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## WHY DID CHINA REFORM ITS DEATH PENALTY?

Kandis Scott<sup>†</sup>

*Abstract:* China recently reformed its death penalty laws, and as a result the government has executed fewer prisoners. The author explores possible reasons and policy concerns behind China's legal reform. These influences include international forces and domestic factors, such as the media, changed circumstances, compassion, and politics. Although hardly transparent, the underlying motivations for the revisions suggest that eventually China may abolish capital punishment, perhaps even before the United States does so.

Even Westerners have heard about the exoneration of She Xianglin,<sup>1</sup> imprisoned in China for the murder of his wife who was found alive more than ten years later. Worse was the case of Nie Shubin, who was executed for murder before another man admitted to the crime.<sup>2</sup> These Chinese cases echo mistaken criminal convictions that have come to light in the United States,<sup>3</sup> yet the two nations have responded differently to similar failures of their criminal justice systems. There has been no national legislative response to these injustices in the U.S., but China has been making changes to prevent erroneous death sentences.

China reduced the number of prior year death sentences in 2007 by as much as thirty percent<sup>4</sup> after revising its procedure for reviewing capital

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<sup>†</sup> B.A., 1963, Cornell University; LL.B. 1966, Stanford University; Professor of Law, University of Santa Clara Law School. The author appreciates Johns Hopkins-Nanjing University Center for her year in China when this essay was inspired.

<sup>1</sup> Li Huizi, *Senior Prosecutor Calls for Better Evidence System to Improve Justice*, XINHUANET Aug. 8, 2009, available at [http://news.xinhuanet.com/english/2009-08/08/content\\_11848717.htm](http://news.xinhuanet.com/english/2009-08/08/content_11848717.htm).

<sup>2</sup> *Id.*; Rupert Wingfield Hayes, *China's New Wealth and Old Failings*, BBC NEWS, Oct. 12, 2006, [http://news.bbc.co.uk/1/hi/programmes/from\\_our\\_own\\_correspondent/6041524.stm](http://news.bbc.co.uk/1/hi/programmes/from_our_own_correspondent/6041524.stm) (last visited Nov. 20, 2009).

<sup>3</sup> The Innocence Project, an organization aimed at exonerating innocent convicts through the use of DNA evidence, reports freeing over 230 prisoners in the United States. Innocence Project Case Profiles, <http://www.innocenceproject.org/know/> (last visited Oct. 2, 2009).

<sup>4</sup> Chinese courts issued "about 30% percent fewer death penalties . . . [in 2007] than in 2006." *China Sees 30% Drop in Death Penalty*, CHINA DAILY, May 10, 2008, [http://www.chinadaily.com.cn/china/2008-05/10/content\\_6675006.htm](http://www.chinadaily.com.cn/china/2008-05/10/content_6675006.htm) (last visited Nov. 7, 2009). According to a judge from Shandong Province, approved death sentences dropped up to forty percent in one city. This diminution in death penalties imposed by the trial court is supplemented by those reversed on appeal. China's Supreme Court reversed 15% of death sentences nationally in 2007 due to a lack of evidence, injustices, and illegal court procedures state media said. Hu Yunteng et al., *15% de si xing wei he zhun li shuo ming le shen me?* [What Can be Explained by the Death Penalty Reversal Rate of 15%?], FA ZHI RI BAO [LEGAL DAILY], Mar. 21, 2008, [http://www.legaldaily.com.cn/bm/2008-03/21/content\\_819603.htm](http://www.legaldaily.com.cn/bm/2008-03/21/content_819603.htm) (last visited Nov. 20, 2009). Xie Chuanjiao, *New Guideline on Death Penalty*, CHINA DAILY, Dec. 23, 2008, [http://www.chinadaily.com.cn/china/2008-12/23/content\\_7331191.htm](http://www.chinadaily.com.cn/china/2008-12/23/content_7331191.htm) (last visited Nov. 7, 2009). Since the Supreme People's Court started reviewing death sentences in 2007, half of

cases.<sup>5</sup> Given that China is believed to execute many,<sup>6</sup> this diminution reflects a significant number of lives. For the first time ever, death sentences with a reprieve for two years, which usually turn into life sentences, exceeded the number of immediate death sentences imposed in China.<sup>7</sup> Although death penalty figures are a state secret, the official Chinese news agency reported these changes and human rights organizations have corroborated them in general.<sup>8</sup> The public statement of a Supreme People's Court ("SPC") official that the number of death sentences imposed by the trial courts diminished at "not a small rate" hints at the significance of the new rules.<sup>9</sup>

In a nation lacking transparency like China, the reason for adopting the new procedures is unknown.<sup>10</sup> Is this revised procedure a step towards a

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the capital cases were sentenced to death with a two-year reprieve and 99% of those were not executed. *Amnesty International Report Refuted*, CHINA DAILY, Apr. 9, 2008, [http://www.chinadaily.com.cn/china/2008-04/09/content\\_6601478.htm](http://www.chinadaily.com.cn/china/2008-04/09/content_6601478.htm) (last visited Oct. 12, 2009). The *Amnesty International Report Refuted*, CHINA DAILY, Apr. 9, 2008, [http://www.chinadaily.com.cn/china/2008-04/09/content\\_6601478.htm](http://www.chinadaily.com.cn/china/2008-04/09/content_6601478.htm) (last visited Oct. 12, 2009). The impossibility of assessing China's secret data is shown by Amnesty International's account of 1718 executions in 2008, *Death Sentences and Executions in 2008* 14, AMNESTY INTERNATIONAL PUBLICATIONS (March 24, 2009), available at <http://www.amnesty.org/en/library/info/ACT50/003/2009/en> (follow "English PDF" hyperlink), and 420 in 2007 when it also reported Dui Hua's calculation of 5000-6000 executions. *China: Amnesty International Submission to UN Universal Periodic Review 3*, AMNESTY INTERNATIONAL (Sept. 1, 2008), <http://www.amnesty.org/en/library/info/ASA17/097/2008/en> (follow "PDF" hyperlink) (last visited Oct. 12, 2009).

<sup>5</sup> Organic Law of the People's Courts (Promulgated by Standing Comm. Nat'l People's Cong., Oct. 31, 2006, effective Jan. 1, 2007), art. 13, translated in CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, available at <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingl=76853> (P.R.C.).

<sup>6</sup> *Death Sentences and Executions in 2006*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/library/asset/ACT50/004/2007/en/dom-ACT500042007en.html> (last visited Oct. 2, 2009).

<sup>7</sup> Liu Wen, *Read the Figures, the Feelings of Progress*, in Hu Yunteng et al., *supra* note 4. The Supreme People's Court published a decision instructing courts to give a death sentence with a two-year reprieve to any defendants who did not need immediate execution. *China Reiterates Prudent Use of Death Penalty*, EMBASSY OF THE P.R.C. IN THE UNITED STATES OF AMERICA, Sept. 14, 2007, <http://www.china-embassy.org/eng/xw/t362622.htm> (last visited Oct. 12, 2009). For a full discussion of this unusual sentence, see generally Zhang Ning, *The Debate Over the Death Penalty in Today's China*, CHINA PERSPECTIVES, Nov. 2005, available at <http://chinaperspectives.revues.org/document545.html>.

<sup>8</sup> *China Sees 30% Drop in Death Penalty*, *supra* note 4; *China*, HANDS OFF CAIN, <http://www.handsoffcain.info/bancadati/schedastato.php?idcontinente=23&nome=china> (last visited Nov. 22, 2009) ("On June 7th 2007, John Kamm, founder of the Dui Hua Foundation, stated that executions in China had decreased by at least 40% in recent years bringing the total to approximately 7,500 annually.") [hereinafter *China*, HANDS OFF CAIN].

<sup>9</sup> This refers to the second trial level courts. See Hu Yunteng, *The Success of the Reform of Death Penalty Review Procedures Enlightenment*, in Hu Yungteng et al., *supra* note 4.

