Introduction

Author: Jerome A. Cohen
Translator: Chao Liu

The last several decades have witnessed a global trend towards the abolition of the death penalty that seems to be accelerating. Today, there are 148 countries that have abolished the death penalty either officially or in practice. In the last five years, the General Assembly of the United Nations has adopted three resolutions calling for a universal, albeit non-binding, moratorium on the death penalty, with the number of supporting votes increasing for each successive resolution and the number of States opposing the moratorium steadily decreasing. Moreover, the rhetoric of the international debate is gradually shifting from that of criminal procedure to that of universal human rights, with abolition increasingly being framed as necessary to the protection of human dignity and the sanctity of life, as enshrined in the Universal Declaration of Human Rights and elsewhere.

Among those nations retaining the death penalty, China and the United States occupy positions of unique prominence due to their substantial political power and vocal opposition to abolition. China, of course, stands apart from even other retentionist jurisdictions because of the sheer volume of executions it performs each year; the precise number remains a tightly guarded state secret, but it is credibly estimated to be roughly several thousand and probably accounts for at least eighty percent of all judicial executions globally. The United States stands out as the last liberal democracy to regularly implement the death penalty, with thirty-three of its states and its federal jurisdiction retaining capital punishment. It conducted forty-three executions in 2011, compared, for example, to nine in Taiwan in the past seven years, and, for the first time in nineteen years, there were no executions in Japan in 2011.

Both China and the U.S. passionately defend their sovereign right to punish crime in accordance with their own laws and local conditions, but both also recognize the right to life as a fundamental value and have struggled to slowly restrict the application of the death penalty. In exercising their sovereign power to accede to the International Covenant on Civil and Political Rights - which the U.S. ratified in 1992 and which China signed in 1998, but has not yet ratified - these two nations have committed themselves to protecting against the arbitrary deprivation of life. The Covenant allows States Parties to retain the death penalty, but restricts its imposition to "the most serious crimes in accordance with law" and prohibits the execution of pregnant women and persons under eighteen years of age at the time of their offense. The question of what offenses constitute "the most serious crimes" is one that has plagued China and the U.S., and it should be noted that, while U.S. law now prevents the imposition of a death sentence against juveniles, at the time of U.S. ratification even this protection was controversial enough to warrant an official reservation to the Covenant!

The protection against arbitrariness in the imposition of capital punishment - the most severe and irreversible of all criminal punishments - is perhaps the central issue in death penalty jurisprudence. Ensuring that similar cases are met with similar punishments following fair and impartial court proceedings is not only essential for maintaining the fundamental principle of

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equality before the law, but is also key to maintaining public confidence in the fairness of the criminal justice system. This invokes a second challenge in death penalty reform - that of public opinion and legitimacy. In both China and the U.S., the death penalty continues to enjoy popular support, and judges, prosecutors and lawmakers may struggle to contend with pressure to appear "tough on crime." Ironically, in China, where the death penalty is imposed with astounding frequency, officials regularly state that abolition is their ultimate goal, while in the U.S., where use of the death penalty is much more reserved, announcing opposition to capital punishment is often tantamount to political suicide for elected officials, including many elected state judges.

Over the past several years, New York University's U.S.-Asia Law Institute has worked extensively in cooperation with Chinese scholars, legal professionals and officials as China has crafted and implemented a panoply of reforms aimed at reducing reliance on the death penalty in furtherance of its policy of executing only rarely and cautiously (少杀慎杀). Prominent among these reforms was the 2007 reclamation of the power of final review of all death sentences by the Supreme People's Court (SPC), which greatly increased the quality of review in such cases and is reported to have reduced executions in China by as much as thirty percent. The 2011 adoption of the Eighth Amendment to China's Criminal Law reduced the number of offenses eligible for the death penalty to fifty-five from sixty-eight by excluding a number of rarely-prosecuted non-violent offenses, and also created a humanitarian prohibition against imposing death sentences upon offenders age seventy-five or over at the time of trial. In 2010, the five highest governmental bodies most directly involved with the criminal justice system, namely the SPC, the Supreme People's Procuratorate, the Ministry of Justice, the Ministry of State Security and the Ministry of Public Security, released detailed evidentiary rules for capital cases that purport to greatly increase the procedural protections available to capital defendants, including an increased emphasis on in-court testimony by critical witnesses whose testimony is disputed.

The recently amended Criminal Procedure Law (CPL), in effect from January 1, 2013, continues China's efforts to ensure fairness and accuracy in death penalty adjudication. Notable among the new provisions is the requirement that interrogations of suspects accused of offenses punishable by death or life imprisonment be recorded in audio or video format, so as to reduce incidents of coerced confessions. Such incidents have marred Chinese criminal justice even after the strengthening of rules for excluding such confessions, which are also now codified in the CPL. Other important improvements in the CPL include a requirement that actual trials be held when second-instance courts consider death penalty cases, extensions of the permissible time periods for hearing capital cases and a requirement that defense counsel's opinions be heard during the SPC's final review of all death sentences if counsel requests.

