathpenaltyinfo.org/node/7277.
“DPICc” Death Penalty Information Center. 2020. “State by State.” https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.
Duara, Prasenjit. 1996. *Rescuing History from the Nation: Questioning Narratives of Modern China*. Chicago: University of Chicago Press.
Dui Hua. 2019. “Submission to the 3rd United States Universal Periodic Review.” https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS36.aspx.
———. 2020. “Death Penalty Reform.” Accessed July 7, 2020. https://duihua.org/resources/death-penalty-reform/.
Durkheim, Emile. 2005 [1897]. *Suicide: A Study in Sociology*. New York: Routledge.
———. 1967 [1900]. “Two Laws of Penal Evolution.” *University of Cincinnati Law Review* 38: 32.
Dutton, Michael Robert. 1992. *Policing and Punishment in China: From Patriarchy to “the People.”* Vol. 141. Cambridge: Cambridge University Press.
Edin, Maria. 2003. “State Capacity and Local Agent Control in China: CCP Cadre Management from a Township Perspective.” *China Quarterly*, 35–52.

Esherick, Joseph W. 1987. *The Origins of the Boxer Uprising*. Berkeley: University of California Press.
Espeland, Wendy Nelson, and Michael Sauder. 2007. "Rankings and Reactivity: How Public Measures Recreate Social Worlds." *American Journal of Sociology* 113 (1): 1–40.
Espeland, Wendy Nelson, and Mitchell L. Stevens. 1998. "Commensuration as a Social Process." *Annual Review of Sociology* 24 (1): 313–43.
Fairbank, John King. 1986. *The Great Chinese Revolution, 1800-1985*. New York: Harper & Row.
Fang, Wenjun. 2007. "The Theory and Practice 'Regarding Some Questions Concerning the Regulations on Reviewing Death Penalty Cases'" ["Guanyu Fuhe Sixing Anjian Ruogan Wenti de Guiding" de Lilun yu Shiyong]. *Renmin Sifa*, 19–22.
Feeley, Malcolm M. 1979. *The Process Is the Punishment: Handling Cases in a Lower Criminal Court*. New York: Russell Sage Foundation.
———. 1997. "Comparative Criminal Law for Criminologists: Comparing for What Purpose?" In *Comparing Legal Cultures*, edited by David Nelken, 93–104. New York: Ashgate.
Feeley, Malcolm M., and Jonathan Simon. 1992. "The New Penology: Notes on Emerging Strategies of Corrections and Its Implications." *Criminology* 30 (4): 449–74.
Finder, Susan. 2014. "Updated with Further Analysis: What Does the 4th Plenum Mean for Death Penalty Reviews?" November 10, 2014. https://supremepeoplescourtmonitor.com/2014/11/10/.
———. 2015. "Supreme People's Court and Its Normative Documents." August 28, 2015. https://supremepeoplescourtmonitor.com/2015/08/28/supreme-peoples-court-and-its-normative-documents/.
Forman Jr, James. 2017. *Locking Up Our Own: Crime and Punishment in Black America*. New York: Farrar, Straus and Giroux.
Forster, Charles. 2013. "Introduction to Thucydides" In *Delphi Complete Works of Thucydides.*
Foucault, Michel. 1977. *Discipline & Punish: The Birth of the Prison*. New York: Random House.
———. 1980. *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*. Edited by Colin Gordon. New York: Pantheon Books.
———. 2007. *Security, Territory, Population: Lectures at the Collège de France, 1977-78*. Palgrave Macmillan UK.
Friedman, Lawrence. 1993. *Crime and Punishment in American History*. New York: Basic Books.
Fu, Hualing. 2016. "Between Deference and Defiance: Courts and Penal Populism in Chinese Capital Cases." In *The Death Penalty in China: Policy, Practice, and Reform*, edited by Bin Liang and Lu, Hong. New York: Columbia University Press.
———. 2019. "Duality and China's Struggle for Legal Autonomy." *China Perspectives* 1: 3-9.
Fukuyama, Francis. 2011. *The Origins of Political Order: From Prehuman Times to the French Revolution*. New York: Farrar, Straus and Giroux.
Fuma, Susumu. 2007. "Litigation Masters and the Litigation System of Ming and Qing China." *International Journal of Asian Studies* 4 (1): 79–111.
Galanter, Marc, and Thomas Palay. 1994. *Tournament of Lawyers: The Transformation of the Big Law Firm*. Chicago: University of Chicago Press.
Gallagher, Mary E. 2006. "Mobilizing the Law in China: 'Informed Disenchantment' and the Development of Legal Consciousness." *Law & Society Review* 40 (4): 783–816.

———. 2017. *Authoritarian Legality in China: Law, Workers, and the State*. New York: Cambridge University Press.
Garland, David. 1993. *Punishment and Modern Society: A Study in Social Theory*. Chicago: University of Chicago Press.
———. 2010. *Peculiar Institution: America's Death Penalty in an Age of Abolition*. Cambridge: Harvard University Press.
———. 2017. "Theoretical Advances and Problems in the Sociology of Punishment." *Punishment & Society* 20 (1): 8–33.
Garrett, Brandon. 2017. *End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice*. Cambridge: Harvard University Press.
Gatrell, Vic. 1994. *The Hanging Tree: Execution and the English People 1770-1868*. New York: Oxford University Press.
Geertz, Clifford. 1973. *The Interpretation of Cultures*. New York: Basic books.
Gilmore, Ruth Wilson. 2007. *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California*. Berkeley: University of California Press.
Ginsburg, Tom. 2008. "Administrative Law and the Judicial Control of Agents in Authoritarian Regimes." In *Rule by Law*, edited by Tom Ginsburg and Tamir Moustafa, 58–72. New York: Cambridge University Press.
Ginsburg, Tom, and Tamir Moustafa. 2008. *Rule by Law: The Politics of Courts In Authoritarian Regimes*. Cambridge: Cambridge University Press.
Givens, John Wagner. 2013. "Sleeping with Dragons? Politically Embedded Lawyers Suing the Chinese State." *Wisconsin International Law Journal* 31: 734–75.
Gong, Ting. 2004. "Dependent Judiciary and Unaccountable Judges: Judicial Corruption in Contemporary China." *China Review*, 33–54.
Gottschalk, Marie. 2006. *The Prison and the Gallows: The Politics of Mass Incarceration in America*. Cambridge: Cambridge University Press.
Gould, Jon B., and Maya Pagni Barak. 2019. *Capital Defense: Inside the Lives of America's Death Penalty Lawyers*. New York: New York University Press.
Greenberg, David F., and Valerie West. 2008. "Siting the Death Penalty Internationally." *Law & Social Inquiry* 33 (2): 295–343.
Greitens, Sheena Chestnut. 2016. *Dictators and Their Secret Police: Coercive Institutions and State Violence*. Cambridge: Cambridge University Press.
———. 2017. "Rethinking China's Coercive Capacity: An Examination of PRC Domestic Security Spending, 1992–2012." *The China Quarterly* 232: 1002–25.
Hacking, Ian. 1990. *The Taming of Chance*. Cambridge: Cambridge University Press.
———. 2007. "Kinds of People: Moving Targets." In *Proceedings-British Academy*, 151:285–317. Oxford: Oxford University Press.
Hansen, Hans Krause, and Tony Porter. 2012. "What Do Numbers Do in Transnational Governance?" *International Political Sociology* 6 (4): 409–26.
Harvard Law Review. 2006. "A Matter of Life and Death: The Effects of Life Without Parole Statutes on Capital Punishment." *Harvard Law Review* 119 (6): 1838–54.
Hay, Douglas. 1975. "Property, Authority and the Criminal Law." In *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, edited by Douglas Hay, Peter Linebaugh, John G. Rule, E. P. Thompson, and Cal Winslow, 17–64. New York: Pantheon Books.
He, Jiahong. 2016. *Back from the Dead: Wrongful Convictions and Criminal Justice in China*. Honolulu: University of Hawai'i Press.