<sup>10</sup> "Internal documents illuminating the black box of Chinese political decision making are not come by easily . . ." Alfred L. Chan, *Fabricated Secrets and Phantom Documents: the "Tiananmen Papers" and "China's Leadership Files," a Re-Rejoinder*, 1, <http://publish.uwo.ca/~achan/Fabricated%20Secrets%20202.pdf> (last visited Nov. 20, 2009) (While acknowledging the problems of accurate information about China, the author disputes the authenticity of the Tiananmen Papers.); Zhang Ning, *supra* note 7. The Tiananmen Papers was generally considered a

repeal of capital punishment? If so, will China abandon the ultimate sanction before the United States does? This paper examines facts and theories, and synthesizes explanations and interpretations underlying China's death penalty reform with a view to understanding future developments.

## I. IN 2007 CHINA CHANGED ITS EXISTING PROCEDURES FOR REVIEW OF CAPITAL CONVICTIONS

In 1983, an increase in lawless behavior spurred China to change its rules for reviewing death sentences.<sup>11</sup> Provincial courts obtained what had been the power of the Supreme People's Court to reevaluate most capital sentences.<sup>12</sup> The effect of the "Strike Hard" campaign, as explicitly intended, was an increased number of executions.<sup>13</sup> In its Second Five-Year (2006-2010) Reform Plan, the SPC reversed course and announced its intention to restore its authority to review death penalty sentences.<sup>14</sup>

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remarkable penetration of the decision-making processes of the Chinese government. THE TIANANMEN PAPERS (Zhang Liang, Andrew J. Nathan, & Perry Link eds., 2001); *see generally* Human Rights in China, State Secrets: China's Legal Labyrinth (2007).

<sup>11</sup> The "crime wave" is thought to have arisen out of the first opening of capitalist opportunities and the decline of the iron rice bowl policies. *China Changes Law to Limit Death Sentence*, People's Daily, Oct. 31, 2006, [http://english.people.com.cn/200610/31/eng20061031\\_316885.html](http://english.people.com.cn/200610/31/eng20061031_316885.html) (last visited Nov. 15, 2009).

<sup>12</sup> "The SPC first shifted the legal authority to review and approve certain death sentences to provincial high courts in 1980, and the NPCSC incorporated this devolution of authority into law with a 1983 Amendment to the 1979 Organic Law of the People's Courts. The 1983 Amendment changed the requirement that the SPC decide or approve all death penalty cases to create the following carve-out: 'The Supreme People's Court, when necessary, may authorize high people's courts of provinces, autonomous regions, and municipalities directly under the central government to exercise the authority to review and approve cases in which the death penalty is imposed for homicide, rape, robbery, causing explosions, and other crimes seriously endangering public security and social order.'" *Law Amended to Require SPC Approval of All Death Sentences*, Human Rights and Rule of Law—News and Analysis, Virtual Academy, Congressional—Executive Commission on China (Nov. 3, 2006), <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingl=76854> (last visited Oct. 12, 2009).

<sup>13</sup> *The Death Penalty in China: Breaking Records, Breaking Rules*, Amnesty International, Aug. 1, 1997, <http://asiapacific.amnesty.org/library/Index/ENGASA170381997?open&of=ENG-2S2> (last visited Oct. 12, 2009).

<sup>14</sup> The Supreme People's Court reviews the death sentence, while an appeal of the judgment is taken to the provincial courts in theory. *China Changes Law to Limit Death Sentence*, *supra* note 11; Mure Dickie, *China's Lower Courts to Lose Power on Death Penalty*, Financial Times, Oct. 25, 2005, available at <http://www.ft.com/cms/s/0/6e1ad4ea-474e-11da-b8e5-00000e2511c8.html>. The SPC also issued guidelines for its review: "Each case will be reviewed by a team of three judges. They will be required to check the facts, laws applied and criminal procedures adopted. Any testimony extracted through illegal means will be declared invalid. During the review, judges must arraign the defendants face to face, and present their separate judgments and reasons in writing. If the case is very complicated or there are doubts over the facts, judges can visit the place where the alleged offence took place to check details." *Top Court Reviews All Death Sentences*, CHINA DAILY, Dec. 29, 2006, [http://www.china.org.cn/government/2007-01/18/content\\_1196508.htm](http://www.china.org.cn/government/2007-01/18/content_1196508.htm) (last visited Oct. 12, 2009). *See also* results of a 2005 symposium questioning

Enacting that decision, the legislature (the Standing Committee of the National People's Congress)<sup>15</sup> amended the law effective January 2007: "Death penalty sentences, with the exception of those decided by the Supreme People's Court, shall be submitted to the Supreme People's Court for review and approval."<sup>16</sup> This action did not complete official efforts to improve death sentencing—the SPC is also developing national guidelines to limit judicial discretion so as to enhance consistency in trial courts' sentencing.<sup>17</sup>

The SPC interpreted this action as more than a procedural change, but rather as an official decision to restrict capital punishment. This change reflected China's explicit desire to cut back the number of executions:

All criminals that can be sentenced without the need for immediate execution should be given a death sentence with a two-year reprieve[,which] not only punish[es] the guilty but effectively reduce[s] death sentences . . . . Capital punishment should be given only to an extremely small number of serious offenders.<sup>18</sup>

By the end of 2007, China reported a diminution in the number of executions<sup>19</sup> of people who Chief Justice Xiao Yang described as an "extremely small number of extremely serious and extremely vile criminals posing a grievous threat to society."<sup>20</sup>

The SPC's official appellate reversals were not the only cause of the diminished number of executions. The Court observed that lower courts were more careful and improved the quality of capital case trials in the first

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the death penalty, *China Questions Death Penalty*, China daily, Jan. 27, 2005, [http://www2.chinadaily.com.cn/english/doc/2005-01/27/content\\_412758.htm](http://www2.chinadaily.com.cn/english/doc/2005-01/27/content_412758.htm) (last visited Oct. 12, 2009).

<sup>15</sup> The Standing Committee is an exceptionally powerful de facto legislature because the full NPC meets only once a year. E-mail from Benjamin L. Liebman, Professor of Law, Columbia Law School, to Kandis Scott, Professor of Law, Santa Clara University Law School, (Feb. 13, 2009, 6:23 p.m. EST) (on file with author).

<sup>16</sup> Decision on Amending the P.R.C. Organic Law of the People's Courts (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 2006, effective Jan. 1, 2007), art. 13, available at <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingl=76853> (P.R.C.).

<sup>17</sup> Xie Chuanjiao, *Judges Will Be Punished for Trial Errors*, CHINA DAILY, June 24, 2008, [http://www.chinadaily.com.cn/cndy/2008-06/24/content\\_6788203.htm](http://www.chinadaily.com.cn/cndy/2008-06/24/content_6788203.htm) (last visited Oct. 12, 2009).

<sup>18</sup> Taken from unidentified SPC document. *Death Sentence Rules Relaxed*, CHINA DAILY, Sept. 14, 2007, <http://www.china.org.cn/english/China/224399.htm> (last visited Oct. 12, 2009). There are similar comments by the then-Chief Justice of the SPC. *No Backtrack for China's Centralized Death Penalty Review System: Chief Justice*, CHINA'S HUMAN RIGHTS, Mar. 14, 2007, <http://www.humanrights-china.org/zl/situation/20040200732085036.htm> (last visited Oct. 12, 2009).

<sup>19</sup> *China Reiterates Prudent Use of Death Penalty*, supra note 7.

<sup>20</sup> *Rare Look at China's Death Penalty*, CBS NEWS, Mar. 10, 2008, [http://www.cbsnews.com/stories/2008/03/10/world/main3920936.shtml?source=RSSattr=World\\_3920936](http://www.cbsnews.com/stories/2008/03/10/world/main3920936.shtml?source=RSSattr=World_3920936) (last visited Oct. 12, 2009).

year of the new review procedures.<sup>21</sup> SPC oversight spurred the trial judges to greater care in deciding capital cases knowing that their work would be scrutinized by the top court and shame their court.<sup>22</sup> This influence is especially potent because judges who are prone to reversal may be punished criminally.<sup>23</sup> The revised SPC appellate procedure has changed trial courts' sentencing practices in a system committed to capital punishment.

