

THE DEATH PENALTY AND INSTITUTIONAL REFORM: THE CASE OF CHINA

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Abstract: This paper considers the implications of recent changes in China's death penalty legislation for the nature and trajectory of its political reforms. Borne out of moral opposition to state killings that followed World War Two, the global movement to abolish capital punishment has experienced major gains over the last six decades. However, the success and spread of the abolitionist norm during this period owes much to a concomitant decline in retentionist dictatorships, suggesting a causal link between death penalty reform and political transition. Given this, changes in the administration of criminal justice in China since 1978 may be a cause or a consequence of post-Mao liberalization and a sign of further changes to come—the policy of the Hu-Wen government to “Kill Fewer, Kill Carefully” represents the latest in a gradual move toward China's eventual abolition of the death penalty, the developing rule of law, improvement of human rights, and eventual democratization. This paper, however, argues that the policy amounts to the deeper institutionalization of capital punishment in Chinese jurisprudence, and that its retention, connected to key aspects of state performance and legitimacy, is in fact a greater portent of the regime's longevity than its demise.

Keywords: China, capital punishment, human rights, democratization, rule of law, legitimacy

Introduction

Autocratic government and the institution of capital punishment have become coincidentally rarer over the past sixty years. According to Amnesty International, whose figures are among the most accurate and widely cited, more than half of all countries had abolished the death penalty as of 2011 and an overwhelming majority did not use it, in contrast to 1945 when just twenty percent of the world was death penalty free (Amnesty International 2012).¹ While this decline is due partly to the global abolitionist movement that emerged after World War Two and gathered momentum throughout subsequent decades (Hood and Hoyle 2008; Schabas 2004), abolitionism gained considerable currency from shifts in domestic criminal policy brought on by the declining number of authoritarian regimes during the same period. The post-War disappearance of totalitarian states has been a particular boon to the movement, as such states, prevalent a half-century ago, have almost completely vanished. Abolitionism also benefitted considerably from the collapse of communism and ensuing third wave of democratization. As one authority reports, “over the eleven years from 1989 to 1999 inclusive, 40 countries became abolitionist: 39 of them for all crimes in all circumstances, in peacetime or wartime, in civil or military law: an average of over three a year” (Hood and Hoyle 2008, 13).

This paper interrogates the empirical link between capital punishment reform and institutional change by tracing the evolution of death penalty legislation in China. Most of the time, the introduction of death penalty controls is seen as part of the advancing rule of law, one of several critical steps along the path from authoritarian rule and a key ingredient for democratic consolidation. The case of China is hardly immune to such thinking, where rule of law development is most often taken as evidence of democracy's forward march and a signpost of eventual transition (Diamond 2003; Lubman 1999; Potter 1994; Peerenboom, 2003). At the very least, China's legal reforms of the past thirty years are thought to represent a gradual softening of authoritarianism, evinced in greater government accountability and a growing respect for human rights.

On the other hand, this study finds that the institutional proliferation around the death penalty in China is a product of state pragmatism, indicative neither of eventual abolition or impending democratization but a calculated effort by the Chinese Communist Party (CCP) to restore and protect popular legitimacy, a matter it considers to be of gravest consequence and a tent pole of its rule (Gilley 2008; Shue 2004; Heberer and Schubert 2006; Laliberte and Lanteigne 2008). Designed to protect popular consent—and thus Party hegemony—by reducing misapplications of the death penalty while simultaneously strengthening guidelines for its retention, the 2007 “Kill Fewer, Kill Carefully” laws offer the most recent affirmation of this survival strategy in action. Far from progress toward abolition, the evolution of China's capital punishment system captures the “self-perfectionism” of the post-Deng leadership more broadly, a conviction that “if the Party's ideology, approaches, and policies can be retooled properly, the CCP's seventy million members can still lead China from strength to strength” (Lam 2006, 35).

In the sections below, I first explain the rise and spread of the abolitionist movement, pointing out the role of domestic institutions in its success. Using data from Amnesty International and the Freedom House *Freedom in the World 2012* Survey, I then describe the connection between abolition and authoritarian breakdown. Next I supply some historical background to the developing rule of law around capital punishment in China, before providing evidence attesting to the Kill Fewer, Kill Carefully policy as a strategy for CCP legitimation and survival. I then conclude by sketching some implications of death penalty reforms and their future in China.

Explaining the Abolitionist Trend

The advance of abolitionism over the last sixty years is primarily attributed to the creation of international legal institutions and treaties that include specific prohibitions on the use of capital punishment. Two of the earliest and most influential documents to this effect were the UN Universal Declaration of Human Rights in 1948 and the International Covenant on Civil and Political Rights of 1966, both of which have been consistently invoked by abolitionists arguing that the death penalty violates two basic human rights as spelled out in those documents: the right to life, and protection against cruel, inhumane, or degrading punishment. Over time, these sentiments crystallized to form the basis of a global abolitionist movement that came to

occupy “a central theme in the development of international human rights law” (Schabas 1996: 30). Indeed, the late twentieth century saw a proliferation of new agreements aimed at permanently ending the use of executions worldwide. The EU now specifically cites ending the death penalty as a core diplomatic objective, making clear its intentions to “progressively restrict the number of offenses for which it can be imposed,” and “establish a moratorium on executions with a view to completely abolishing the death penalty” (1998).² The European Convention on Human Rights has enforced a specific protocol requiring abolition of the death penalty among members since 1985 (Hodgkinson 2004: 21). This measure was itself an extension of the landmark Protocol No. 6 adopted two years earlier, which committed member states to relinquishing the death penalty. Enacted in 2002, Protocol No. 13 reaffirmed that commitment by expanding the scope of prohibition further, stipulating that for all nations subject to the Convention, the death penalty shall be abolished “in all circumstances” (Council of Europe 2002). Most recently, the Moratorium on Capital Punishment introduced at the UN by Italy and Chile calls for an immediate general suspension of the death penalty across the world. The resolution passed the General Assembly twice, once on November 15, 2007, and again on December 15, garnering large majorities on both occasions.