Hegel, Robert E. 2011. *True Crimes in Eighteenth-Century China: Twenty Case Histories*. Seattle: University of Washington Press.
Heilmann, Sebastian, ed. 2017. *China's Political System*. London: Rowman & Littlefield.
Heinz, John P., and Edward O. Laumann. 1982. *Chicago Lawyers: The Social Structure of the Bar*. New York: Russell Sage Foundation.
Hilbink, Lisa. 2007. *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile*. Cambridge: Cambridge University Press.
Hinton, Elizabeth. 2016. *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America*. Cambridge: Harvard University Press.
Hobbes, Thomas. 1651. *Leviathan*. London: A&C Black.
Hood, Roger, and Surya Deva, eds. 2013. *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion*. Oxford: Oxford University Press.
Hood, Roger, and Carolyn Hoyle. 2015. *The Death Penalty: A Worldwide Perspective*. Oxford: Oxford University Press.
Hu, Kangsheng, and Fucheng Li. 1997. *Explanation of the Criminal Law of the People's Republic of China* [*Zhonghua Renmin Gongheguo Xingfa Shiyi*]. Beijing: Law Press.
Huang, Weiming. 2007. *The Contemporary Value of the Suspended Execution System* [*Sihuan Zhidu de Dangdai Jiazhi*]. Beijing: Beijing Science Press.
Hucker, Charles O. 1951. "The Traditional Chinese Censorate and the New Peking Regime." *American Political Science Review* 45 (4): 1041–57.
Hugo, Victor. 1829. *The Last Day of a Condemned Man*. Translated by Arabella Ward. Mincola, New York: Dover.
Human Rights in China (HRIC). 2007. "State Secrets: China's Legal Labyrinth." https://www.hrichina.org/en/publications/hric-report/state-secrets-chinas-legal-labyrinth.
Ip, Eric C. 2011. "The Supreme People's Court and the Political Economy of Judicial Empowerment in Contemporary Chin." *Columbia Journal of Asian Law* 24: 367–435.
Jisheng, Yang. 2012. *Tombstone: The Great Chinese Famine, 1958-1962*. New York: Macmillan.
Johnson, David T., and Franklin E. Zimring. 2009. *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia*. New York: Oxford University Press.
Jones, William C., trans. 1994. *The Great Qing Code*. Oxford: Oxford University Press.
Keith, Ronald C., Zhiqiu Lin, and Shumei Hou. 2014. *China's Supreme Court*. New York: Routledge.
Kiely, Jan. 2014. *The Compelling Ideal: Thought Reform and the Prison in China, 1901-1956*. New Haven: Yale University Press.
Kohler-Hausmann, Issa. 2018. *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing*. Princeton: Princeton University Press.
Kovarsky, Lee. 2017. "Structural Change and State Postconviction Review." *Notre Dame Law Review*, 443–98.
Kroeber, Arthur R. 2016. *China's Economy: What Everyone Needs to Know*. New York: Oxford University Press.
Kronman, Anthony T. 1995. *The Lost Lawyer: Failing Ideals of the Legal Profession*. Cambridge: Harvard University Press.
Kuhn, Philip. 1990. *Soulstealers: The Chinese Sorcery Scare of 1768*. Cambridge: Harvard University Press.

Kuhn, Philip A. 1970. *Rebellion and Its Enemies in Late Imperial China: Militarization and Social Structure, 1796-1864*. Cambridge: Harvard University Press.
Landry, Pierre Francois. 2008. *Decentralized Authoritarianism in China: The Communist Party's Control of Local Elites in the Post-Mao Era*. New York: Cambridge University Press.
Lang, Sheng. 2015. *Explanation of the Criminal Law of the PRC (6th Edition) (Newly Revised According to the 9th Amendment to the Criminal Law)* [*Zhonghua Renmin Gonghe Guo Xingfa Shiyi (Di Liu Ban) (Genju Xingfa Xiuzheng an Jiu Zui Xin Xiuding)*]. 6th edition. Legal Explanation Standard Edition. Beijing: Law Press.
Latour, Bruno. 2005. *Reassembling the Social: An Introduction to Actor-Network-Theory*. Oxford: Oxford University Press.
Lau, Mimi. 2013. "Family of Executed Hunan Businessman Vows to Seek Justice." *South China Morning Post*, July 17, 2013. https://www.scmp.com/news/china/article/1284283/family-executed-hunan-businessman-zeng-chengjie-vow-seek-justice.
Lehrfreud, Saul. 2013. "The Impact and Importance of International Human Rights Standards: Asia in World Perspective." In *Confronting Capital Punishment in Asia*, edited by Roger Hood and Surya Deva. 23-45: Oxford: Oxford University Press.
Lewis, Margaret K. 2011. "Leniency and Severity in China's Death Penalty Debate." *Columbia Journal of Asian Law* 24: 303–32.
Li, Fenlei. 2014. "A New Inquiry into the Supreme People's Court's Death Penalty Review Process" [Zuigao Renmin Fayuan Sixing Fuhe Chengxu Xintan]. *Guojia Jianchaguan Fayuan Xuebao* [*Journal of National Prosecutor's College*] 22 (5): 24–32.
Li, Ling. 2012. "The 'Production' of Corruption in China's Courts: Judicial Politics and Decision Making in a One-Party State." *Law & Social Inquiry* 37 (4): 848–77.
———. 2016. "The Rise of the Discipline and Inspection Commission, 1927–2012: Anticorruption Investigation and Decision-Making in the Chinese Communist Party." *Modern China* 42 (5): 447–82.
———. 2019. "Politics of Anticorruption in China: Paradigm Change of the Party's Disciplinary Regime 2012–2017." *Journal of Contemporary China* 28 (115): 47–63.
Liang, Bin. 2005. "Severe Strike Campaign in Transitional China." *Journal of Criminal Justice* 33 (4): 387–99.
———. 2016. "China's Death Penalty Practice: Working Progress, Struggle, and Challenges Within the Global Abolition Movement." In *The Death Penalty in China: Policy, Practice, and Reform*, edited by Bin Liang and Hong Lu, 1–30. New York: Columbia University Press.
Liang, Bin, Ni Phil He, and Hong Lu. 2014. "The Deep Divide in China's Criminal Justice System: Contrasting Perceptions of Lawyers and the Iron Triangle." *Crime, Law and Social Change* 62 (5): 585–601.
Lieberthal, Kenneth. 2004. *Governing China: From Revolution through Reform*. New York: Norton.
Liebman, Benjamin L. 2014. "Legal Reform: China's Law-Stability Paradox." *Daedalus* 143 (2): 96–109.
Liebman, Benjamin L., Margaret Roberts, Rachel E. Stern, and Alice Z. Wang. 2019. "Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law." *Social Science Research Network*, 1–48.