## II. CHINA'S TRADITIONS WORK AGAINST REFORM OF THE DEATH PENALTY

China's traditional acceptance of the death penalty sets the context for evaluating the significance of the new developments.<sup>24</sup> Execution, along with face tattooing, nose amputation, foot amputation, and castration was one of the "Old Five Punishments" originating as early as the 17th century BCE.<sup>25</sup> Today, surveys show little public objection to the tradition of capital punishment.<sup>26</sup> Xingliang Chen, Professor of Law at Beijing University, attributed this to the influence of "the Chinese cultural tradition of retribution and lowly-regarded individual rights."<sup>27</sup>

Authorities, accepting the reality of cultural values, have made it clear they do not intend to abolish the death penalty anytime soon. Former-Chief Justice Xiao Yang, a supporter of the new procedures,<sup>28</sup> and his successor, Wang Shengjun, a less-enthusiastic supporter, have ruled out ending the

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<sup>21</sup> *China*, HANDS OFF CAIN, *supra* note 8.

<sup>22</sup> *China Death Penalty Verdicts Drop*, BBC NEWS, June 8, 2007, available at <http://news.bbc.co.uk/2/hi/asia-pacific/6733279.stm>.

<sup>23</sup> Xie Chuanjiao, *supra* note 17. "It's going to have a psychological effect on local judges when they are making decisions because they are going to be afraid that if they approve capital punishment, the supreme court will overrule them," said Li Heping. Posting of Lisa Brackmann to *Big Change in China's Death Penalty Policy*, PAPER TIGER TAIL, [http://papertigertail.blogspot.com/2006\\_10\\_01\\_archive.html](http://papertigertail.blogspot.com/2006_10_01_archive.html) (Oct. 31, 2006, 11:48 PM) (last visited Oct. 12, 2009).

<sup>24</sup> Virgil K.Y. Ho, *What is Wrong with Capital Punishment? Official and Unofficial Attitudes Toward Capital Punishment in Modern and Contemporary China*, in *THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVES* 274, 286 (Austin Sarat & Christian Boulanger eds., 2005).

<sup>25</sup> Bin Liang, Hong Lu, Terance D. Miethe, & Lening Zhang, *Sources of Variations in Pro-Death Penalty Attitudes in China*, 46 *BRIT. J. CRIMINOLOGY* 119, 120 (2005).

<sup>26</sup> In 2002, 88% of the Chinese surveyed favored capital punishment. Zhang Ning, *supra* note 7, at 91 ¶ 39; *China*, HANDS OFF CAIN, *supra* note 8. Even young Chinese continue to support this traditional value system and approve of the retributive maxim: an eye for an eye. *International Symposium on Death Penalty Held in China (II)*, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE REPUBLIC OF ESTONIA, May 5, 2004, <http://www.mfa.gov.cn/ce/ceee/eng/dtxw/t111300.htm> (last visited Oct. 12, 2009); Bin Liang et al., *Sources of Variations in Pro-Death Penalty Attitudes in China*, 46 *BRIT. J. CRIMINOLOGY* 119, 126, 128 (2006).

<sup>27</sup> HONG LU & TERANCE D. MIETHE, *CHINA'S DEATH PENALTY: HISTORY, LAW, AND CONTEMPORARY PRACTICE* 125 (2007).

<sup>28</sup> *Id.* at 126.

death penalty,<sup>29</sup> as have Premier Wen Jiabao and President Hu Jintao.<sup>30</sup> As Senior Judge Huang Ermei of the Supreme People's Court said, “[c]urrently our country does not have the conditions to abolish the death penalty and will not have those conditions for a considerable period of time.”<sup>31</sup> The new SPC rules will diminish the number of executions, satisfy a public that is presently committed to capital punishment, and postpone radical change. However, the fact that Chinese authorities rely on current conditions to explain preserving the death sentence may signal openness to significant changes in the future.

There have been signs that this cultural tradition is weakening.<sup>32</sup> A fissure in traditional support for capital punishment appeared in 2000, when academics began to speak and write criticizing capital punishment or favoring its extensive restriction.<sup>33</sup> Currently, there is not a dramatic demand for abolition of death sentences: In 2005 Qiu Xinglong claimed to be the only scholar in China who proposed outright abolition.<sup>34</sup> Nonetheless, some Chinese now recommend limiting capital punishment, through changes like restoring SPC review, as a first step towards abolition.<sup>35</sup> “[L]eniency and more judicious use of capital punishment [has become] the trend of the time,”<sup>36</sup> as seen in 2006, *before* the new law took effect, when executions numbered the fewest in ten years.<sup>37</sup> An example of

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<sup>29</sup> *China To Expand Lethal Injections*, BBC NEWS, Jan. 3, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7169122.stm> (last visited Oct. 12, 2009); “We must pay more attention to maintaining state security and social stability . . . We must boost our consciousness of [safeguarding] the power of the regime . . . and fully develop our functions as a department for [proletarian] dictatorship,” wrote Wang Shengjun in the official Seeking Truth Journal. Willy Lam, Op-Ed., *The Crackdown to Come*, WALL ST. J. ASIA, Aug. 22, 2008, <http://online.wsj.com/article/SB121935422617061449.html?> (last visited Oct. 12, 2009).

<sup>30</sup> *Premier Wen Jiabao Meets The Press*, CHINA DAILY, Mar. 14, 2005, [http://www.chinadaily.com.cn/english/doc/2005-03/14/content\\_424729.htm](http://www.chinadaily.com.cn/english/doc/2005-03/14/content_424729.htm) (last visited Oct. 12, 2009).

<sup>31</sup> *Rare Look At China's Death Penalty*, *supra* note 20.

<sup>32</sup> *Meeting Hears Calls for Death Penalty Reform*, CHINA DAILY, (July 23, 2005), [http://news.xinhuanet.com/english/2005-07/23/content\\_3255802.htm](http://news.xinhuanet.com/english/2005-07/23/content_3255802.htm) (last visited Oct. 12, 2009).

<sup>33</sup> Zhang Ning, *supra* note 7, ¶¶ 4, 6, 37. Small reforms began in 1997. Peter D. Nestor, *When the Price is Too High: Rethinking China's Deterrence Strategy for Robbery*, 16 PAC. RIM L. & POL'Y J. 525, 535, 537-38 (2007).

<sup>34</sup> Qiu Xinglong, *The Morality of the Death Penalty*, 36 CONTEMP. CHINESE THOUGHT 9, 22 (2005).

<sup>35</sup> This view, held by Prof. Xingliang Chen, is “the most popular scholarly view.” LU & MIETHE, *supra* note 27, at 124-25; *International Symposium on Death Penalty Held in China (II)*, May 18, 2004, <http://www.mfa.gov.cn/ce/ceee/eng/dtxw/t111300.htm> (last visited Nov. 22, 2009); Zhang Ning, *supra* note 7, ¶ 7; Hu Yunteng et al., *supra* note 4.

<sup>36</sup> Chen Weidong quoted in *China Death Penalty Verdicts Drop*, BBC NEWS, June 8, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6733279.stm> (last visited Oct. 12, 2009).