Another version of the global institutions hypothesis places the emphasis on international law as a mechanism for the spread of human rights values. Sometimes this is articulated in terms of state adaption to an environment in which the benefits (or costs) associated with norm adoption have changed (Simmons and Elkins 2004). At other times it is described as a process of learning about those benefits from those who adopted already through participation in a global community (Elkins and Simmons 2005; Boli and Thomas 1997). The international relations literature on norm diffusion and compliance emphasizes the importance of socialization and learning in the adoption of certain norms, including the right to life and human dignity (e.g. Checkel 1997; Risse, Ropp and Sikkink 1999; Khagram, Riker, and Sikkink 2002). Much of the work on transnational human rights advocacy, for example, focuses on persuasion as an instrument of normative change, and the concern of norm violators for their reputation and image on the global stage (Price 2003, 587; Burgerman 2001).

Yet neither of these approaches satisfactorily explains patterns of retention and abolition around the world. For one thing, there is still “no stable universal standard” in the way the death penalty is applied (Asad 1997). Rates and methods of execution continue to vary widely. Moreover, abolition has never been fully recognized as a customary norm of international law. Rather, “the use of the death penalty sits squarely within those issues which are fundamentally matters of domestic criminal policy” (Schabas 1996, 17). Thus it is largely state-level institutions—not international ones—that underpin the substantial variation in death ordinances cross-nationally. As Risse-Kappen puts it, domestic institutions “mediate, filter, and refract the efforts of transnational actors to influence policies in various issue areas,” especially human rights (1994, 213).

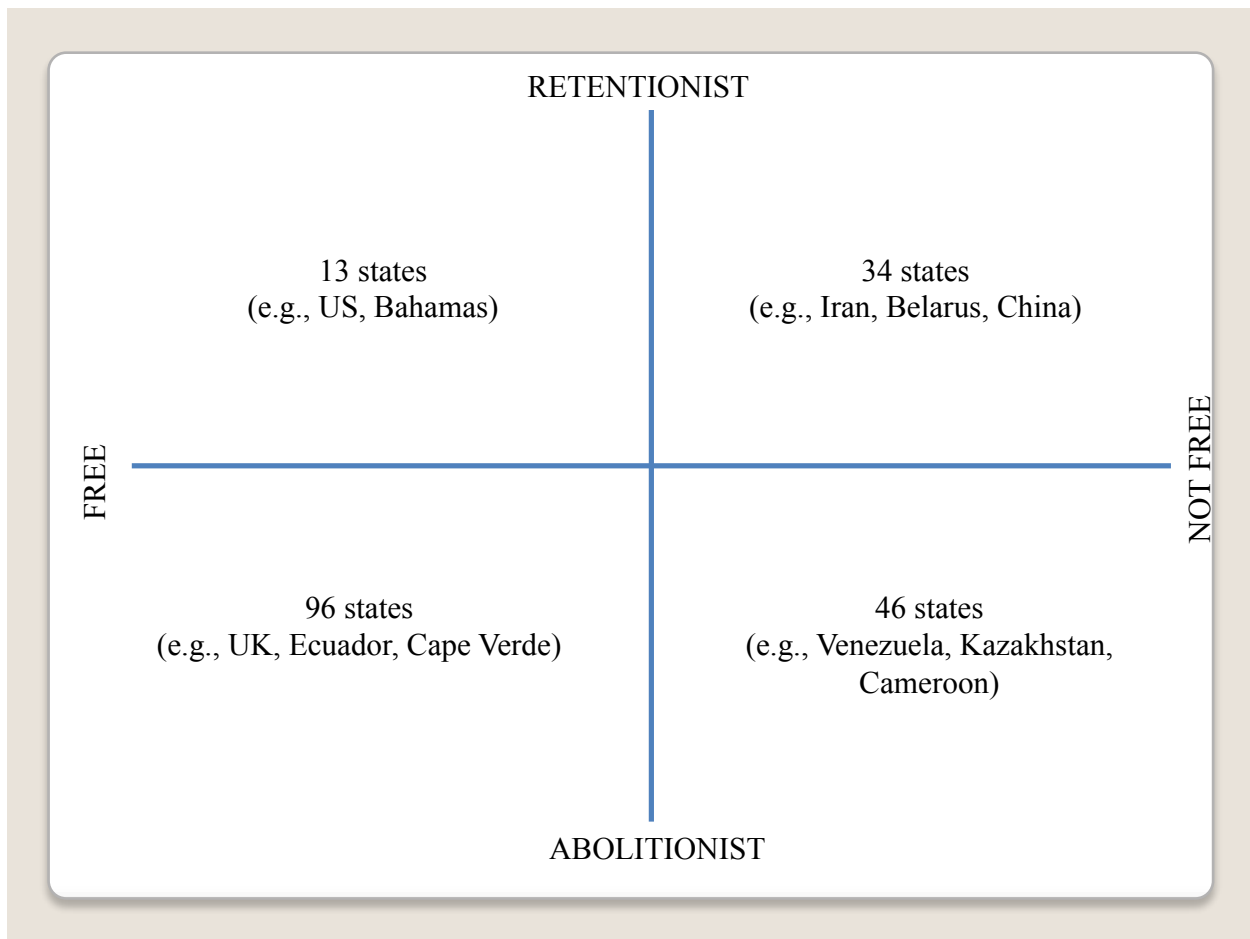
Political Transitions and the Death Penalty Worldwide

Some institutional types are more disposed to abolition than others. While varying widely in terms of competitiveness and capacity to repress, authoritarian states nevertheless

share a relative insularity from exogenous pressure for norm compliance (Hawkins 2002). For this reason, such states are described as “hard cases” for successful moral entrepreneurship, including on matters related to human rights and legal reform (Price 2003, 593). Democracies, on the other hand, tend to have structures that are more permeable, making them less norm-resistant and more compliant with global prohibition regimes such as the one surrounding the death penalty (Hawkins 2008; Tilly 2006; Haynes 2005).