Lipman, Jonathan. n.d. “A Fierce and Brutal People: On Islam and Muslims in Qing Law.” In *Empire at the Margins: Culture, Ethnicity, and Frontier in Early Modern China*, edited by Pamela Kyle Crossley, Helen Siu, and Donald Sutton, 83–110. Berkeley: University of California Press.

Liu, Lawrence J. and Rachel E. Stern. Forthcoming. “State-adjacent Professionals: How Chinese Lawyers Participate in Political Life.” *China Quarterly.*

Liu, Renwen. 2013. *The Death Penalty in Global Perspective and Chinese Context* [Sixing de Quanqiu Shiye Yu Zhongguo Yujing]. Beijing: China Social Science Press.

Liu, Sida, and Terence C. Halliday. 2008. “Dancing Handcuffed in the Minefield: Survival Strategies of Defense Lawyers in China’s Criminal Justice System.” *Center on Law and Globalization Research Paper*, no. 08–04.

———. 2011. “Political Liberalism and Political Embeddedness: Understanding Politics in the Work of Chinese Criminal Defense Lawyers.” *Law & Society Review* 45 (4): 831–66.

Lockett, Hudson. 2016. “China Anti-Corruption Campaign Backfires.” Financial Times. October 9, 2016. https://www.ft.com/content/02f712b4-8ab8-11e6-8aa5-f79f5696c731.

Lu, Hong, Yudu Li, and Charlotte Hu. 2016. “The Criminal Justice System and the Death Penalty.” In *The Death Penalty in China: Policy, Practice and Reform*, edited by Bin Liang and Hong Lu, 31–61. New York: Columbia University Press.

Lu, Hong, and Terance D. Miethe. 2007. *China’s Death Penalty: History, Law and Contemporary Practices*. New York: Routledge.

Lu, Hong, Tereza Trejbalova, and Bin Liang. 2019. “Proceduralism, Political Embeddedness and Death Penalty Lawyers in China.” *The China Quarterly* 238: 353–74.

Lu, Jianping. 2015. “Speech after Undergoing the ‘Torment of the Soul’: This Staunch Abolitionist Scholar Served Two Years in the Death Penalty Review Court” [Jingli ‘linghun Zhemo’ Zhihou de Yanjiang: Zheming Jianding de ‘Feisi’ Xuezhe, Zai Sixing Fuhe Ting Zhuazhi Le Liang Nian].” December 31, 2015. https://mp.weixin.qq.com/s/ozu6laWDz2oIeat19dVuHg.

Lu, Suxun. 2015. “‘Practical Affairs - Reflections on Ten Years of Work by a Death Penalty Review Judge’ [Shiwu - Yiwei Congshi Sixing Fuhe Gongzuo Shinian Faguan de Ganhuai].” *Faguanzhijia*, July 9, 2015. https://mp.weixin.qq.com/s/C5rD4n8GDJ8i3J2Sb-9wIg.

Lubman, Stanley B. 1999. *Bird in a Cage: Legal Reform in China after Mao*. Stanford: Stanford University Press.

Lynch, Mona. 2009. *Sunbelt Justice: Arizona and the Transformation of American Punishment*. Stanford: Stanford University Press.

Ma, Josephine. 2018. “Revealed: The Far-Reaching Powers of China’s New Anticorruption Agency.” *South China Morning Post*, March 13, 2018. https://www.scmp.com/news/china/policies-politics/article/2136949/far-reaching-powers-chinas-new-super-anti-corruption.

Macauley, Melissa Ann. 1998. *Social Power and Legal Culture: Litigation Masters in Late Imperial China*. Stanford: Stanford University Press.

Magaloni, Beatriz, and Ruth Kricheli. 2010. “Political Order and One-Party Rule.” *Annual Review of Political Science* 13: 123–43.

Mao, Zedong. 1951. “Strike Surely, Accurately and Relentlessly in Suppressing Counterrevolutionaries.” https://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5_14.htm.

Martin, John Levi. 2003. “What Is Field Theory?” *American Journal of Sociology* 109 (1): 1–49.

Masur, Louis P. 1989. *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865*. New York: Oxford University Press.
Matthews, Roger. 2005. "The Myth of Punitiveness." *Theoretical Criminology* 9 (2): 175–201.
McGregor, Richard. 2010. *The Party: The Secret World of China's Communist Rulers*. New York: Harper Collins.
McKnight, Brian E. 1981. *The Quality of Mercy: Amnesties and Traditional Chinese Justice*. Honolulu: University of Hawai'i Press.
Meijer, Marinus Johan. 1984. "The Autumn Assizes in Ch'ing Law." *T'oung Pao* 70: 1–17.
Merry, Sally Engle. 2016. *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking*. Chicago: University of Chicago Press.
Miao, Michelle. 2013a. "Examining China's Responses to the Global Campaign against the Death Penalty." In *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion*, edited by Roger Hood and Surya Deva, 46–67. Oxford: Oxford University Press.
———. 2013b. "Capital Punishment in China: A Populist Instrument of Social Governance." *Theoretical Criminology* 17 (2): 233–50. https://doi.org/10.1177/1362480613476788.
Michelson, Ethan. 2006. "The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work." *Law & Society Review* 40 (1): 1–38.
Miller, Ian Matthew. 2013. "Rebellion, Crime and Violence in Qing China, 1722–1911: A Topic Modeling Approach." *Poetics* 41 (6): 626–49.
Miller, Lisa Lynn. 2016. *The Myth of Mob Rule: Violent Crime and Democratic Politics*. Oxford: Oxford University Press.
Minas, Stephen. 2009. "Kill Fewer, Kill Carefully: An Analysis of the 2006 to 2007 Death Penalty Reforms in China." *UCLA Pacific Basin Law Journal* 27: 36–70.
Minzner, Carl. 2018. *End of an Era: How China's Authoritarian Revival Is Undermining Its Rise*. New York: Oxford University Press.
———. 2009. "Riots and Cover-Ups: Counterproductive Control of Local Agents in China." *University of Pennsylvania Journal of International Law* 31: 53–124.
———. 2011. "China's Turn Against Law." *The American Journal of Comparative Law* 59 (4): 935–84.
Moustafa, Tamir. 2014. "Law and Courts in Authoritarian Regimes." *Annual Review of Law and Social Science* 10: 281–99.
Mühlhahn, Klaus. 2009. *Criminal Justice in China: A History*. Cambridge: Harvard University Press.
Murakawa, Naomi. 2014. *The First Civil Right: How Liberals Built Prison America*. Oxford: Oxford University Press.
Nagin, Daniel S., and John V. Pepper, eds. 2012. *Deterrence and the Death Penalty*. Washington, D.C: National Academies Press.
National Research Council. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, D.C: The National Academies Press.
Nebehay, Stephanie. 2018. "U.N. Says It Has Credible Reports That China Holds Million Uighurs in Secret Camps." *Reuters*, August 10. https://www.reuters.com/article/us-china-rights-un/u-n-says-it-has-credible-reports-that-china-holds-million-uighurs-in-secret-camps-idUSKBN1KV1SU.
Neighbors, Jennifer M. 2009. "The Long Arm of Qing Law? Qing Dynasty Homicide Rulings in Republican Courts." *Modern China* 35 (1): 3–37.