<sup>37</sup> *China Death Sentences at Ten Year Low*, JURIST, Sept. 3, 2007, <http://jurist.law.pitt.edu/paperchase/2007/09/china-death-sentences-at-ten-year-low.php> (last visited Oct. 12, 2009); James Pomfret, *China Urged to Curb Executions Ahead of Olympics*, REUTERS, June 16, 2008, available at <http://www.reuters.com/article/GCA-Olympics/idUSHKG34709720080616?sp=true>; Liu

the limitations mentality is that a death sentence is no longer thought appropriate for an accidental killing committed during a fight between neighbors if the victim's family is compensated.<sup>38</sup> The SPC's reversing fifteen percent of the death sentences brought before it signaled to the lower courts its change of attitude towards executions.<sup>39</sup> Fewer executions in recent years support the view that the new procedures reflect a major step towards abolition of capital punishment.<sup>40</sup>

In the face of the long tradition of capital punishment, why would Chinese authorities bother to reduce the number of executions by means of the new appellate procedures? Returning sentencing review to the SPC after twenty-four years carries more significance than a simple procedural revision because the Chinese Communist Party influences the Supreme Court in policy matters.<sup>41</sup> This reform may herald a revolution in Chinese criminal punishment, perhaps even abolition of the death penalty, or may mean nothing so important. Because the Communist Party leadership makes decisions without transparency, one can only hypothesize about its reasons for approving a new capital punishment policy. Those reasons probably include the influence of international and domestic forces.

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Jiachen, a political advisor and former Vice-President of the SPC, said that the courts imposed fewer death sentences in 2006 than in any year in the last ten. *Least Number of Death Sentences Meted Out in '07*, THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA, <http://en.court.gov.cn/public/detail.php?id=4157> (last visited Nov. 20, 2009).

<sup>38</sup> *Death Sentence Rules Relaxed*, CHINA.ORG.CN, Sept. 14, 2007, <http://china.org.cn/english/China/224399.htm> (last visited Nov. 20, 2009).

<sup>39</sup> Reasons leading the SPC to overturn death sentences include "facts verified in the original judgment are unclear, evidence insufficient, punishment inappropriate, procedures illegal and other reasons." Hu Yungteng et al., *supra* note 4.

<sup>40</sup> *Death Penalty Reform Boosts Human Rights*, CHINA'S HUMAN RIGHTS, <http://211.167.236.236/newsrdgz/death.html> (last visited Oct. 10, 2009).

<sup>41</sup> The Supreme People's Court is "responsible to the National People's Congress." XIAN FA [CONSTITUTION], art. 128 (1982) (P.R.C.), available at <http://english.peopledaily.com.cn/constitution/constitution.html>; Benjamin L. Liebman, *China's Courts: Restricted Reform*, 21 COLUM. J. OF ASIAN L. 1, 3 (2007); see generally Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, note 41, La Trobe Univ. Sch. of Law Working Paper, No. 2008/11, available at <http://ssrn.com/abstract=1283179>.



### III. MANY FORCES CONTRIBUTED TO THE DECISION TO REFORM DEATH PENALTY REVIEW

#### A. *International Opinion Pressed for Change in China*

Hosting the Olympics could not justify significant changes in Chinese death penalty procedure as some suggest.<sup>42</sup> Although China wanted to burnish its image to impress the world at the Olympic Games, it is unlikely that it modified its criminal sanctions for the same reasons it implemented queuing and no-spitting campaigns.<sup>43</sup> China's militant response to the Tibetan monks' uprising in 2008<sup>44</sup> and its suppression of Uighur-Han ethnic violence in Xinjiang in 2009,<sup>45</sup> both of which led to executions under the new appellate system, demonstrate that internal control trumps public image. But China is not oblivious to international influences,<sup>46</sup> despite its refusing to sign the United Nations Moratorium on the Death Penalty.<sup>47</sup> A Chinese scholar acknowledged that China must eventually conform to the "inexorable trend internationally" to restrict the death penalty.<sup>48</sup>

Foreign human rights organizations that have long criticized China's extensive use of the death penalty may have motivated the recent reform.<sup>49</sup>

<sup>42</sup> Posting of Robin Moroney to THE INFORMED READER, *China (Slightly) Rethinks the Death Penalty*, WALL ST. J., <http://blogs.wsj.com/informedreader/2008/01/06/china-slightly-rethinks-the-death-penalty/> (Jan. 6, 2008, 19:22 EST) (last visited Oct. 12, 2009); Antoaneta Bezlova, *Death Penalty-China: Going Easy on Executions Ahead of Olympics*, IPS NEWS, Nov. 23, 2007, <http://ipsnews.net/news.asp?idnews=40182> (last visited Oct. 12, 2009); Posting of Tim Goodwin to ASIA DEATH PENALTY, *China's Deadly World Record Under Attack*, <http://asiadeathpenalty.blogspot.com/2008/02/chinas-deadly-world-record-under-attack.html> (Feb. 27, 2008, 23:21) (last visited Oct. 12, 2009).

<sup>43</sup> Daniel K. Gardner, *Beijing Minds China's Manners*, N.Y. TIMES, June 13, 2008, available at <http://www.nytimes.com/2008/06/13/opinion/13iht-edgardner.1.13693509.html>.

<sup>44</sup> David Barboza, *660 Held in Tibetan Uprising, China Says*, N.Y. TIMES, Mar. 27, 2008, available at <http://www.nytimes.com/2008/03/27/world/asia/27tibet.html>.

<sup>45</sup> Edward Wong, *China Executes 9 for Their Roles in Ethnic Riots in July*, N.Y. TIMES, Nov. 9, 2009, available at <http://www.nytimes.com/2009/11/10/world/asia/10xinjiang.html>.

<sup>46</sup> Bin Liang et al., *Sources of Variations in Pro-Death Penalty Attitudes in China*, 46 BRIT. J. CRIMINOLOGY, 119, 120, 122 (2006).

<sup>47</sup> G.A. Res. 62/149, U. N. Doc. A/RES/62/149 (Dec. 18, 2007).

<sup>48</sup> Chen Xingliang, *An Examination of the Death Penalty in China*, 36 CONTEMP. CHINESE THOUGHT, 35, 38 (2005).

<sup>49</sup> The National People's Congress itself acknowledged international forces when justifying changes to the procedure of death penalty appeals. Yu Tian et al., *Zhongguo zui gao fa yuan shou hui si xing he zhun quan 2007 nian 1 yue 1 ri shi xing [China's Highest Court Takes Back Right to Review Death Penalty Effective on January 1, 2007]*, XINHUA NEWS AGENCY, Oct. 31, 2006, <http://npc.people.com.cn/GB/14957/53049/4981341.html> (last visited Nov. 20, 2009). Organizations such as The World Coalition Against the Death Penalty and Anti-Death Penalty Asia Network have joined Amnesty International in campaigns against the Chinese death penalty. *China Urged to Take Steps to End the Death Penalty*, AMNESTY INTERNATIONAL, Feb. 28, 2008, <http://www.amnesty.org/en/news-and-updates/news/china-urged-to-take-steps-end-death-penalty-20080228> (last visited Oct. 12, 2009). The

Chinese people and political leaders certainly are conscious of international opinion.<sup>50</sup> More than merely being aware, China sometimes responds to international criticism, albeit in a face-saving way.<sup>51</sup> Evidence of this is that China told the United Nations Human Rights Commission that it “might heed criticism that China’s application of the death penalty for 68 categories of crimes, including nonviolent offenses such as tax evasion, may be too broad.”<sup>52</sup> One Chinese judge attributed the reform in capital case procedure to the extensive use of the death penalty that had brought China “under excessive international pressure.”<sup>53</sup> By openly identifying the beneficial *international* effect of the 2007 death penalty revisions, China reveals the impact of international opinion.<sup>54</sup>

Although China has not acceded to the world’s cries for abolition of its death penalty,<sup>55</sup> it recognizes its non-compliance with international standards.<sup>56</sup> If international opinion played an important part in China’s

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international publicity given to mistaken convictions further disgraced the Chinese criminal justice system. Reports of China’s convictions of innocent defendants are read worldwide. *China Death Penalty Verdicts Drop*, BBC NEWS, June 8, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6733279.stm> (last visited Oct. 12, 2009); Jim Yardley, *In Worker’s Death, View of China’s Harsh Justice*, N.Y. TIMES, Dec. 31, 2005, available at <http://www.nytimes.com/2005/12/31/international/asia/31china.html>.