This prediction is borne out by the correlation between the declining number of dictatorships and the gains of the abolitionist movement over the last sixty years. In 1945, only 21 states had abolished capital punishment, and just 24 were politically free. By 2012, those figures had risen to 142 and 107 respectively. Not all countries that transitioned from authoritarianism after the Cold War achieved democratic consolidation, but many did (Levitsky and Way 2010, 21), and many of those eliminated the death penalty as part of that process. Totalitarian regimes—particularly those of Leninist heritage—saw capital punishment as a necessary and indispensable tool for maintaining control over society, and are now all but extinct.

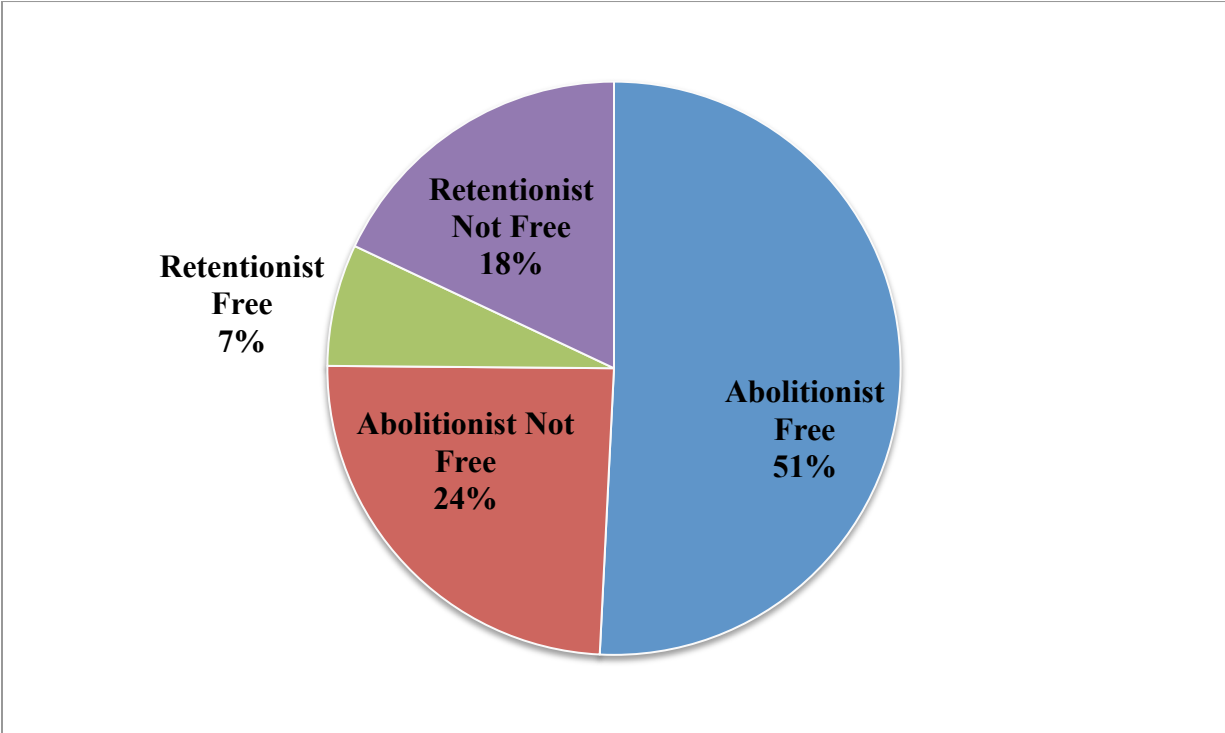
Fig. 1. Capital Punishment Status by Regime Type, for All States, 2012



Source: Amnesty International, Freedom House

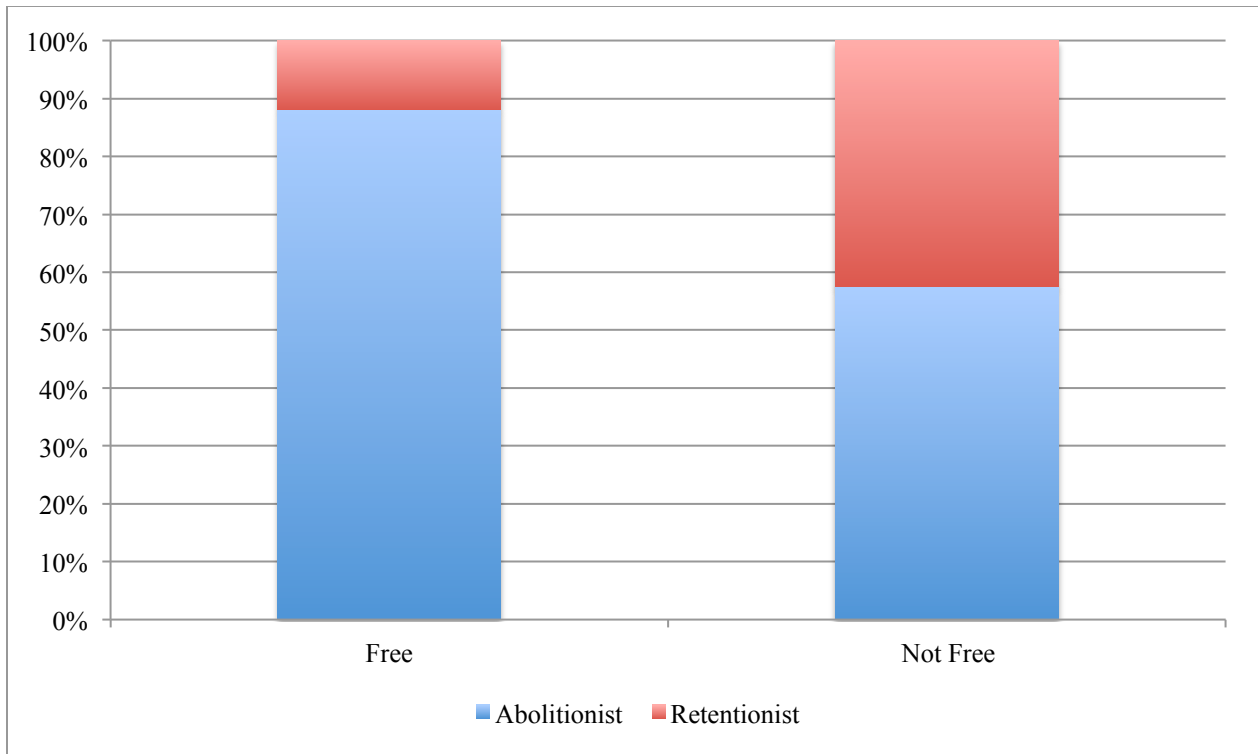
Figure 1 depicts the strength of this bivariate relationship internationally, showing a breakdown of 189 states into four separate categories. Those appearing in the lower left quadrant, politically free abolitionist countries, comprise an absolute majority of all countries worldwide at 96 states in total, or about 51 percent. Retentionist democracies, which are shown in the upper left quadrant, are by far the smallest group at around seven percent. This category includes major exceptions that buck the overall trend toward abolitionism in democracies, such as the US and Japan. The correlation is an admittedly imperfect one, however, as 46 unfree states are also abolitionist, making them the second largest group overall. Politically unfree retentionist states, such as China, make up the final category in the top right-hand quadrant, comprising 34 countries or roughly 18 percent of the total. Representing these data another way, Figure 2 reiterates the basic point nicely—not only are the majority of abolitionist states politically free democracies, but abolitionist democracies account for the largest segment of all states by a considerable margin. Indeed, as Figure 3 demonstrates, 88 percent of democracies are abolitionist, while only about 58 percent of non-democracies are.