This book responds to our close cooperation with Chinese colleagues during this dynamic period of reform, by examining not the Chinese death penalty legal system, but that of the United States. While the American experience and reform path differ in many ways from those of China, many of the problems confronted by each nation are the same. What procedures can guarantee consistency in the handling of death penalty cases, but also allow for individualized sentencing consideration of each defendant's unique circumstances? What crimes should be viewed as "the most serious" and thus be eligible for the death penalty? Are some types of defendants, such as the elderly, young or mentally ill, so vulnerable as to deserve our mercy for that reason alone? In

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what circumstances should an accused be deemed unable even to sustain criminal responsibility? How can the legal system satisfy the demands of international human rights, fundamental fairness and the rule of law, but also respond to the demands of individual crime victims and the public at large? The authors of this volume have done an admirable job in presenting primary source materials and scholarly commentary that demonstrate the contemporary American approach to these problems and others that have been the subject of frequent inquiry in our conversations with Chinese experts.

In the U.S., restrictions on the use of the death penalty, with a few notable exceptions, have generally arisen from the courts' interpretation of state and federal constitutional guarantees of due process and freedom from cruel and unusual punishment. As is required under our common law system, these interpretations are not issued in the abstract, but arise from the resolution of concrete cases and controversies before the courts. American lawyers begin their training by learning how to read published court opinions in order to derive principles of law from the courts' holdings and analyses, and the authors of this text have chosen also to present the law through the courts' own language when possible. To assist in the understanding of the courts' often quite dense opinions and the broader ramifications of each case, the authors have interspersed commentary and annotations throughout these opinions to make them more focused and accessible.

The choice to follow a case-analysis method, however, was not merely one of following the conventions of American legal pedagogy, but was made to emphasize the important role of written opinions in U.S. criminal justice. Opinions are the means by which courts communicate their conclusions and the reasoning behind them to the parties and their lawyers; and in doing so they create a clear and publicly available record that can be rationally reviewed and challenged. The written opinion, when published, also announces the law generally to the legal profession, scholars, judges and the interested public. It is thus not enough that courts' decisions correctly apply the law - they must also state their reasoning in an understandable and persuasive fashion so as to explain why the decision is fair, principled and sound. Perhaps most importantly, the intellectual rigor of committing one's thoughts to paper forces judges to confront their own reasoning head-on. Justice Felix Frankfurter, for whom I long ago worked as a law clerk, was fond of saying that, "some opinions simply won't write," meaning that the very process of articulating the reasoning behind a decision can sometimes lead one to reevaluate that reasoning and even the decision initially contemplated.

The Supreme Court opinions and other cases selected by the authors for inclusion in this book are presented not to suggest the U.S. system as a model or direction for Chinese reformers, but to offer insight into another major retentionist jurisdiction's struggle with common questions of law and justice. In each chapter, the authors provide background material to orient readers to the legal, political and social context in which the issue arises before guiding the reader through the text of relevant court opinions. The emphasis throughout is on demonstrating the judicial process as much as on presenting the current law. While this short volume cannot provide a comprehensive overview of American death penalty jurisprudence, taken together this collection of brief discussions on topics important to both U.S. and Chinese capital punishment jurisprudence begins to offer a story of America's forty-year effort to reconcile the perceived need to retain the death penalty with contemporary standards of decency and due process of law.

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Whether the courts' efforts have succeeded in producing a rational legal framework for making the death penalty decision, or whether such a goal is even feasible, are questions still very much open to debate. In 1972, the Supreme Court found that state courts applying state death penalty laws meted out death sentences in a manner so arbitrary and capricious that they violated the Eighth Amendment's prohibition against cruel and unusual punishment. This resulted in a four-year de facto moratorium on the death penalty that many believed would spell the end of capital punishment in the U.S. What followed instead was the beginning of a new era in death penalty jurisprudence that can be thought of as an ongoing dialogue between state legislatures and the U.S. Supreme Court, in which states have revised their death penalty laws in response to new constitutional rulings. Through its review of the constitutionality of individual death sentences under these laws, the Supreme Court has attempted to craft rational standards that allow U.S. jurisdictions to preserve the death penalty for the worst-of-the worst offenses - in terms of the seriousness of the act, the severity of the harm and the intent of the offender - but that also require wide space for judicial consideration of any possible grounds for mercy.