Nelken, David. 2010. *Comparative Criminal Justice: Making Sense of Difference*. Vol. 1. London: Sage.
Nelles, H. V. 1997. "American Exceptionalism: A Double-Edged Sword." *The American Historical Review* 102 (3): 749–57.
Nellis, Ashley. 2017. "Still Life: America's Increasing Use of Life and Long-Term Sentences." The Sentencing Project. http://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/.
Nellis, Ashley, and Ryan S. King. 2009. "No Exit: The Expanding Use of Life Sentences in America." Sentencing Project. https://www.sentencingproject.org/publications/no-exit-the-expanding-use-of-life-sentences-in-america/.
Nesossi, Elisa. 2017. "Wrongful Convictions: The Useful Injustice?" In *Justice: The China Experience*, edited by Flora Sapio, Susan Trevaskes, and Sarah Biddulph, 141–67. Cambridge: Cambridge University Press.
Ng, Kwai Hang, and Xin He. 2017. *Embedded Courts: Judicial Decision-Making in China*. Cambridge: Cambridge University Press.
O'Brien, Kevin J., and Lianjiang Li. 2006. *Rightful Resistance in Rural China*. Cambridge: Cambridge University Press.
Ocko, Jonathan K. 1988. "I'll Take It All the Way to Beijing: Capital Appeals in the Qing." *The Journal of Asian Studies* 47 (02): 291–315.
Ogletree, Charles, and Austin Sarat, eds. 2012. *Life without Parole: America's New Death Penalty?* New York: New York University Press.
"OHCHR" Office of the High Commissioner on Human Rights. 2017. "Death Penalty Disproportionately Affects the Poor, UN Rights Experts Warn." United Nations Human Rights Office of the High Commissioner. October 10, 2017. https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22208&LangID=E.
Oman, Charles P., and Christiane Arndt. 2010. "Measuring Governance" 39: 1–27.
Packer, Herbert L. 1964. "Two Models of the Criminal Process." *University of Pennsylvania Law Review* 113: 1–68.
Park, Nancy E. 1997. "Corruption in Eighteenth-Century China." *The Journal of Asian Studies* 56 (04): 967–1005.
"Parole" Supreme People's Court. 2012. Guanyu Banli Jianxing Jiashi Anjian Juti Yingyong Ruogan Falü Wenti de Guiding [Regulations regarding the Specific Application of Law in Handling Cases of Sentence Reductions and Parole].
———. 2014. Zuigao Renmin Fayuan Guanyu Jianxing Jiashi Anjian Shenli Chengxu de Guiding [Supreme People's Court Regulations Regarding Hearing Procedure in Sentence Reduction and Parole Cases].
Parsons, Talcott. 1939. "The Professions and Social Structure." *Social Forces* 17 (4): 457–67.
Pascoe, Daniel. 2016. "Researching the Death Penalty in Closed or Partially-Closed Criminal Justice Systems." In *Changing Contours of Criminal Justice*, edited by Mary Bosworth, Carolyn Hoyle, and Lucia Zedner, 197–212. Oxford: Oxford University Press.
Petersilia, Joan. 1999. "Parole and Prisoner Reentry in the United States." *Crime and Justice* 26: 479–529.
Pils, Eva. 2015. *China's Human Rights Lawyers: Advocacy and Resistance*. London and New York: Routledge.

Poling, Kathleen. 2012. “The Performance of Power and the Administration of Justice: Capital Punishment and the Case Review System in Late Imperial China.” Dissertation, University of California, Berkeley.
Porter, Theodore M. 1996. *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life*. Princeton: Princeton University Press.
Pozen, David E. 2009. “Deep Secrecy.” *Stanford Law Review* 62: 257–340.
Pratt, John. 2007. *Penal Populism*. New York: Routledge.
Prewitt, Kenneth. 1987. “Public Statistics and Democratic Politics.” In *The Politics of Numbers*, edited by William Alonso and Paul Starr, 113. New York: Russell Sage Foundation.
Qian, Nancy, and Jaya Wen. 2015. “The Impact of Xi Jinping’s Anti-Corruption Campaign on Luxury Imports in China.” http://aida.wss.yale.edu/~nq3/NANCYS_Yale_Website/resources/papers/QianWen_20150403.pdf.
Qian, Yang, and Mo Zhang. 2015. “Death Penalty Review Torment of the Soul” [Sixing Fuhe Linghun Zhemo]. *Renwu [People]*, 2015.
Qiang, Zhou. 2016. “Supreme People’s Court Report Regarding Deepening Judicial Transparency and Promoting Judicial Fairness” [Zuigao Renmin Fayuan Guanyu Shenhua Sifa Gongkai, Cujin Sifa Gongzheng Qingkuang de Baogao]. http://www.npc.gov.cn/zgrdw/npc/xinwen/2016- 11/05/content_2001171.htm.
Reed, Bradly Ward. 2000. *Talons and Teeth: County Clerks and Runners in the Qing Dynasty*. Stanford: Stanford University Press.
Ren, Zhongyuan. 2014. “Eight Years After the Return of Death Penalty Review Authority How Does the Supreme People’s Court Spare Life” [Sixing Fuhequan Shangshou Banian Zuigao Fayuan Ruhe Daoxialiuren]. *Southern Weekend*, October 16, 2014. http://www.infzm.com/content/104788.
Renmin Fayuan Bao. 2018. “Life, Surging for the Emblem of Law -- Remembering Wang Fengyong, Presiding Judge of Unit Three of the Criminal Division of the Supreme People’s Court” [Shengming, Wei Fahui Pengpai -- Zhuiyi Renmin Zuigao Fayuan Xingshi Shenpan Disan Tingyuan Shenpanzhang Wang Fengyong], January 23, 2018. http://www.court.gov.cn/zixun-xiangqing-77982.html.
Report. 2015. “Report on the Outcome of Deliberations on the Draft 9th Amendment to the Criminal Law of the PRC” [Guanyu (Zhonghua Renmin Gonghe Guo Xingfa Xiuzheng an (Jiu) (Cao’an)) Shenyi Jieguo de Baogao]. Legal Daily. http://www.legaldaily.com.cn/index_article/content/2015-08/24/content_6235917.htm?node=5955.
Robertson, Matthew P., Raymond L. Hinde, and Jacob Lavee. 2019. “Analysis of Official Deceased Organ Donation Data Casts Doubt on the Credibility of China’s Organ Transplant Reform.” *BMC Medical Ethics* 20 (1): 79.
Robinson, David M. 2001. *Bandits, Eunuchs, and the Son of Heaven: Rebellion and the Economy of Violence in Mid-Ming China*. Honolulu: University of Hawaii Press.
Rosenberg, Gerald N. 2008. *The Hollow Hope: Can Courts Bring about Social Change?* Second. Chicago: University of Chicago Press.
Rosenzweig, Joshua, Flora Sapio, Susan Trevaskes, Sarah Biddulph, and Elisa Nesossi. 2017. “State, Society and the Justice Debate in Contemporary China.” In *Justice: The China Experience*. Cambridge: Cambridge University Press.