<sup>50</sup> LU & MIETHE, *supra* note 27, at 138. An example of this from the author’s experience is the domestic media’s heavy publication of China’s participation in the six-party nuclear weapons negotiations with North Korea, proudly demonstrating China’s important role in the world community. This publicity did not mention the nation’s own interest in deterring the unlawful emigration of North Koreans to northern China.

<sup>51</sup> For example, vigorous international protest of China’s tolerance of the plight of Darfur refugees yielded some small, new actions towards Sudan. Morton Abramowitz & Jonathan Kolieb, *Why China Won’t Save Darfur*, FOREIGN POLICY, June 2007, [http://www.foreignpolicy.com/story/cms.php?story\\_id=3847](http://www.foreignpolicy.com/story/cms.php?story_id=3847) (last visited Oct. 12, 2009).

<sup>52</sup> “‘Some countries suggest we should reduce the number of crimes subject to the death penalty. I can say proper consideration is being given to the subject,’ said Hu Yunteng” of the SPC. Tim Johnson, *China Tells U.N. It Doesn’t Censor or Abuse Human Rights*, MCCLATCHY NEWSPAPERS, Feb. 9, 2009, <http://www.mcclatchydc.com/world/story/61826.html> (last visited Oct. 12, 2009). But China did not actually accept nations’ recommendations about its death penalty. Willy Fautré, *United Nations: China Says NO to Democracy and Human Rights*, HUMAN RIGHTS WITHOUT FRONTIERS, Feb. 16, 2009, [http://www.david-kilgour.com/2009/Feb\\_15\\_2009\\_05.php](http://www.david-kilgour.com/2009/Feb_15_2009_05.php) (last visited Oct. 12, 2009).

<sup>53</sup> Wang Guangze, *The Mystery of China’s Death Penalty Figures*, HRIC REFORM AND REALITY, June 30, 2007, [http://hrichina.org/public/PDFs/CRF.2.2007/CRF-2007-2\\_Mystery.pdf](http://hrichina.org/public/PDFs/CRF.2.2007/CRF-2007-2_Mystery.pdf) (last visited Oct. 12, 2009).

<sup>54</sup> See Hu Yunteng et al., *supra* note 4. Hu is Associate Dean of the Supreme People’s Court Research Department, who would not be publishing an unapproved opinion in a Chinese journal. Luo Gan, one of nine members of the Communist Party Standing Committee, noted that the judiciary “should consider the possible international influence of and reaction to their decisions,” in the course of a speech generally exhorting legal authorities to defer to the Party-state. Joseph Kahn, *Chinese Official Warns Against Independence of Courts*, N.Y. TIMES, Feb. 3, 2007, available at <http://www.nytimes.com/2007/02/03/world/asia/03china.html>.

<sup>55</sup> For example, China did not agree to the United Nations Moratorium on the Use of the Death Penalty. G.A. Res. 62/149, U.N. Doc. A/RES/62/149 (Dec. 18, 2007).

<sup>56</sup> Wang Guangze, *supra* note 53; Chen Xingliang, *supra* note 48, at 38; HONG LU, CHINA’S DEATH PENALTY: HISTORY, LAW, AND CONTEMPORARY PRACTICES 138 (2007).

motivation for changing death penalty procedures, one may anticipate further responses restricting or even abolishing capital punishment. In contrast, the United States appears to resist the criticisms of its death penalty laws by the world community.<sup>57</sup> Supreme Court Justice Kennedy's use of international standards in capital punishment analysis<sup>58</sup> is made dramatic by its rarity. Unlike China, the United States will not bend its capital punishment policy to international opinion.

*B. Several Domestic Factors Influenced Liberalization of Capital Punishment Procedures*

*1. The Chinese Media Exposed Unjust Executions Publically*

China's media may have influenced the Supreme People's Court to increase the Court's supervision of death penalty cases.<sup>59</sup> China's media are more influential politically than the courts.<sup>60</sup> "Since 2005, China's media have exposed a series of errors in death sentence cases and criticized courts for lack of caution in meting out capital punishment."<sup>61</sup> The "media had a field day reporting the [She Xianglin] case . . . and their frenzy did not end there. They began looking for similar cases . . ."<sup>62</sup> In this way and by exposing regionally inconsistent results, the country's press has monitored the lower courts.<sup>63</sup> If publicity can incite the public to demand fair

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<sup>57</sup> The United States did not agree to the United Nations Moratorium on the Use of the Death Penalty. G.A. Res. 62/149, U.N. Doc. A/RES/62/149 (Dec. 18, 2007). *Kansas v. Marsh*, 548 U.S. 163, 187 (Scalia, J., concurring) ("There exists in some parts of the world sanctimonious criticism of America's death penalty, as somehow unworthy of a civilized society. (I say sanctimonious, because most of the countries to which these finger-waggers belong had the death penalty themselves until recently-and indeed, many of them would still have it if the democratic will prevailed.)"); Russel G. Murphy, *Lecture Executing the Death Penalty: International Law Influences on United States Supreme Court Decision-Making in Capital Punishment Cases*, 32 SUFFOLK TRANSNAT'L L. REV. 599, 621-22 (2009).

<sup>58</sup> *Roper v. Simmons*, 543 U.S. 551, 574-77 (2005).

<sup>59</sup> LU & MIETHE, *supra* note 27, at 35; Dickie, *supra* note 14.

<sup>60</sup> Liebman, *supra* note 41, at 21.

<sup>61</sup> *China Changes Law to Limit Death Sentence*, *supra* note 11.

<sup>62</sup> Xie Chuanjiao, *Justice for Those Wronged by the Judiciary*, CHINA DAILY, Apr. 30, 2004, [http://www.chinadaily.com.cn/china/2008-04/30/content\\_6654456.htm](http://www.chinadaily.com.cn/china/2008-04/30/content_6654456.htm) (last visited Nov. 20, 2009); *China Death Penalty Verdicts Drop*, *supra* note 36; *China Changes Law to Limit Death Sentence*, *supra* note 11.

<sup>63</sup> See *Law Amended to Require SPC Approval of All Death Sentences*, *supra* note 12. Different crimes were assigned the death penalty in different regions. *China Changes Law to Limit Death Sentence*, *supra* note 11.

processes,<sup>64</sup> it may have prompted the government to adopt the recent procedural change.<sup>65</sup>

Other inferences arise from press attention to unjust criminal convictions. The media have a profit-making obligation yet are government controlled,<sup>66</sup> usually by means of post-publication or self-censorship.<sup>67</sup> Nonetheless, stories of erroneous convictions that successfully sold newspapers were not banned or inhibited by the state. Given that no government should wish to disclose its failings, the publication of unjust convictions may suggest that the state allowed the media to stimulate public outrage, which could serve as a justification for a prior, independent political decision to change the death penalty procedure.<sup>68</sup>

In the United States, too, the media has disclosed convictions of the innocent.<sup>69</sup> As in China, there has been some political response to public awareness of dreadful sentencing errors across America: former Illinois Governor George Ryan imposed a moratorium on executions,<sup>70</sup> and New

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<sup>64</sup> See Clifford Coonan, *Protests in China at Official 'Cover-Up' of Teenager's Death*, THE INDEPENDENT, June 30, 2008, available at <http://www.independent.co.uk/news/world/asia/protests-in-china-at-official-coverup-of-teenagers-death-856905.html>.

<sup>65</sup> The public's influence is limited by the difficulty of mobilizing, differences within the public, and poor information about the law. Ultimately state controls restrain media and public pressure. See Peerenboom, *supra* note 41, at 20 n.43 (citing Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1 (2005)).