Fig. 2. Regime Classification as Percentage of All States, 2012



Source: Freedom House, Amnesty International

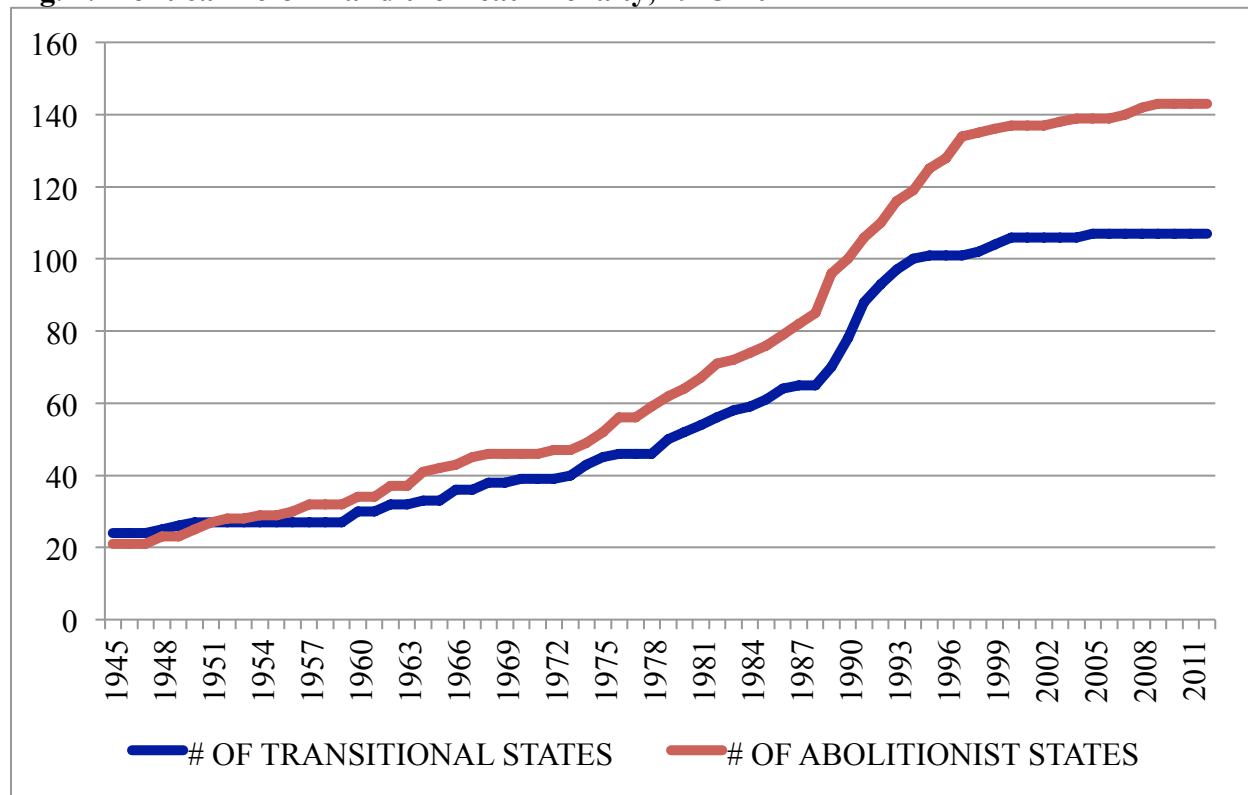
Fig. 3. Proportion of Abolitionist to Retentionist States, by Regime Type, 2012



Source: Freedom House, Amnesty International

Figure 4 underscores the point that there are far more states in the “politically free” category than there used to be, and that this trend is concurrent with the growth and spread of abolitionism. The red line in Figure 4 represents the growth in the number of abolitionist states since 1945. The blue line represents all those that underwent transition from authoritarian rule during the same period. Though not precise mirror images, the form and trajectory of the two lines is strikingly similar, suggesting that in general, and with important exceptions, the world has become both more abolitionist and politically free.

Fig. 4. Political Reform and the Death Penalty, 1945-2012



Source: Freedom House, Amnesty International

It is of course no accident that the point of steepest increase in both lines falls between 1989 and 1991. During these years, a significant number of countries clustered mostly in Eastern and Southern Europe became both free and abolitionist, some of them seemingly overnight. Most of the former Soviet satellites and Yugoslav states dropped the death penalty when those systems collapsed (Hood and Hoyle 2008, 50). Thus the third wave was a direct catalyst of the sharp rise in abolitionist states during the early 1990s. In a broader sense, the increase in abolition from 1945 until 2000 corresponds directly to the second and third waves of democratization, during which time the number of free and independent states rose exponentially.