Rowe, William T. 2001. *Saving the World: Chen Hongmou and Elite Consciousness in Eighteenth-Century China*. Stanford: Stanford University Press.
Ruskola, Teemu. 2002. "Legal Orientalism." *Michigan Law Review*, 179–234.
Sapio, Flora. 2008. "Shuanggui and Extralegal Detention in China." *China Information* 22 (1): 7–37.
Sarat, Austin. 1998a. "Between (the Presence of) Violence and (the Possibility of) Justice: Lawyering against Capital Punishment." In *Cause Lawyering: Political Commitments and Professional Responsibilities*, edited by Austin Sarat and Stuart Scheingold, 317–46. Oxford: Oxford University Press.
———. 1998b. "Recapturing the Spirit of Furman: The American Bar Association and the New Abolitionist Politics." *Law and Contemporary Problems* 61 (4): 5–28.
———. 2001. *When the State Kills: Capital Punishment and the American Condition*. Princeton and Oxford: Princeton University Press.
———. 2005. *Mercy on Trial: What It Means to Stop an Execution*. Princeton: Princeton University Press.
———. 2019. *The Death Penalty on the Ballot: American Democracy and the Fate of Capital Punishment*. Cambridge: Cambridge University Press.
Sarat, Austin, and Stuart Scheingold. 2006. *Cause Lawyers and Social Movements*. Stanford: Stanford University Press.
———. 2008. *The Cultural Lives of Cause Lawyers*. Cambridge: Cambridge University Press.
Sarat, Austin, and Neil Vidmar. 1976. "Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis." *Wisconsin Law Review*, 171–206.
Scheck, Barry, Peter J. Neufeld, and Jim Dwyer. 2000. *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted*. New York: Doubleday Books.
Scheppele, Kim Lane. 1988. *Legal Secrets: Equality and Efficiency in the Common Law*. Chicago: University of Chicago Press.
Scott, James C. 1990. *Domination and the Arts of Resistance: Hidden Transcripts*. New Haven: Yale University Press.
Scott, Kandis. 2010. "Why Did China Reform Its Death Penalty." *Pacific Rim Law and Policy Journal* 19 (1): 63–80.
Seet, Matthew. 2017. "Finding Reprieve: Should the Global Movement Against Capital Punishment Embrace China's Suspended Death Sentence as a Model for Other Retentionist States to Emulate?" *Chinese Journal of International Law* 16 (3): 453–74.
Seron, Carroll, and Susan S. Silbey. 2004. "Profession, Science and Culture: An Emergent Canon of Law and Society Research." In *The Blackwell Companion to Law and Society*, edited by Austin Sarat, 30–59. Malden, MA: Blackwell Publishing.
Shan, Yuxiao, Shen Fan, and Han Wei. 2017. "Death Penalty for Economic Crimes in China Faces Increased Scrutiny." *Caixin Global*, January 13, 2017. https://www.caixinglobal.com/2017-01-13/death-penalty-for-economic-crimes-in-china-faces-increased-scrutiny-101043227.html.
Simon, Jonathan. 2007. *Governing Through Crime: The War on Crime and the Transformation of America, 1960-2000*. Oxford: Oxford University Press.
———. 2012. "Dignity and Risk: The Long Road From Graham v. Florida to Abolition of Life without Parole." In *Life Without Parole: America's New Death Penalty?*, edited by Charles J. Ogletree and Austin Sarat, 282–310. New York: New York University Press.

Smith, Tobias. 2020. “Body Count Politics: Quantification, Secrecy and Capital Punishment in China.” *Law and Social Inquiry* 45 (3): 706-727.
———. 12019a. “Harsh Justice?” *Made in China* 4 (3). https://madeinchinajournal.com/2019/10/25/harsh-justice/.
———. 2019b. “Power Surge: China’s New National Supervisory Commission.” In *China Story Yearbook: Power*, edited by Jane Golley, Linda Jaivin, Paul Farrelly, and Sharon Strange, 31–35. Acton: Australia National University Press.
Smith, Tobias, and Su Jiang. 2019. “Making Sense of Life Without Parole in China.” *Punishment & Society* 21 (1): 70–88.
Sng, Tuan-Hwee. 2014. “Size and Dynastic Decline: The Principal-Agent Problem in Late Imperial China, 1700–1850.” *Explorations in Economic History* 54: 107–27.
Sohu. 2018. “Wang Fengyong, Presiding Judge of Unit Three of the Supreme People’s Court, Passes Away Due to Illness at Age 48” [Zuigao Faxing Santingyuan Shenpanzhang Wang Fengyong Yinbing Shishi], January 11, 2018. https://www.sohu.com/a/216057116_260616.
Spierenburg, Petrus Cornelis. 1984. *The Spectacle of Suffering: Executions and the Evolution of Repression: From a Preindustrial Metropolis to the European Experience*. Cambridge: Cambridge University Press.
Steiker, Carol S., and Jordan M. Steiker. 2016. *Courting Death: The Supreme Court and Capital Punishment*. Cambridge: Harvard University Press.
Stern, Rachel E. 2013. *Environmental Litigation in China: A Study in Political Ambivalence*. New York: Cambridge University Press.
Stern, Rachel E. and Lawrence J. Liu. 2020. “The Good Lawyer: State-Led Professional Socialization in Contemporary China.” *Law and Social Inquiry*. 45 (1): 226-48.
Stetler, Russell. 2018. “Lockett Symposium: Lockett v. Ohio and The Rise of Mitigation Specialists.” *ConLawNow* 10 (1): 52–63.
Stetler, Russell, and W. Bradley Wendel. 2013. “The ABA Guidelines and the Norms of Capital Defense Representation.” *Hofstra Law Review* 1: 635–96.
Stuntz, William J. 2001. “The Pathological Politics of Criminal Law.” *Michigan Law Review* 100 (3): 505–600.
Strauss, Julia. 2002. “Paternalist Terror: The Campaign to Suppress Counterrevolutionaries and Regime Consolidation in the People's Republic of China, 1950-1953” *Comparative Studies in Society and History.* 44 (1). 80-205.
Su, Yang. 2011. *Collective Killings in Rural China during the Cultural Revolution*. New York: Cambridge University Press.
Sun, Jiahong. 2007. *Deferred Execution in the Qing Dynasty* [*Qingdai de Sixing Jianhou*]. Beijing: Shehui Kexue Wenxian Chubanshe.
Sun, Zhongwei. 2014. *A Judge’s Guide: How to Change the Death Sentence* [*Sixing Gaipan Caozuo Zhiyin*]. Beijing: China Law Press.
Supreme People’s Court. 2020. Main Personnel in the Internal Organization of the Supreme People’s Court. http://www.court.gov.cn/jigou-fayuanbumen.html
———. 2016. The Supreme People’s Court Provisions on People’s Courts Release of Judgments on the Internet [Zuigao Renmin Fayuan Guanyu Renmin Fayuan Zai Hulianwang Gongbu Caipan Wenshu de Guiding]. https://www.chinalawtranslate. com/en/the-supreme-peoples-court-provisions-on-peoples-courts-release-of-judgments-on-theinternet/.