<sup>66</sup> Jonathan Hassid, *China's Contentious Journalists: Reconceptualizing the Media*, 55 PROBLEMS OF POST-COMMUNISM 52, 53-54 (2008); Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 42-43, 56-58 (2005); Alex An & David An, *Media control and the Erosion of an Accountable Party-State in China*, 8 CHINA BRIEF, Oct. 7, 2008, available at [http://www.jamestown.org/programs/chinabrief/single/?tx\\_ttnews\[tt\\_news\]=5209&tx\\_ttnews\[backPid\]=16&no\\_cache=1](http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews[tt_news]=5209&tx_ttnews[backPid]=16&no_cache=1).

<sup>67</sup> See Liebman, *supra* note 66.

<sup>68</sup> A nice touch because it makes the government appear responsive to the public will. Professor Liebman has another interpretation in Benjamin Liebman & Tim Wu, *China's Network Justice*, 8 CHI. J. INT'L L. 257, 285 (2007).

<sup>69</sup> *Medill Innocence Project, Undergraduate Journalism* <http://www.medill.northwestern.edu/journalism/undergrad/page.aspx?id=59507> (last visited Oct. 17, 2009); Stephen B. Bright, *Why the United States Will Join the Rest of the World in Abandoning Capital Punishment*, in DEBATING THE CASE AGAINST DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? 160 (Hugo Adam Bedau & Paul G. Cassell eds., 2004); Joshua K. Marquis, *Truth and Consequences: The Penalty of Death*, in DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? 143 (Hugo Adam Bedau & Paul G. Cassell eds., 2004); Bryan Smith, *NU Students Taught the System a Lesson*, CHICAGO SUN-TIMES, Feb. 21, 1999, available at [http://nl.newsbank.com/nl-search/we/Archives?p\\_product=CSTB&p\\_theme=cstb&p\\_action=search&p\\_maxdocs=200&p\\_topdoc=1&p\\_text\\_direct=0=0EB423FF90F50664&p\\_field\\_direct=0=document\\_id&p\\_perpage=10&p\\_sort=YMD\\_date:D&s\\_trackval=GooglePM](http://nl.newsbank.com/nl-search/we/Archives?p_product=CSTB&p_theme=cstb&p_action=search&p_maxdocs=200&p_topdoc=1&p_text_direct=0=0EB423FF90F50664&p_field_direct=0=document_id&p_perpage=10&p_sort=YMD_date:D&s_trackval=GooglePM); Don Terry, *Survivors Make the Case Against Death Row*, N.Y. TIMES, Nov. 16, 1998, available at <http://query.nytimes.com/gst/fullpage.html>.

<sup>70</sup> Press Release, Governor's Office, Governor Ryan Declares Moratorium On Executions, Will Appoint Commission To Review Capital Punishment System (Jan. 31, 2000), available at <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=359>.

Jersey repealed its capital punishment law.<sup>71</sup> In different ways, reflecting different roles for the press, public exposure has influenced death sentence policy in both countries.

## 2. *Changed Circumstances in China Enabled Reform*

The Supreme People's Court may have recaptured its power to review capital convictions because China now has the resources and the capacity for that process.<sup>72</sup> In 2003, a Chinese critique of capital case procedures claimed that "material considerations, in the form of lack of staff, [were] the greatest obstacle" to SPC review of all capital cases.<sup>73</sup> That the Supreme People's Court plans to hire 120 "criminal judicial officers" and has staffed three tribunals with judges and lawyers to assist it with review of capital cases<sup>74</sup> supports that argument. Yet such expense seems trivial and inadequately explains China's failure to reform earlier.<sup>75</sup> A more believable interpretation of this "adequate resources" argument is that the increased professional *qualifications* of Chinese judges and lawyers have expanded the judicial system's capacity to assure fair trials.<sup>76</sup> The resources analysis has little application to the United States, where the legislatures are

<sup>71</sup> Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, N.Y. TIMES, Dec. 17, 2007, available at [www.nytimes.com](http://www.nytimes.com) (search "Death Penalty Repealed in New Jersey").

<sup>72</sup> *Lawyers, Teachers to be Hired for Death Penalty Reviews*, THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA, <http://en.court.gov.cn/public/detail.php?id=4076> (last visited Nov. 22, 2009); see Liu Wen, *Read the Figures, the Feelings of Progress*, in Hu Yunteng et al., *supra* note 4. Taking a utilitarian view, Professor Chen Xingliang, Beijing University, advocated abolishing the death penalty when the country could afford the cost of long-term imprisonment. *Lessons Still Need Reinforcing*, CHINA DAILY, Jan. 27, 2005, [http://www.chinadaily.com.cn/english/doc/2005-01/27/content\\_412578.htm](http://www.chinadaily.com.cn/english/doc/2005-01/27/content_412578.htm) (last visited Oct. 12, 2009).

<sup>73</sup> Chen Xingliang, *supra* note 48, at 50. However Prof. Chen contended that inadequate resources were a "mask" for a judgment preferring material values over human life. *Id.* He proposed limiting the imposition of the death penalty at a forum at the Beijing University Faculty of Law in 2002. See *id.* at 51 n.1. I believe his opinions were within the range of politically acceptable views and might have prepared the public for the 2006 changes.

<sup>74</sup> *Lawyers, Teachers to be Hired for Death Penalty Reviews*, *supra* note 72. Some believe these assistants are less qualified than new criminal court judges. Ni Jian, *A Cold, Hard Look at the Supreme Court's "Expansion of the Ranks" of Criminal Judges*, translated in Dui Hua Foundation, *Will Death Penalty Review Overwhelm China's Supreme Court*, DUI HUA HUMAN RIGHTS J. (Nov. 25, 2007), <http://duihua.org/hrjournal/2007/11/will-death-penalty-review-overwhelm.html> (last visited Oct. 3, 2009).

<sup>75</sup> The SPC has used remote video to clarify case facts without bringing the defendant to Beijing, exemplifying the use of modern technology to make review more efficient. Xie Chuanjiao, *Video Used to Review Death Sentence*, CHINA DAILY, Apr. 28, 2008, [http://www.chinadaily.com.cn/china/2008-04/26/content\\_6645761.htm](http://www.chinadaily.com.cn/china/2008-04/26/content_6645761.htm) (last visited Nov. 22, 2009).

<sup>76</sup> Hualing Fu, *Putting China's Judiciary into Perspective: Is It Independent, Competent, and Fair?* in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 208 (Erik G. Jensen & Thomas C. Heller eds., 2003); Liebman, *supra* note 41, at 12-13; Peerenboom, *supra* note 41, at 22. By regulation, the S.P.C. and Ministry of Justice have required that lawyers in capital cases have criminal defense experience. PEOPLE'S DAILY ONLINE, May 23, 2008, <http://english.people.com.cn/90001/90776/6416593.html> (last visited Nov. 21, 2009).

constitutionally obliged to protect the fundamental rights of criminal defendants even in capital prosecutions that demand many more resources than other criminal cases.<sup>77</sup>

Another change of circumstances is the drop in crime rates in China. An increase in crime provoked the 1983 “Strike Hard” program, which included transferring capital punishment reviews from the SPC to the local courts.<sup>78</sup> In 2007, however, convictions based upon a group of serious violent felonies dropped 6.87% from 2006.<sup>79</sup> The government was able to restore the authority of the Supreme People’s Court when lower crime rates made “Strike Hard” superfluous.<sup>80</sup> This explanation for the recent change does not suggest a rethinking of capital punishment in principle and so would not foreshadow a permanent or extended limitation on executions. Rather than a significant development, China’s revised rules may reflect the same “law and order/mandatory sentencing” political swings that occur periodically in the United States.<sup>81</sup>

### 3. *Compassion Is Reflected in the Stated Goal of Executing Fewer Defendants*

Despite China’s traditional acceptance of the death penalty, it would be cynical to reject simple humanity as an explanation for the nation’s new approach to executions. Wrongful convictions<sup>82</sup> and inconsistent imposition

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<sup>77</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 342-44 (1963) (requiring states to guarantee rights “fundamental and essential to a fair trial”). Because death penalty trials cost much more than prosecutions seeking other punishment, some states are considering repealing capital punishment. Ian Urbina, *Citing Cost, States Consider End to Death Penalty*, N.Y. TIMES, Feb. 25, 2009, available at <http://www.nytimes.com/2009/02/25/us/25death.html>.