Evidence from within some third wave countries suggests that more than mere correlation is at work here. In several such cases, the abolition of the death penalty came about as a result of the “settling of past accounts” that often accompanies transitions from authoritarian rule (O’Donnell and Schmitter 1986, 28). Much of the time that process signifies a critical step forward in the rule of law, and is an essential part of coming to grips with and burying an especially repressive past. South Africa officially discontinued its use of the death penalty in 1995 following a ruling of its Constitutional Court and an extensive indictment by a Truth and Reconciliation Commission of the apartheid regime’s overtly racialized application of executions. Romania signified the demise of the Ceausescu dictatorship by immediately abandoning its capital

punishment provisions. As one observer writes, abolition is rooted directly in “the rejection of cruelties and injustices associated with totalitarianism, of which capital punishment may be regarded as a symbol,” and is therefore also seen as “an appropriate way to welcome democratization” (Hood 2001, 339).

Evolution of the CCP’s Death Penalty Policy: The Emergent Rule of Law

All scholarship on the death penalty in China confronts the challenge of estimating the true number of executions carried out each year, which is classified by the state. As a consequence of the culture of obfuscation and secrecy surrounding China’s death penalty practices, analysts are forced to rely on a range of outside data sources, including Amnesty International’s annual execution reports, criminologist Roger Hood’s Quinquennial reports to the UN Secretary General, and the testimony of myriad Chinese NGOs such as Human Rights in China (HRIC), the Dui Hua Foundation (DHF), Chinese Human Rights Defenders (CHRD), and the China Human Rights Lawyers Concern Group (CHRLCG). Though imprecise, data from these sources nevertheless reveal that the death penalty has been widely in use throughout the country since 1949, and remains so. All are more-or-less in agreement with respect to the rate of executions over the last twenty years, and are sufficiently reliable to conclude, as two experts recently did, that “for the last two decades, the PRC has carried out thousands of executions each year, accounting for at least 90 percent (and probably more) of all the executions in the world. In absolute terms, this makes China the world’s execution leader, and whatever country is in second place is not close” (Johnson and Zimring 2009, 232).

There is also general agreement among the available data sources that the raw number of executions has declined since the late 1990s. Estimates resulting from the “strike hard” (*yanda*) anti-crime campaign between 1998-2001 have topped 15 000 (Nathan and Gilley 2003), though more conservative figures peg the death toll at closer to 10 000 (Tanner 2000; Qi 2005; Bakken 2004; Wang 2007).³ By contrast, estimates from the period 2005-2006 place the number of sentences carried out at 7500-8000 (Dui Hua Foundation 2007a; Yardley 2007).

This drop in executions has coincided with the gradual expansion of a formal legal apparatus to reign in and regulate the death penalty in China. During the Maoist years the practice was vigorously employed for expressly political purposes, in keeping with the Leninist principle that severe forms of criminal punishment were necessary in order to protect the revolution from bourgeois reactionaries.⁴ Indeed, the elimination of counterrevolutionaries by means of execution was important even before 1949, and played a key role in the Communist rise to power (Oda 1983, 54). This trend simply continued throughout the early years of the PRC, when criminal procedures in general served as “a blunt instrument of terror” (Cohen 1968, 9; see also Dikotter 2002, 81). However, the more informal, ad hoc application of the death penalty that occurred during the civil war was replaced with a set of more official bureaucratic mechanisms

after 1949, beginning in 1950 with the General Rules for the Organization of People's Tribunals, the 1951 Law for the Punishment of Counterrevolutionaries, Provisional Law on Guarding State Secrets, and Provisional Law on Penalties for Undermining the State Monetary System, and the 1952 Instructions Relating to the Suppression of Counterrevolutionary Activity and the Law on Penalties for Corruption. Their chief objective was to identify and punish any and all who threatened the stability of the regime by sowing unrest, making as fearful an example of them as possible (Dutton 2005). Hence no distinctions were made at this time between class enemies and criminals. In a 1957 speech, Mao named "exploiters, counter-revolutionaries, landlords, bureaucrat-capitalists, robbers, swindlers, murderers, arsonists, hooligans and other scoundrels who seriously disrupt social order" as fit for execution, and acknowledged that by the mid-1950s some 800 000 of these individuals had been sentenced to death by the People's Tribunals (Mao 1989, 142).⁵

Maoist attitudes toward the death penalty have characterized official policy since 1978 in meaningful ways. Specifically, capital punishment has remained consistently important as a way for the Party to shape socialist society and preserve its rule, even as reforms to the practice continued to be introduced (Zhang 2008). Zhang Ning writes of an "instrumental conception of the legal system" which is "subject to ideological and political imperatives," and consistent across four generations of CCP leadership (2005). Thus, for Deng Xiaoping and his immediate successors "Law, including in particular the Criminal Law and its provisions on the death penalty, are seen as 'weapons' (*wuqi*), by means of which the Chinese Communist administration continues its dominance of the Chinese people" (Palmer 1996, 106; Clarke and Feinerman 1995). Although the adoption of the Criminal Law in 1979 was ostensibly a response to the radicalization of executions during the Cultural Revolution, the 1983 Yanda anti-crime campaign signaled a revival of Maoist sensibilities regarding the death penalty, and has been dubbed "the bloodiest chapter in post-Mao Chinese politics" (Tanner 2000, 93).⁶ Indeed, there was a pervasive sentiment during this period within Party ranks and among mainland legal scholars that "the primary function [of the law]...is to suppress 'enemies'" (Cui 1983, 14). In a January 1986 address to the Standing Committee, Deng himself referred to executions as an "indispensable means" of educating the masses about proper conduct, accused the courts of being "too soft on criminals," and called for stiffer use of the death penalty against corrupt regime officials, recidivists, and organizers of "secret reactionary societies," among others (1987, 137-38).