Just as China's courts are urged to consider the actual harm caused by an offense and the subjective malice of the offender when making the death penalty decision, the U.S. Supreme Court has also looked to these factors in deciding what offenses are eligible for the death penalty. In recent broad rulings, the Supreme Court has gone so far as to say that the death penalty is not a permissibly proportional punishment when applied in a prosecution for any crime against an individual that does not cause the loss of a life. Even within the category of homicide crimes, however, the Supreme Court has required that legislatures limit sentencers' discretion in applying the death penalty by allowing death sentences only in cases in which an additional aggravating circumstance is found - such as the crime being especially heinous or cruel, or the victim having been an on-duty police officer. The Supreme Court has also required that a defendant have the highest level of intention to kill, an issue that has proven critical in reviewing jointly committed offenses where a defendant may be held responsible for a murder committed by another person.

That a crime is so serious as to make the death penalty a possibility, of course, does not mean that the ultimate penalty *should* be imposed, and the U.S. Supreme Court has said that to create such a requirement would itself be impermissibly arbitrary. Instead, in what may to Chinese readers evoke China's justice policy of "balancing severity and leniency" (宽严相济), the Supreme Court requires an individual consideration of any mitigating factors that might be reasonably relevant to the sentencing decision in capital cases. In addition, some types of defendant, including juveniles, the mentally retarded, and those who by reason of mental illness are unable to bear criminal liability or understand the nature and purpose of the death penalty, are categorically excluded from it.

While some of this jurisprudence may seem familiar to Chinese readers, there are of course stark contrasts between Chinese and American criminal procedure. Perhaps preeminent among these is the American reliance on jury trials as a means of popular participation in adjudication and capital sentencing. The jury's role in capital proceedings is especially critical, in that jurors not only serve as finders of fact as in normal criminal trials, but also are directly involved in the

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sentencing determination. Juries in capital cases thus serve as the representation of society's moral conscience in making the ultimate appraisal of the offender and his crime, and their participation helps to satisfy the general public that the decision whether or not to apply the death penalty was legitimate. America's use of a jury system may not be well-suited to China or other civil law jurisdictions, although South Korea currently resorts to advisory juries in certain criminal cases, Taiwan is considering a similar system, and even select areas in China claim to have introduced their own type of experimental criminal jury. Nevertheless, understanding the American jury system's functions in including and educating the American public in criminal justice is essential to understanding the American death penalty jurisprudence discussed throughout this volume.

Chinese courts, in addition to usually including the often compliant "people's assessors" in the trial of less important criminal cases, are also urged to be responsive to the public, as part of efforts to "democratize" the judicial system and win public support. Unfortunately, Chinese courts' perceived responsiveness to public opinion too often works against the creation of a rational, credible rule of law. The well-known case of Li Changkui in Yunnan is a prime example, in which after the Yunnan High Court reduced an initial death sentence for immediate execution from the intermediate court to a suspended death sentence, public outrage actually resulted in the High Court retrying the case, and this time itself imposing a sentence for immediate execution. In the earlier infamous Liu Yong case, even the SPC reinstituted a sentence of immediate execution after public outrage over the Liaoning High Court's suspension of the immediate execution sentence imposed by the trial court, and this was done after the SPC reportedly had secretly authorized the High Court to suspend the death sentence. While such moves might temporarily mollify an angry public, the message they send is clear – the decision to execute is not one made by law or even the courts' discretion, and is thus inherently arbitrary.

One final point that will become immediately clear to readers is that, while China and the U.S. differ in many ways in their handling of capital cases, both legal systems agree that the death penalty holds a special place in criminal punishment. It is often said in the U.S. courts that "death is different" from all other punishments, and the Chinese phrase "人命关天"echoes this sentiment. Even Chairman Mao Zedong recognized that "People's heads are not like leeks. When you cut them off, they will not grow again." This has led both nations to erect special procedures in capital cases in an attempt to ensure that the death penalty is used only with great caution. The severity and irreversibility of the death penalty mean that an unjust or wrongfully decided verdict would create an irreparable harm committed by the hand of the state. In China, high-profile mistaken decisions such as that in the Zhao Zuohai case have demonstrated that the possibility of a wrongful conviction is all too real, and, in the United States, the use of DNA evidence to exonerate prisoners on death row has done the same.

As you read the cases that have been assembled within, please keep in mind that the story of the death penalty in America is far from finished. What is presented here is only a brief glimpse of the American experience, which is in turn only a small part of an international story of mankind's experience with capital punishment. Whether the U.S. will ultimately abandon the death penalty for alternatives such as a life sentence without parole remains to be seen. We hope that this book, and the insights it provides, will give readers new perspectives not only on American death penalty practice, but also that of their own country.

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