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Body Count Politics: Quantification, Secrecy, and Capital Punishment in China

Tobias Smith

As quantification has become socially ubiquitous, the disclosure of numerical data emerges as a key feature of legal reform and global governance. Scholars document how seemingly value-neutral statistical indicators shape, and are shaped by, institutional interests. Although less attention has been paid to cases where states resist numerical disclosure, prohibitions on the disclosure of such indicators also produce social effects. This article extends scholarship on the governance effects of quantification to include secrecy by exploring the case of capital punishment data in China, which is reportedly the world's leading executioner state. Amid a major death penalty reform effort, China steadfastly refuses international calls to publicly disclose relevant statistics. I analyze capital cases and draw on seventy-three interviews with legal insiders in China's death penalty system to identify the impact of state efforts to conceal capital punishment indicators while undertaking reforms in three areas: transparency; legal representation; and criminal procedure. I show how tension between the disclosure and nondisclosure of death penalty numbers does not simply suppress data; it also shapes and becomes data, influencing both policy and action in the legal sphere in ways that are seemingly far removed from quantification.

> Full and accurate data is vital to policy-makers, civil society and the general public. It is fundamental to the debate around the death penalty and its impact. Secrecy around executions undermines that debate, and obstructs efforts to safeguard the right to life.
>
> — *António Guterres, United Nations Secretary General, "Remarks on Transparency and the Death Penalty," October 10, 2017*

> As far as lawyers are concerned, aggregate numbers don't matter.
>
> — *Chinese capital defense lawyer, commenting on China's execution rate, interview with author, Beijing, 2017*

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INTRODUCTION

The power to execute is traditionally regarded as the prerogative of the sovereign state (Hobbes 2010). This prerogative, however, must increasingly yield to the prerogative of the sovereign statistic (Comaroff and Comaroff 2006, 211). As with virtually every aspect of governance today, the death penalty is a phenomenon subject to quantification (Hacking 1990; Porter 1995; Foucault 2009; Merry 2016; Berman and Hirschman 2018). International organizations such as Amnesty International publish annual reports that compare and rank countries according to execution data (Amnesty International 2018). Because executions are formal, discrete legal proceedings administered by the state, it would seem that quantifying executions would be an uncontroversial process. But states are not disinterested parties in matters of life and death. Rather, states are active participants in "body count politics" (Andreas and Greenhill 2010, 14).

Wherever states take life—from police shootings to war casualties—body count politics may mediate assessments of legitimate state action, including what "counts" as legitimate death (Andreas and Greenhill 2010; Greenhill 2010; Zimring 2017). I develop body count politics here as a sociolegal concept to name the deployment and mobilization of numerical mortality measurements to support or contest legitimacy in governance.[1] Conceptualized this way, body count politics offer a useful theoretical and empirical lens for scholars to recognize and engage the political and legal mechanisms of the wider sociological phenomena of governance and quantification.

In the case of public data and the quantification of the death penalty, the body count politics at play in the People's Republic of China stand out for two reasons. First, China is widely regarded as far and away the world's leading executioner state; second, China is also one of only a handful of countries that criminalizes the disclosure of statistics about its use of the penalty (Amnesty International 2018). Indeed, China designates national data on the death penalty as top secret, and revealing this data may itself be a capital offense. Although China conceals data from international scrutiny, it actively produces and uses data in domestic governance. China's leaders have embraced what Sally Engle Merry (2016, 39–40) terms "indicator culture," an approach to social management that "places a high value on numerical data as a form of knowledge and as a basis for decision making." Indicator culture features in China's legal reforms, yet in the area of death penalty reform, the state also goes to great lengths to conceal its most basic death penalty indicator: the annual number of executions. Because of this tension between increased quantification and sustained secrecy, China's death penalty data pose a provocative case for the social science of quantification.

Despite appearances of numerical neutrality, observers show that, just like other forms of knowledge, numbers are bound up with power (Foucault 1980; Scott 1990;

1. I adapt this term from Peter Andreas and Kelly Greenhill (2010). In their edited volume *Sex, Drugs and Body Counts: The Politics of Numbers in Global Crime and Conflict*, Andreas and Greenhill evaluate "the politics and process of knowledge production in two international issue areas where quantification is particularly treacherous terrain: transnational crime and armed conflict" (6). While the theme of body count politics is central to the volume, the authors use the phrase only once in passing, writing: "Body count politics became particularly notorious during the Vietnam War" (14). Here, I make explicit the analytic of body count politics and extend it from transnational crime and armed conflict to include domestic mortality statistics.