<sup>78</sup> See *China Changes Law to Limit Death Sentence*, *supra* note 11; see also discussion in notes, *supra* note 12.

<sup>79</sup> The crimes were intentional murder, robbery, kidnap, and felonious assault. Crime rates diminished when capital punishment was abandoned, but this may not be a causal relationship. Some attribute the change to improved economic conditions. Hu Yunteng et al., *supra* note 4.

<sup>80</sup> The SPC began considering restoration of its death sentence review power in the late 1990s. In its Second Five-Year Plan (2006-2010), the SPC announced its intention to make the change that took effect in January 2007. *China Changes Law to Limit Death Sentence*, *supra* note 11.

<sup>81</sup> See AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* 18 (2002) (“Yet this era also is associated with a hardening of attitudes toward crime and a dramatic escalation of state investment in the apparatus of punishment. As a result, no American politician today wants to be caught on the wrong side of the death penalty debate.”).

<sup>82</sup> Dickie, *supra* note 14; *China Changes Law to Limit Death Sentence*, CHINA DAILY, [http://www.chinadaily.com.cn/china/2006-10/31/content\\_721315.htm](http://www.chinadaily.com.cn/china/2006-10/31/content_721315.htm) (last visited Nov. 15, 2009); *Law Amended to Require SPC Approval of All Death Sentences*, *supra* note 12; *Fewer Death Sentences*, CHINA DAILY, June 8, 2007, [http://www.chinadaily.com.cn/cndy/2007-06/08/content\\_889791.htm](http://www.chinadaily.com.cn/cndy/2007-06/08/content_889791.htm) (last visited Nov. 15, 2009).

of the death penalty by provincial courts<sup>83</sup> have troubled many.<sup>84</sup> The articulated aim of the procedural revisions is to save lives: “The SPC’s authority to review death sentences is intended to sharply reduce the rate of executions.”<sup>85</sup> The balance moved towards “kill fewer, kill cautiously.”<sup>86</sup> The expansion of execution by lethal injection rather than gun shot is “considered more humane.”<sup>87</sup> Compassion underlies these positions. The decline in the national crime rate makes the government less afraid of disruption and citizens less concerned with personal security, thereby opening space for mercy. Moreover, a demonstration of compassion is consistent with the influence of international human rights organizations on China’s law.

#### 4. *Supreme Judicial Court Review of Death Sentences Serves Internal Political Interests*

A discussion of the national-local tensions in China is beyond the scope of this essay, but is it important to recognize that the national government is eager to extend its authority over local officials, where widespread government corruption arises.<sup>88</sup> Local governments have proved “unruly and disobedient”<sup>89</sup> in China’s decentralized system. The authority of local governments over court funding and judicial appointments enables them to influence basic level courts.<sup>90</sup> Centralizing capital case reviews in the SPC diminishes the power of local government officials and the “local protectionism” that influences court decisions.<sup>91</sup> An example of centralization in the court system is found in the 2005 Five-Year Plan, which

<sup>83</sup> Xie Chuanjiao, *Review ‘Not a Signal of Lenience,’* CHINA DAILY, Jan. 8, 2008, [http://www.chinadaily.com.cn/cndy/2007-01/08/content\\_776466.htm](http://www.chinadaily.com.cn/cndy/2007-01/08/content_776466.htm) (last visited Nov. 15, 2009).

<sup>84</sup> Zhao Huanxin & Xie Chuanjiao, *No Turning Back on Death Rule,* CHINA DAILY, March 15, 2007, [http://www.chinadaily.com.cn/cndy/2007-03/15/content\\_827908.htm](http://www.chinadaily.com.cn/cndy/2007-03/15/content_827908.htm) (last visited Nov. 20, 2009). The wrongful convictions of She Xianglin and Nie Shubin were well publicized.

<sup>85</sup> See Dui Hua Foundation, *Death Penalty Reform Should Bring Drop in Chinese Executions*, 26 DIALOGUE 1 (2007), available at [http://www.duihua.org/work/publications/nl/nl\\_pdf/nl\\_26\\_2.pdf](http://www.duihua.org/work/publications/nl/nl_pdf/nl_26_2.pdf).

<sup>86</sup> Susan Trevaske, *The Death Penalty in China Today: Kill Fewer, Kill Cautiously*, 48 ASIAN SURVEY 393 (2008), available at <http://caliber.ucpress.net/doi/abs/10.1525/as.2008.48.3.393?journalCode=as>.

<sup>87</sup> Jiang Xingchang, vice-president of the SPC, quoted in Xie Chuanjiao, *Lethal Injection to be Used More*, CHINA DAILY, Jan. 3, 2008, [http://www.chinadaily.com.cn/china/2008-01/03/content\\_6366528.htm](http://www.chinadaily.com.cn/china/2008-01/03/content_6366528.htm) (last visited Nov. 22, 2009).

<sup>88</sup> See ROB GIFFORD, *CHINA ROAD: A JOURNEY IN THE FUTURE OF A RISING POWER* 58 (2007).

<sup>89</sup> Brackmann, *supra* note 23. Local Party-state officials control the appointment of local court presidents. See Liebman, *supra* note 41, at 17-18.

<sup>90</sup> Peerenboom, *supra* note 41, at 18.

<sup>91</sup> LU & MIETHE, *supra* note 27, at 104; see Brackmann, *supra* note 23. Local governmental units control the finances and staffing of local courts making them susceptible to local pressures. *Law Amended To Require SPC Approval of All Death Sentences*, *supra* note 12.

initiated a limited program of national appointment of judges.<sup>92</sup> From a political viewpoint, restoring authority to the top court—regardless of the legal doctrine involved—serves the aims of the national government.<sup>93</sup> The capital punishment issue is not central to this analysis.

If cutting the number of executions is not the goal of the recent reforms, disempowering local courts to strengthen national political authority may be the purpose.<sup>94</sup> The SPC chief justice emphasized the importance of central supervision: “strengthen[ing] supervision over lower courts in death penalty cases” and “*unifying death penalty standards across the country* [are] important for improving human rights and ensuring fair trials.”<sup>95</sup> Nonetheless, given other means to control local authorities and the local judiciary’s recent history of disregarding SPC orders,<sup>96</sup> the political explanation for changes to capital punishment procedure is not the most salient.<sup>97</sup>

Given weak court independence in China,<sup>98</sup> changes in capital punishment processes and in official statements connote a shift in Party policy. Since the 2007 procedural changes, Wang Shengjun has become President of the Supreme Peoples’ Court. His public comments are much less sympathetic to the rights of defendants than were those of his predecessor,<sup>99</sup> suggesting a political, not judicial, explanation for restoring SPC authority. In April 2008, according to the official news agency:

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<sup>92</sup> Second Five Year Reform Program for the People’s Courts (2004-2008), (issued by the Sup. People’s Ct., Oct. 25, 2005), at No. 37, *translated in* CCEC.gov, <http://www.cecc.gov/pages/virtualAcad/index.php?showsingle=38564> (last visited Oct. 3, 2009) (“Exploring, within a given area, the implementation of a system to centrally recruit and assign judges to hold positions in basic people’s courts.”).

<sup>93</sup> Posting of Dan Harris to *Chinese Executions and China Courts*, CHINA LAW BLOG, [http://www.chinalawblog.com/2006/11/chinese\\_executions\\_and\\_china\\_c.html](http://www.chinalawblog.com/2006/11/chinese_executions_and_china_c.html) (Nov. 21, 2006, 19:16) (last visited Nov. 22, 2009); Brackmann, *supra* note 23.