Nevertheless, Deng's introduction of the Criminal Law and Criminal Procedure Law was a major step forward for procedural reforms. Tabled at the Third Plenary of the Eleventh Central Committee, it represented a first attempt to create a comprehensive national death penalty framework, in keeping with the Deng's famous slogan: "There must be laws for people to follow, these laws must be observed, their enforcement must be strict, and law-breakers must be dealt with accordingly" (Lo 1992, 654). This more juristic approach was aimed primarily at decreasing the unknown but undoubtedly huge number of extrajudicial executions that took place

between 1966 and 1974, and thus served to distinguish the second generation leadership from its predecessor (Bakken 2004, 80). Specifically, the new laws made provisions for 28 capital offenses, including a host of economic crimes and a brand new category of infractions related to “endangering public security” (*weihai gongong anquan zui*), while at the same time specifying that the death penalty was only to be applied in such cases “when harm to the state and the people is especially serious and the circumstances especially odious.”⁷ They also envisaged some of the first official prohibitions on the death penalty in China, including the killing of juvenile offenders, and named death by a single gunshot to the back of the head as the only state-sanctioned method of execution (Ye 2006).

These reforms were expanded further with the 1996 Amendments to the Criminal Procedure Law, which focused predominantly on the strengthening of defendants’ rights. Among the more notable provisions was the mandatory appointment of defense counsel in all capital cases, as well as the strengthening of trial procedures to prevent executions resulting from judicial incompetence (Zhou 1998). However, despite the slow creep of legal reforms there remained a strong official reliance on the death penalty for crime deterrence and order maintenance, especially after Tiananmen and for most of the 1990s and early 2000s. Jiang Zemin, who famously earned his post as General Secretary and later President through his tough-on-crime stance and no-nonsense handling of the June 1989 sympathy demonstrations in Shanghai, added more than twenty new capital offenses to the criminal code during his time in office, bringing the total to sixty-eight (Wei 1998). A government White Paper on human rights defended China’s use of the death penalty to protect what was termed “national stability” (State Council 1991). Travaskes (2003) notes that the strike hard campaigns carried out on Jiang’s watch in 1996 and 2001 were not qualitatively different from the earlier one under Deng, but were likewise motivated by a fear of violent crime and a preoccupation with order, and resulted in considerable spikes in the population of death row inmates.

“Kill Fewer, Kill Carefully”

The reformist trend has been carried further by the Hu administration, which despite having inherited Jiang’s concern with stability and crime prevention nonetheless displays a commitment to reducing its reliance on capital punishment for those purposes. These intentions were first made clear with the Second Five Year Reform Programme for the People’s Courts (2004-2010), which mapped out an aggressive strategy to overhaul China’s death penalty laws. Dubbed “Kill Fewer, Kill Carefully” (*shaosha shensha*), its expressed intent was to curtail the number of executions held across the country each year. In December 2005, the Supreme People’s Court (SPC) and Supreme People’s Procuratorate (SPP) issued a document requiring open trials for second instance courts in cases that may result in a death sentence and for which key facts or evidence were in dispute (SPC 2005). This provision was then expanded in September 2006 to include all death penalty cases in which defendants were subject to

immediate execution (*sixing liji zhixing*) (SPC/SPP 2006).

The government plan was put in full motion in 2007 with a package of new measures designed to further standardize criminal justice procedures. Of these, the most important and internationally recognized was the restoration of power to the SPC to review all decisions handed down for immediate execution, a move that reversed a 1983 policy decentralizing appellate review in order to encourage executions as a means to deter crime (Standing Committee of the National People's Congress 2006). Other significant initiatives adopted in 2007 included the issuance of guidelines regarding changes to the appeals process, such as when the SPC would uphold a guilty verdict and when it would order a retrial in a lower court (SPC 2007). Another directive issued jointly by the SPC, SPP, and the Ministries of Justice and Public Security gave instructions to provincial courts outlining specific conditions under which seeking the death penalty is appropriate, provided training to government lawyers elaborating new procedures to help reduce wrongful death sentences, mandated witness testimony at trials, and guaranteed that confessions obtained through torture were inadmissible (SPC et al 2007).⁸ This latter measure was adopted in response to claims such as those of SPP Deputy Procurator-General Wang Zhenchuan, who publicly admitted that “nearly every wrongful verdict in recent years relates to illegal interrogation,” and that more than 30 wrongful convictions per year were attributable to confessions extracted through torture (Savadove 2006).

Subsequent years saw the introduction of further procedural reforms. Financial incentives for local authorities to switch to lethal injection as the primary method of execution were enacted in 2008, ramping up a policy initially floated in 1996.⁹ According to one source, the SPC “issued a circular requiring local courts to popularize the use of lethal injections according to their own conditions,” promising to “help equip courts with all required facilities,” expand judicial training, and pay for all necessary chemicals (“China to Expand Lethal Injections” 2008).¹⁰ Controversially, the government has also proposed a cash-for-clemency system in which the executions of those able to pay may be commuted to a non-lethal form of punishment (Johnson and Zimring 2008, 277). Most recently, legislation was tabled at the 2011 meeting of the Standing Committee of the National People's Congress to remove thirteen economic offenses from the list of capital crimes, reducing the total number from 68 to 55.

The Political Instrumentality of the Kill Fewer, Kill Carefully Laws

While data confirming the anticipated reduction in executions resulting from the Hu leadership's reforms is not yet available, early expectations for the policy's success are high. Jurists in Beijing and Shanghai point to sharp reductions in the number of sentences handed down since the 2007 laws took effect (confidential interviews, March 2012). One human rights report argued that as a consequence of restoring the authority of the SPC to review death penalty cases, “it should be possible to cut the rate of executions in half over the next two to three years,

from 7000 in 2006 to 3500 in 2009“ (DHF, 2007b). Although impossible to verify with precise figures, these independent claims are consistent with official reports that the Kill Fewer, Kill Carefully laws resulted in an immediate 30 percent reduction in executions across the country (“China Death Penalty Verdicts Drop” 2007).