———. 2018. Records of People's Courts Historical Judicial Statistics: 1949-2016 [Renmin Fayuan Sifa Tongji Lishi Dianji: 1949-2016)]. Beijing: China Democracy and Legal System Press.
———. 2019. Several Provisions of the Supreme People's Court on Protection of Parties' Lawful Rights and Interests During Death Penalty Review and Enforcement Procedures [Guanyu Sixing Fuhe Yiji Zhixing Chengxuzhong Baozhang Dangshiren Hefa Quanyi de Ruogan Guiding].
Sutton, Donald S. 2003. "Violence and Ethnicity on a Qing Colonial Frontier: Customary and Statutory Law in the Eighteenth-Century Miao Pale." *Modern Asian Studies* 37 (01): 41–80.
Svolik, Milan W. 2012. *The Politics of Authoritarian Rule*. New York: Cambridge University Press.
Tang, Wenfang. 2016. *Populist Authoritarianism: Chinese Political Culture and Regime Sustainability*. Oxford: Oxford University Press.
Tanner, Harold M. 1999. *Strike Hard!: Anti-Crime Campaigns and Chinese Criminal Justice, 1979-1985*. Ithaca: East Asia Program-Cornell University.
Tanner, Murray Scot. 2000. "State Coercion and the Balance of Awe: The 1983-1986 "Stern Blows" Anti-Crime Campaign." *The China Journal* 44: 93–125.
———. 2005. "Campaign-Style Policing in China and Its Critics." In *Crime, Punishment, and Policing in China*, edited by Børge Bakken, 171–88. Oxford: Rowman & Littlefield.
Teng, Biao. 2012. "China Against the Death Penalty: Report 2012." www.worldcoalition.org.
Ter Haar, Barend. 1992. *The White Lotus Teachings in Chinese Religious History. Honolulu*. Honolulu: University of Hawaii Press.
Tetlock, Philip E. 2017. *Expert Political Judgment: How Good Is It? How Can We Know?* Princeton: Princeton University Press.
The Economist. 2013. "Strike Less Hard." *The Economist*, August 3, 2013.
———. 2015. "Judging Judges," September 24, 2015. https://www.economist.com/china/2015/09/24/judging-judges.
The Guardian. 1949. "Mao Zedong Proclaims the Establishment of the People's Republic of China." *The Guardian*, October 2, 1949. https://www.theguardian.com/world/from-the-archive-blog/2019/oct/01/mao-zedong-proclaims-establishment-of-peoples-republic-of-china-1949.
Tian, Wenchang, and Ruihua Chen. 2013. *The Chinese Experience of Criminal Defense* [*Xingshi Bianhu de Zhongguo Jingyan*]. Beijing: Peking University Press.
Tonry, Michael. 2004. *Thinking about Crime: Sense and Sensibility in American Penal Culture*. Oxford: Oxford University Press.
Trevaskes, Susan. 2007. *Courts and Criminal Justice in Contemporary China*. Lanham, MD: Lexington Books.
———. 2010. *Policing Serious Crime in China: From "Strike Hard" to "Kill Fewer."* London and New York: Routledge.
———. 2015. "Lenient Death Sentencing and the 'Cash for Clemency' Debate." *China Journal* 73: 38–58.
———. 2016a. "Creative Death Penalty Reform in China: The Case of Drug Transportation." *Law & Policy* 38 (2): 143–61.
———. 2016b. "From 'Killing Many' to 'Killing Fewer.'" In *The Death Penalty in China: Policy, Practice and Reform*, edited by Bin Liang and Lu Hong, 123–55. New York: Columbia University Press.

"Two Supremes." Supreme People's Court and Supreme People's Procuratorate. 2016. "The Supreme People's Court and Supreme People's Procuratorate Interpretation on Several Issues Regarding the Applicable Law for Handling Criminal Cases of Corruption and Bribery [Lianggao Guanyu Tanwu Huilu Xingshi Anjian de Jieshi]." https://www.chinalawtranslate.com/spcbribery2/.
Tyler, Tom R. 2006. *Why People Obey the Law*. Princeton: Princeton University Press.
Uelmen, Gerald F. 2009. "Death Penalty Appeals and Habeas Proceedings: The California Experience." *Marquette Law Review* 93 (2): 495–514.
University of San Francisco. 2012. *Cruel and Unusual: US Sentencing Practices in a Global Context*. San Francisco: University of San Francisco School of Law. https://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf.
Van Rooij, Benjamin. 2016. "The Campaign Enforcement Style: Chinese Practice in Context and Comparison." In *Comparative Law and Regulation: Understanding the Global Regulatory Process*, edited by Francesca Bignami and David Zaring, 217–37. Cheltenham: Edward Elgar Publishing.
Wacquant, Loïc. 2009. *Punishing the Poor: The Neoliberal Government of Social Insecurity*. Durham: Duke University Press.
Wakeman Jr, Frederic. 1995. *Policing Shanghai, 1927-1937*. Berkeley: University of California Press.
Waley-Cohen, Joanna. 1991. *Exile in Mid-Qing China: Banishment to Xinjiang, 1758-1820*. New Haven: Yale University Press.
Wang, Doudou. 2009. "Working '5+2' Handling Cases 'Day and Night' -- An Investigation of the True Conditions of a Death Penalty Review Judge" [Gongzuo '5+2' Ban'an 'Bai +hei' - Sixing Fuhe Faguan Zhenshi Zhuangkuang Diaocha]. *Fazhi Ribao*, January 16, 2009. http://www.lawyers.org.cn/info/11ede18998d38bd1441bc5dd2b65b3d4.
Wang, Fang, Shuo Chen, and Dan Wang. 2018. "No Need for Draco's Code: Evidence from China's "Strike Hard" Campaigns." *Issues & Studies,* 1-18.
Wang, Shenghua. 2016. *Research on Suspended Death Penalty with Limited Commutation* [*Sihuan Xianzhi Jianxing Yanjiu*]. Beijing: China University of Politics and Law Press.
Wang, Yueduan. 2020. "'Detaching' Courts from Local Politics? Assessing the Judicial Centralization Reforms in China." *China Quarterly,* Forthcoming.
Wang, Yuhua. 2015. *Tying the Autocrat's Hands*. New York: Cambridge University Press.
Wang, Yuhua, and Carl Minzner. 2015. "The Rise of the Chinese Security State." *China Quarterly*, 339–59.
Weber, Max. 1965 [1919]. *Politics as a Vocation*. Philadelphia, PA: Fortress Press.
Welsh, William. "Legal Origins of Penal Terror: China's 1983 Strike-Hard Campaign. Unpublished paper on file with author.
Western, Bruce. 2006. *Punishment and Inequality in America*. New York: Russell Sage.
Wong, Edward. 2016. "Ling Jihua, Ex-Presidential Aide in China, Gets Life Sentence for Corruption." *New York Times*, July 4, 2016. http://www.nytimes.com/2016/07/05/world/asia/china-ling-jihua-sentence.html.
Woodside, Alexander. 2006. *Lost Modernities: China, Vietnam, Korea, and the Hazards of World History*. Cambridge: Harvard University Press.
World Prison Brief. 2020. *China.* https://www.prisonstudies.org/country/china
Wu, Hongyao, and Liang Zhang. 2017. "Defendant's Right to Legal Aid During the Death Penalty Review Process - Based on Empirical Study of 255 Death Penalty Review"