<sup>94</sup> “He [Xiao Yang, former President of the SPC] knows the bureaucracy and local administrations interfere with the courts because that has been the convention for long. But he insists that trials should be held under direct authority of the State and according to the Constitution. ‘Some local officials don’t want to understand the nature of the judiciary. They think of it as another administrative office. Hence, they ignore the judges and treat them as any other professionals, no different from a public servant.’” Xie Chuanjiao & Xu Chunzi, *A visionary’s march toward rule of the law*, CHINA DAILY, Mar. 11, 2008, [http://www.chinadaily.com.cn/cndy/2008-03/11/content\\_6524584.htm](http://www.chinadaily.com.cn/cndy/2008-03/11/content_6524584.htm) (last visited Oct. 12, 2009).

<sup>95</sup> Xie Chuanjiao, *supra* note 83.

<sup>96</sup> See Liebman, *supra* note 41, at 14.

<sup>97</sup> See LU & MIETHE, *supra* note 27, at 105.

<sup>98</sup> See generally XIAN FA [CONSTITUTION] art. 128 (1982) (P.R.C.). Peerenboom, *supra* note 41, at 12-13; see Liebman, *supra* note 66, at 1.

<sup>99</sup> The new “Three Supremes” campaign re-emphasizes Party control, even the written law. Wang Shengjun, coming from the Party’s political-legal apparatus, not from a legal institution, has promoted this effort. Carl Minzner, *Are Chinese Authorities Seeking to Rein in the Courts?*, CHINESE LAW AND POLICY BLOG, <http://sinolaw.typepad.com/> (follow “November 2008” hyperlink, then “Are Chinese Authorities Seeking to Rein in the Courts?” hyperlink) (last visited Oct. 4, 2009).



[Wang] told judges to impose the death penalty and other harsh sentences for violent crimes . . . . [These] comments . . . struck a markedly different tone from that of his predecessor who had campaigned to limit death sentences to the bare minimum, and only for the most heinous crimes.<sup>100</sup>

Wang went on to justify tough punishment to “‘increase the sense of security among the people . . . .’ ‘Where the law mandates the death sentence, the death sentence should be given . . . . Crimes involving terrorism or organized groups, violence, and those that ‘seriously threaten social order’ should be dealt with especially harshly.”<sup>101</sup>

Such public declarations are very different from Wang’s predecessor Xiao Yang, who “‘urged courts to exercise ‘extreme caution’ when handing down death sentences.’”<sup>102</sup> Xiao Yang reminded judges “‘every judgement [sic] should ‘stand the test of time’”<sup>103</sup> and said that “‘[i]n cases where the judge has legal leeway to decide whether to order death, he should always choose not to do so.’”<sup>104</sup> Finally Xiao advised, “Judges should be very cautious, as if walking on thin ice, when it comes to the death penalty.”<sup>105</sup>

Wang’s short tenure as Chief Justice has provided insufficient data to determine whether the Court’s actions support or contradict his tough statements. His statements may have been a response to recent violence surrounding ethnic Muslims’ protests,<sup>106</sup> or they may signal a new interpretation of the death penalty review procedures that is less protective of defendants’ rights. Or he may be signaling the Party’s latest attitude towards the judiciary or towards capital punishment—a harsher view than

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<sup>100</sup> *China. Chief Justice calls for Death Sentences to be Imposed*, HANDS OFF CAIN, April 12, 2008,

<http://www.handsoffcain.info/news/index.php?iddocumento=10309190> (last visited Oct. 4, 2009).

Wang Shengjun announced a presumption for execution “‘where the law mandates the death sentence,” contradicting his predecessor’s approach. Christopher Bodeen, *China’s Chief Justice Urges Death Sentences*, THE STAR, Apr. 12, 2008, available at <http://www.thestar.com/News/World/Article/413930>.

<sup>101</sup> See Bodeen, *supra* note 100. The SPC President aroused concern about returning to the time of the Cultural Revolution when he “‘stressed three bases for a courts [sic] ruling: the law, the level of security in society . . . and the ‘society and people’s feelings.’” Harvard Kennedy School Program in Criminal Justice Policy and Management, *Death Penalty Debate Expands*, CHINA JUSTICE NEWS UPDATE 2 (2008), available at [http://www.hks.harvard.edu/criminaljustice/publications/CJNU\\_45\\_FINAL.pdf](http://www.hks.harvard.edu/criminaljustice/publications/CJNU_45_FINAL.pdf).

<sup>102</sup> Tim Goodwin, *China: Judges Try to Limit Death Penalty*, ASIA DEATH PENALTY, <http://asiadeathpenalty.blogspot.com/2006/11/china-judges-try-to-limit-death.html> (last visited Oct. 4, 2009).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> See Barboza, *supra* note 44.

expressed when the SPC's review powers were restored. In either event, Communist Party goals will continue to drive death penalty policy.

Most of the domestic justifications for changing procedures in China are not significant in the United States. Few public officials in the United States have spoken about capital punishment recently. The American media did influence capital punishment policies in Illinois and New Jersey with reports of mistaken convictions,<sup>107</sup> but most other challenges to the death penalty are made through individual constitutional challenges in court. Because capital punishment is largely a state matter in the United States,<sup>108</sup> the Chinese political system enables reform of death penalty laws throughout the country more easily than does the United States' system.

#### IV. CONCLUSION

One cannot confidently specify the most powerful influence on China's decision to extend legal protection for those sentenced to capital punishment, therefore the significance of the change is unclear. Nonetheless, one sees signs of transformation. The "mainstream views of scholars" favor ultimate abolition of the death penalty.<sup>109</sup> The actions of the Supreme People's Court reflect change: more reversals<sup>110</sup> and threats to prosecute judges who decide incorrectly.<sup>111</sup> Even Zhang Yumao, a member of the powerful NPC Standing Committee, believes that the recent changes portend a very slow movement towards abolishing executions: "China is on the direction of abolishing the death sentence. But it will take time."<sup>112</sup> Limiting the death penalty, as the SPC is now doing, serves the goal of abolishing executions. This measured development recognizes implicitly that social acceptance will take a long time.<sup>113</sup>

The United States Supreme Court has also limited the scope of capital punishment. It has banned execution of minors and the mentally retarded,

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<sup>107</sup> *Medill Innocence Project*, *supra* note 69; Bright, *supra* note 69, at 160; Marquis, *supra* note 69, at 143; Smith, *supra* note 69; Terry, *supra* note 69. In 2007, Maryland's legislature would have abolished the death penalty but for one vote. Urbina, *supra* note 77.

<sup>108</sup> FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 78 (2003).

<sup>109</sup> LU & MIETHE, *supra* note 27, at 124-25; *International Symposium on Death Penalty Held in China (I)*, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE REPUBLIC OF ESTONIA, <http://www.fmprc.gov.cn/ce/ceee/eng/dtxw/t111299.htm> (last visited Oct. 4, 2009).

<sup>110</sup> *China Sees 30% Drop in Death Penalty*, *supra* note 4.

<sup>111</sup> The SPC will track retrials resulting from cases tried by particular judges and will punish those who are prone to errors. This is the first time the SPC has said it will hold judges responsible for issuing verdicts that are later overturned, according to Shen Deyong, vice-president of the SPC. Xie Chuanjiao, *supra* note 17. However, attempts to make lower court judges responsible for intentional or major errors began in 1992. LU & MIETHE, *supra* note 27, at 223 n.43.

<sup>112</sup> *China Changes Law to Limit Death Sentence*, *supra* note 11.

<sup>113</sup> See LU & MIETHE, *supra* note 27, at 125.

and prohibited death sentences for rape of a minor.<sup>114</sup> But most executions arise out of state punishment systems untouched by any national policy decisions.<sup>115</sup> In contrast, China's revisions are politically approved and take the form of national rulemaking, rather than court decisions, making it possible that China will abolish the death penalty before the United States. Neither nation will do so soon.

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<sup>114</sup> *Roper*, 543 U.S. at 574; *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); *Kennedy v. Louisiana*, \_\_\_ U.S. \_\_\_, (128 S. Ct. 2641, 2664 (2008)).

<sup>115</sup> ZIMRING, *supra* note 108, at 78.