The 2007 reforms and their impact have generated much speculation about the future of capital punishment in China, specifically whether it would ultimately be eliminated. Zhang (2005) notes a “new spirit of debate” within the Chinese legal community on the morality of the death penalty that includes significant support for abolition from such prominent scholars as Qiu Xinglong and Chen Xingliang. At a March 2007 meeting of the UN Human Rights Council, Chinese delegate La Yifan stated that the scope of China’s death penalty laws was under reconsideration and that their application was to be reduced “with the final aim of abolishment” (Macbean 2008, 205). Yet no timeline has ever been established for the phasing-out of executions by the CCP leadership, and talk of if and when it will do so tends to be hypothetical at best. As Johnson and Zimring put it, “this aspiration usually comes attached to qualifications that posit a long-term future in which the country is economically developed and its legal system is significantly more advanced than it is today” (2009, 226). Indeed, leading officials of the current administration, including President of the Supreme People’s Court Xiao Yang, have indicated publicly that capital punishment will not be abolished, but will be meted out more cautiously and fairly than in the past in an effort to “temper leniency with severity” (*kuanyan xiangji*) in law enforcement (Chen 2006; Xie 2008).

This attempt to balance retention and restraint enables the CCP to cater to public opinion and shore up popular consent for its rule in at least two ways. First, there is broad support for the death penalty as a means to maintain social order and prevent violent crime. Multiple sources point to a deep-seated fear of crime and chaos among urban and rural Chinese extending back more than twenty years (Scobell 1990, 503; Kelliher 1997, 66; Zhang et al 2009). More recent research confirms that public approval of capital punishment to contain lawlessness has held steady over time and is prevalent even among segments of the Chinese public thought to be relatively liberal, such as college students (Liang, Lu, Miethe, & Zhang 2006; Jiang, Lambert, & Wang 2007). Several studies also show a wide belief in the deterrent effects of the death penalty, as well as very little gender gap in attitudes toward the practice (Jiang & Wang 2008; Lambert et al 2007). Further evidence suggests public endorsement of the death penalty as a form of retributive justice, particularly in high-profile corruption cases. One author recounts the “festival-like thrill” and air of general satisfaction at the execution of a former Party head in Jiangxi province convicted of embezzlement (Qiu 2007, 17). Similar experiences have been reported at the killing of other public servants such the disgraced former head of the State Food and Drug Administration Zheng Xiaoyu.

Public enthusiasm for capital punishment is embedded to a significant extent in claims of China’s cultural exceptionalism. Indeed, history and tradition are the “twin towers” that justify the practice for millions in today’s China (Ho 2005, 285). The historiography of the death

penalty in China highlights a tradition of executions stretching back as far as the Qin dynasty, one that incorporated some extraordinarily gruesome methods of killing such as burning, decapitation, and most famously, “death by a thousand cuts” (Brook, Bourgon, and Blue 2008). As Lu and Miethe argue, such practices have been “widely used throughout Chinese history for purposes of social control, order maintenance, and regulation of individuals and private groups” (2007, 27). Customary use of the death penalty for deterrent purposes is even captured in traditional Chinese sayings such as “killing one to warn a hundred,” (*sha yi jing bai*) and “killing a chicken to warn the monkeys” (*sha ji jing hou*).

Recourse to traditional values offers the state a means to legitimize capital punishment and itself by positioning support for abolitionism as incommensurable with China’s uniqueness and social goals, of which the Party is the sole vanguard. For cadres brought up on Marxist-Leninist doctrine, “western creeds promoting abolition, such as ‘humanitarianism’ (*rendao zhuyi*) and ‘human rights’ (*renquan*) are infused with class characteristics and are therefore unsuitable for the socialist context of the PRC” (Palmer 1996, 125). Framed in this way, China’s retention of the death penalty brooks no justification to the global community, but is rather a natural characteristic of Chinese governance, one that allows the current regime to reject international human rights at minimal domestic cost and imbues the abolitionist stance with a whiff of imperialism. Under such conditions the state not only provides a popular public good, but keeps indigenous morality—even Chineseness itself—safe from alien encroachment. Thus, as one study concludes, “under the current sociopolitical conditions in China, the death penalty seems to have sufficient official and grassroots support to play a continued role in crime prevention and order maintenance even in the face of a global movement toward its abolition” (Lu and Miethe 2007, 121).

At the same time, formally restricting the unfettered use of executions is increasingly vital to the Party’s public approval. Calls for more restraint are most prevalent in the domestic legal community where “a majority believe that depriving an individual of his or her life for a nonviolent offense is near useless in preventing new economic crimes” (Wei 2010). However, the shift toward greater leniency represented in the Kill Fewer, Kill Carefully policy also signals a new and important development in CCP thinking, one that has arisen in the context of a larger debate within the Party on how best to build a harmonious socialist society (“*Shehui Zhuyi Hexie Shehui*”) and resolve the large number of “social contradictions” resulting from China’s rapid modernization. When plans for legal reform were discussed at the Sixteenth Party Congress in October 2006, proponents of greater leniency argued that to achieve harmonious society, severe forms of punishment must be used against only a small minority of society’s worst criminals, and not against all who are guilty (Travaskes 2008, 399). Additionally, the *Resolution of the CCP Central Committee on Major Issues Concerning the Building of a Socialist Harmonious Society* adopted at the Sixth Plenum that year committed the Party to improving the function of legal institutions in accordance with social expectations. According to state media, the specific intent was to protect stability and prevent a mass withdrawal of popular consent (Xinhua News Agency

2006). For this reason, the Party has expanded many of the earlier proposals of Chinese academics at home and abroad to supplement the budding rule of law with various methods of popular consultation (Pan 2003; Shih 2000). On March 11, 2011, Chairman Wu Bangguo announced to the Standing Committee of the NPC that construction of a comprehensive “socialist legal system with Chinese characteristics” had been completed. Calling it “scientific, harmonious, and consistent,” and a “major milestone” in China’s social development, Wu took pains to stress that in creating this national framework, China has “put people first and legislated for the people, as well as maintained the unity of the socialist legal system,” (National People’s Congress, 2011).