Decisions [Sixing Fuhe Chengxu Zhong Beigaoren de Lüshi Bangzhuquan - Jiyu 255 Fen Sixing Fuhe Xingshi Caiding Shu de Shizheng Yanjiu]. *Falü Shiyong*, no. 7: 61–69.
Xinhua. 2007. "Suspended Death Sentences Exceed Immediate Executions for 1st Time," November 23, 2007. http://www.chinadaily.com.cn/china////2007-11/23/content_6276102.htm.
———. 2013. "The Supreme Court Carefully Explains China Judgments Online Publication Measures "[Zuigao Fayuan Xiangjie Shengjiao Caipan Wenshuwang Shangwang Gongkai Banfa], July 3, 2013. http://m.china.caixin.com/m/2013-07-03/100550701.html.
———. 2017. "China Has 300,000 Lawyers," January 9, 2017. http://www.xinhuanet.com//english/2017-01/09/c_135967814.htm.
Xiong, Moulin. 2016. "The Death Penalty After the Restoration of Centralized Review: An Empirical Study of Capital Sentencing." In *The Death Penalty in China: Policy, Practice and Reform*, edited by Bin Liang and Hong Lu, 214–46. New York: Columbia University Press.
Xu, Xiaoqun. 2007. "The Rule of Law without Due Process: Punishing Robbers and Bandits in Early-Twentieth-Century China." *Modern China* 33 (2): 230–57.
Yan, Zhang. 2016. "No Parole for High-Ranking Party Boss." *China Daily*, October 10, 2016. http://english.court.gov.cn/2016-10/10/content_27008023.htm.
Yang, Kuisong. 2008. "Reconsidering the Campaign to Suppress Counterrevolutionaries." *The China Quarterly* 193: 102–21.
Yin, Bo. 2018. "Effectiveness of Criminal Defense for the Death Penalty Cases: Situations, Dilemmas and Solutions" [Sixing Anjian Bianhu Youxiaoxing Yanjiu: Kunjing Yu Chulu]. *Faxue Zazhi*, 115.
Yip, Martin. 2012. "Death for Fraud: China Debates Wu Ying's Sentence." *BBC News*, February 24, 2012. https://www.bbc.com/news/world-asia-china-17071311.
Yu, Zhigang. 2016. "The Abolitionist and Retentionist Debate." In *The Death Penalty in China: Policy, Practice and Reform*, edited by Bin Liang and Hong Lu, translated by Charlotte Hu, 156–86. Columbia University Press.
Zeng, Zhaojin, and Joshua Eisenman. 2018. "The Price of Persecution: The Long-Term Effects of the Anti-Rightist Campaign on Economic Performance in Post-Mao China." *World Development* 109: 249–60.
Zhang, Jiahua. 2013. "Capital Cases: From 'Having' Legal Defense to Having 'Effective' Legal Defense" [Sixing Anjian: Cong 'You' Bianhu Dao 'Youxiao' Bianhu]. *Zhonghuo Shehui Kexue Bao*, July 13, 2013.
Zhang, Mingkai. 2008. "The Abolition of Capital Punishment Does Not Require A Life without Parole Replacement" [Sixing de Feizhi Bu Xuyao Zhongshenxing Tidai]. *Faxue Yanjiu*, no. 2: 79–94.
Zhang, Ning. 2016. "Crimes of Counterrevolution and Politicized Use of the Death Penalty during the Mao Era." In *The Death Penalty in China: Policy, Practice and Reform*, edited by Bin Liang and Lu Hong, 62–96. New York: Columbia University Press.
Zhang, Taisu. 2017. "Disaggregating the Court: A Methodological Survey of Research on the Supreme People's Court of China." *China Law and Society Review* 2 (2): 154–76.
Zhang, Yan. 2018. "All Criminal Cases to Have Defense Lawyers." *China Daily*, January 19, 2018. http://www.chinadaily.com.cn/a/201801/19/WS5a613083a3106e7dcc1352ce.html.
Zheng, Xi. 2018. "A Study of the Investigative Power of the National Supervisory Commission" [Jiancha Weiyuanhui Jishu Zhenchaquan Yanjiu]. *Study and Exploration* 12 (1): 79–85.

Zheng, Yongnian, and Sow Keat Tok. 2007. “Harmonious Society and Harmonious World: China’s Policy Discourse under Hu Jintao.” *Briefing Series* 26: 1–12.
Zhu, Lin. 2015. “Punishing Corrupt Officials in China.” *China Quarterly* 223: 595–617.
“Zhuoan” Sichuan Zhuoan Lüshi Shiwusuo. 2016. *Handbook of Practical Essentials for Handling Drug Crime Cases* [*Dupin Fanzui Ban’an Shiwu Bibei Shouce*]. Sichuan Zhuoan Lüshi Shiwusuo.
Zimring, Franklin E. 2003. *The Contradictions of American Capital Punishment*. New York: Oxford University Press.
———. 2006. “The Necessity and Value of Transnational Comparative Study: Some Preaching from a Recent Convert.” *Criminology & Public Policy* 5 (4): 615–22.
Zimring, Franklin E., and Gordon Hawkins. 1993. *The Scale of Imprisonment*. Chicago: University of Chicago Press.
Zimring, Franklin E., Gordon Hawkins, and Sam Kamin. 2001. *Punishment and Democracy: Three Strikes and You’re Out in California*. New York: Oxford University Press.
Zimring, Franklin E., and David T. Johnson. 2012. “The Dark at the Top of the Stairs: Four Destructive Influences of Capital Punishment on American Criminal Justice.” In *The Oxford Handbook of Sentencing and Corrections*, edited by Joan Petersilia and Kevin Reitz, 737–52.
Zimring, Franklin, and Gordon Hawkins. 1995. *Incapacitation: Penal Confinement and the Restraint of Crime*. New York: Oxford University Press.
Zyl Smit, Dirk van. 2002. *Taking Life Imprisonment Seriously: In National and International Law*. Leiden: Brill.