With state interest in socially responsive governance at an all-time high, efforts at legal reform have sought to more actively address the growing public will for more standardized rulings and systemic safeguards against excessive abuses of legal authority, including wrongful executions. “Public supervision can help prevent possible cases of twisting the law,” reads a nationally publicized editorial, indicating that while society values capital punishment as an instrument of punitive justice, it increasingly values accountability as well (Global Times 2011). One academic study links the reforms of recent years directly to social demand for more rational, impartial judicial decision-making (Liebman 2006). Another describes increasing pressure in the form of citizen petitions and protests to alter incorrect court decisions, noting that these “do result in judges re-examining or correcting erroneous cases” (Liebman 2007, 630). In some instances, those condemned to die have become martyrs for the cause of legal reform and rights enhancement, gathering significant public sympathy for crimes committed out of sheer frustration and anger with a system lacking sufficient oversights. Such was the case for Yang Jia, a Beijing man catapulted to folk hero status after stabbing six police officers in retaliation for an unsuccessful lawsuit against those who had reportedly beaten him during an interrogation over an improper bicycle license. “You have done what most people want to do, but do not have the courage to do” read a message posted to Yang online after his execution (Moore 2008).

Conclusion

The case of China highlights the limits of death penalty norm penetration when that process is mediated by a legitimacy-seeking authoritarian regime. From a cross-national perspective, the growing acceptance of abolitionism and ebbing of authoritarianism in recent decades paints a picture of inexorability on both accounts. Rule of law emergence is a sign of progress on a road that terminates where states are free and death penalty free. By this logic, the capital punishment reforms accompanying China’s post-Mao liberalization should be an indication of further legal and political changes to come. Instead, the evolution of its death penalty system points to three important lessons.

First, China's death penalty practices have become more entrenched with time, not less. Beginning in 1979 with the first Criminal Procedure Law, each new generation of CCP leadership has expanded China's capital punishment framework. The unprecedented growth of rules and regulations envisaged by the Kill Fewer, Kill Carefully laws is the latest in a series of steps to strengthen and standardize capital punishment, all of which contribute to the deepening institutionalization of the death penalty in Chinese jurisprudence and the long-term viability of its retention.

Second, China's most recent wave of death penalty legislation is much more the product of domestic political considerations than the power of international norms. Indeed, the provisions of the Kill Fewer, Kill Carefully statutes directly contravene the objectives of the global abolitionist movement by committing China to new methods and procedures that lay the groundwork for capital punishment's continued use. They also speak to several issues of domestic social concern, suggesting that these, and not global human rights talk, are the more proximate cause of the law's adoption.

Finally, the preoccupation of China's leaders with meeting public expectations suggests that while the long-standing instrumental conception of the legal system has not changed, the imperatives and objectives of capital punishment have. Namely, the institution of the death penalty has shifted from a primary focus on punishing counterrevolutionaries to preserving domestic legitimacy. By virtue of enhancing state performance on two key measures of that legitimacy, the Kill Fewer, Kill Carefully laws are more suggestive of authoritarian adaption and durability than its impending breakdown in China—as is the evolution of China's capital punishment system more generally, despite predictions to the contrary.

Appendix

The information presented in Figures 1-4 was generated using data from Amnesty International's Annual Country Reports as presented in Hood and Hoyle's *The Death Penalty: A Worldwide Perspective (Fourth ed.)* and Freedom House's *Freedom in the World 2012 Survey*, two of the most authoritative sources in their respective areas. In order to arrive at the sample size of 189 countries—a figure slightly smaller than is used by Hood et al—several units were omitted for reasons of complete data availability. These include the “de facto” abolitionist Cook Islands and the Holy See, as well as South Sudan, a presumptively retentionist state that gained independence too recently to have reliable figures. Three retentionist pseudo-states—Taiwan, the Palestinian Territories, and Western Sahara—are also omitted due to their contested constitutional status. All others were assigned numerical values depending on the legal status of capital punishment within their borders. Each state was then given a dummy variable coding for its political status based on a modified version of the seven-point Freedom House scale. For Figure 4, states received an additional binary coding for each year during the period 1945-2012,

pivoting on the year of political transition as determined by data drawn from Freedom House or, alternatively, the *CIA World Factbook*.

¹ This figure increases to nearly 75 percent if one includes those countries considered by Amnesty International to be “de facto” abolitionist due to the absence of any executions in recent memory while nonetheless keeping capital punishment laws on the books. It also includes nine states that have abolished the death penalty for “all ordinary crimes” but officially retain it for some non-civilian offenses.

² Death penalty practices have also been an important factor in assessing human rights among states being considered for EU membership, especially in successor states to the former Soviet Union and Yugoslavia.

³ It is thought that the number of erroneous executions resulting from corruption and incompetence in local court systems reached its peak during the Strike Hard campaigns of the 1990s (Chen 2002, 544).

⁴ Lenin’s view of the death penalty as an instrument of class warfare provided an explicit justification for its use in many communist states, including China (Wuhan Daxue Falu Bianzhu 1986).

⁵ The precise numbers of those executed during the Maoist period are not known with any precision.

⁶ The first of the Yanda campaigns, which lasted from September 1983 until January 1987, the first Yanda campaign was a response to growing public fear over certain types of crimes, especially kidnapping and human trafficking, and saw new mandatory death sentences for those specific crimes as well as a major increase in the overall number of capital offenses. The central government also restricted judicial oversight, granting local courts first authority to try capital cases (Tanner 2000).

⁷ Article 43 explicitly states that “the death penalty is only to be applied to criminal elements who commit the most heinous [*zuida eji*] crimes.”

⁸ This legislation also expanded earlier reforms regarding the suspension or commutation of death sentences for minors and, under limited circumstances, women (Lu and Zhang 2005).

⁹ The SPC initially made its request that lower courts replace death by shooting with lethal injection in 1996, when a reported four sentences were carried out that way in Kunming (Wang 2008).

¹⁰ Although allegedly grounded in a desire to lessen the pain and suffering of the accused, the growing preference for lethal injection is also cheaper and more efficient than the more conventional method of death by shooting, particularly when mobile injection vans are used (Johnson and Zimring 2008: 275).

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