US Cases

Baze v. Rees 533 US 35 (2008)
Furman v. Georgia 408 US 238 (1972)
Gregg v. Georgia 428 US 153 (1976)
Hall v. Florida 502 US 701 (2014)
Jones v. Chappell 31 F. Supp. 3d 1050 (2014)
Kennedy v. Louisiana 554 US 407 (2008)
Madison v. Alabama 585 US ___ (2019)
Payne v. Tennessee 508 US 808 (1991)
Powell v. Alabama 287 US 45 (1932)
Schick v. Reed 419 US 256 (1974)

Interview Appendix

Interviews are a major source of empirical evidence for this project. This was a happy accident. I initially intended to use archival materials to write a history of suspended execution in China. Early on in my initial fieldwork in Beijing in 2015, a colleague invited me to attend a public law talk on the 20th anniversary of the O.J. Simpson trial. I struck up a conversation with a Chinese lawyer seated beside me. I asked this lawyer about his area of practice and the lawyer mentioned death penalty review cases. At that point I was not even aware that condemned men and women in China could retain counsel for the death penalty review process. It occurred to me that lawyers might have things to tell me about capital punishment. I decided to track down lawyers to learn more. Soon, these interviews displaced my archival work and became the backbone of my project. All told, I conducted 75 interviews for this project over 18 months of fieldwork in China between 2015 and 2019.

Doing interviews on a sensitive topic in an illiberal country poses a variety of challenges. One challenge is simply finding people to interview. There is no database of lawyers who handle death penalty cases. Early on I considered doing a random sample of all lawyers, by, for example, visiting every law firm in a certain geographic area and asking to speak with lawyers who have done criminal work. This approach can be useful for learning about the legal profession in China (e.g. Givens 2013). But I worried that approaching strangers to talk about the death penalty might draw political scrutiny and put me or my interlocutors at risk. I also wondered whether the average lawyer would have enough death penalty experience to make this method worth the time. Ultimately, I decided that since the goal of the project was to get information about capital punishment, I should draw on a purposive sample of lawyers with as much death penalty experience as possible.

I tried to find lawyers with capital punishment experience in a variety of ways. First, I made an attempt to use published cases to identify them. I collected 573 death penalty decisions published on *China Judgments Online* and found that fifty-three indicated the presence of legal counsel. Unfortunately, the name of counsel is not provided; the only indication of counsel in each decision is a stock phrase: "the opinion of the lawyer was heard" (*tingqule lüshi de yijian* 听取了律师的意见) (see Chapter Six). I used other identifiers in the case such as the defendant's name to search for these cases online. I hoped that I could connect the cases to lawyers through media coverage, but I only turned up the names of a couple of attorneys this way. I also searched websites that advertise legal services in order to find lawyers. I identified a few lawyers on these sites who claimed practice expertise in capital punishment. However, initial cold calls to these lawyers were not well-received and I abandoned this method.

Ultimately, I used a snowball sample. That is, I identified people in my professional network who had handled death penalty cases and asked them if they could introduce me to others. Because criminal justice practitioners in China wear many hats, I didn't limit my interviews to just people who identify as attorneys: law professors sometimes handle cases on the side; judges leave the bench to practice defense; police officers take the bar. In the end, about half of my interviews were with someone who had represented a client in a capital case, and half of the people in that group had handled such a case during the death penalty review phase. I brought the snowball sampling process to a close at the point when most people I interviewed recommended contacts who were already in my network. This is evidence that I reached sample saturation.

It is worth noting that my sampling method has a few shortcomings. For one, it would not capture any individuals with lots of death penalty experience who were not well networked.

However, in a heavily connected professional environment such as China's legal market, I do not believe this is a big concern. For another, as Gould and Barak note in their work on US death penalty lawyers (2019), a snowball sample is unlikely to capture lawyers who are well-known but have a poor reputation in the legal community. This means my interviews may overemphasize the zealous lawyers and underemphasize the shoddy ones.

It also bears noting that my sample only includes people who were willing to speak with me. Many of the people to whom I was introduced declined to be interviewed. There are lots of reasons people might not wish to speak with me; one of those reasons is surely sensitivity around the topic of the death penalty in China. People rarely told me this themselves outright. Instead, I often came to understand it indirectly. For example, one contact introduced me to lawyers in another city. I arranged a series of meetings and set up a trip. As my trip neared, a couple of these lawyers simply stopped communicating. I had to cancel the interviews. Another contact later told me that someone on a professional online social network raised concerns about meeting with a foreign researcher, which is why these individuals went silent. The point of this story is that my sample may not include people who see this work as most risky, and therefore may not adequately capture the attitudes those individuals hold about the political sensitivity of the death penalty.

I began research in Beijing, where a majority of the interviews took place. It made sense to start in Beijing because it is both a huge legal market and the location of the Supreme People's Court. Over the course of the project I also took research trips to three other provinces. I did this for a few reasons. First, because the SPC is located in Beijing, it is an anomalous site. It is the only location in China where first instance trials, second instance trials and death penalty review all occur in one place. Most lawyers face a geographic challenge in participating in second instance trials in the provincial capital and in death penalty review procedures in Beijing (see Chapter Four); I wanted to talk to those lawyers too. Second, I wanted to uncover regional variation in death penalty administration. I selected two inland provinces that have a reputation for high rates of capital punishment because of the drug trade, and one coastal province that does not. I took one or more trips to each of these places. Most of these trips lasted about a week. While there, I visited multiple locations, focusing on both provincial and more local practitioners and law firms. I also conducted a small number of interviews in other places as well. These included one-off interviews with prominent lawyers in other parts of China or abroad, as well as a handful of interviews with foreign lawyers who had experience working with Chinese defense attorneys during various legal training initiatives.

My interviews were semi-structured. I came with a set of standard questions, but conversation often diverted from this path. Some interviews lasted a few minutes; others lasted a few days. Most interviews were one-on-one, though occasionally people asked to meet with others present. Interviews typically took place in person at a location of the interviewee's choosing, usually law firms, cafes, university offices or parks. I conducted interviews in Chinese, unless the person preferred to converse in English. I took contemporaneous handwritten notes during the interview and wrote thorough fieldnotes immediately after each interview concluded. Although audio recordings of these conversations would have yielded a more accurate transcript, I was concerned that recordings would put me and others at risk, so I did record my interviews.

Throughout this project, interview citations appear in brackets like this [X10]. The X indicates an interview; the number indicates the number in my interview index in the order they were conducted. I have chosen to catalogue by interview number, rather than interviewee. A small number of individuals were interviewed multiple times (so they show up under multiple citations),

and a small number of interviews involved multiple individuals (meaning one interview citation represents multiple people).

It is common to include an interview list in an appendix such as this one. These lists often provide some basic interview details, such as location and date of interview and some basic biographic data about each person. I have chosen not to provide such a list here. I doubt that the basic information provided in an interview list adds much useful information for most readers. But I am confident that in a society such as China where state surveillance cameras are now as ubiquitous as traffic lights and communication networks are subject to government scrutiny, providing such information could conceivably make it easier to identify my contacts. Where I believe a demographic or locational detail is relevant to a particular claim or quotation, I endeavor to share it within the body of the text. For a similar reason, I have refrained from the thick description that often animates qualitative research. While this yields a marginally less vivid experience for my readers, it adds marginally more protection for the people I spoke with.