Porter 1995; Hacking 1990; Latour 2005). Far from being objective and unbiased indicators, quantitative data are shaped by the values, choices, and preferences of people and institutions (Lynch 2017). Numbers shape people and institutions as well. Agents modify their behavior reflexively in response to measurement, producing "reactivity" (Espeland and Sauder 2007, 6) and "looping effects" (Hacking 2007, 286). While scholars across a variety of fields have also explored the influence of secrecy, denial, and the lack of transparency on institutional culture (Simmel 1906; Shils 1956; Bok 1989; Cohen 2001), less attention has been given to the interplay of quantification and data secrecy in forging modes of governance with sociolegal effects, particularly in authoritarian contexts. Can a legal system increase the use of legal indicators for accountability and also systematically restrict outside access to part of this output? What happens when people within a legal system are governed by numbers and must also conceal them? This study extends the literature on quantification to explain how states, legal institutions, and legal actors navigate a field that at once embraces indicator culture for domestic governance and also maintains silence about a major integer—annual executions—in the face of international scrutiny.

This article also draws our attention to the varieties of secrecy. The annual number of executions in China is not only a top secret, but it is also a "shallow secret." A so-called shallow secret is a secret whose existence and rough contours are apparent, even to the people from whom the precise information in question is being concealed (Scheppele 1988; Pozen 2010, 260–61). To use a now iconic American idiom, shallow secrets are "known unknowns" (Pozen 2010, 259). One of the ironies of shallow secrets is that, because their existence is known, they produce more curiosity, confusion, and conflict than deep secrets. People who do not know the shallow secret want to learn it. People who do know the shallow secret make efforts to conceal it. Shallow secrets are also natural research topics, making China's death penalty data an ongoing subject of scholarly inquiry (for example, Lu and Miethe 2007; Johnson and Zimring 2009; Liang and Lu 2016; Xiong 2016).

While this article does not provide any new empirical data about the number of people China executes, it does provide new empirical data on how this secret creates tensions and shapes behaviors and rationales for the national government, the courts, and individual actors in China's criminal justice system. As such, the example of capital punishment statistics in China provides new insights into the way that secrets with particular attributes—secrets about aggregate legal data that are shallow and politically sensitive—have the power to drastically alter state policy, institutional action, and individual behavior. This case of body count politics in China also introduces the influence of state secrecy into the "ethnography of an indicator" and the broader social theory of quantification (Merry 2016, 38).

I draw on data collected in China between 2015 and 2019, including government laws and regulations, available legal records of capital cases, and interviews with more than seventy actors in China's death penalty system to examine the interaction between legal reform and data secrecy. I reveal how, just as the production of quantitative data leads to reactive effects, the suppression of data also leads to reactive effects in the realms of national policy, institutional legal reform, and individual behavior in China. Specifically, I show how efforts to keep data about the death penalty secret impede other state-endorsed legal reforms that appear both quantitatively and qualitatively unconnected

to the death penalty and its statistics. I analyze three instances. First, I show that, even as China's courts increase publication and aggregation of case data, the prohibition on the publication of death penalty statistics inhibits the release of court records in capital cases, putting secrecy at odds with a wider-circulating judicial principle of legal transparency. Second, although China is working to institute universal legal representation in criminal cases, concern over the disclosure of execution numbers has stymied attempts to provide legal aid during the final crucial review stage in capital cases, obstructing yet another widely touted legal reform. Third, despite a state commitment to criminal procedure reform, death penalty secrecy has prevented courts from notifying legal counsel when a client is executed, blocking a basic mechanism of procedural accountability. My study shows how the juxtaposition of China's national imperative of secrecy and the domestic culture of quantification does not merely yield an absence of data on capital punishment. These forces also produce behaviors and practices for leaders, institutions, and actors caught between the directives of disclosure and secrecy, with consequences for both law and society.

DEATH BY THE NUMBERS

Today, numbers are not only ubiquitous, but they are also indispensable tools of institutional, national, and transnational governance (Blanton 2002; Hansen and Porter 2012). Because numbers flatten complex social phenomena into standard and commensurate units, they seem to allow for objective comparisons across space and time (Porter 1995; Espeland and Stevens 1998, 314). This logic is typified by the "indicator," "a named collection of rank-ordered data that purports to represent the past or projected performance of different units" (Davis, Kingsbury and Merry 2012, 73–74; Merry 2016). Many indicators are now composites that quantify everything from the rule of law to corruption and transparency (Oman and Arndt 2010). Indicators that may trigger body count politics include traditional quantifications of life (for example, population by census) and death (for example, suicide, homicide, and mortality rates) (Durkheim 1951; Prewitt 1987; Hacking 1990; Porter 1995; Foucault 2009) as well as more recent health indicators such as organ transplant statistics (Robertson, Hinde, and Lavee 2019).

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

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

While governmental and nongovernmental bodies present calls for disclosure as value-neutral requests for objective facts about the world, these groups also request and rank execution data in order to rebuke outliers and induce changes in regimes under scrutiny. As with other indicators, death penalty rankings serve to shame states into changing their behavior (Merry 2016, 46). Amnesty International is up front about this goal, as it actively "campaigns for the total abolition of capital punishment" (Amnesty International 2018, 4). Recognizing the normative valence of death penalty rankings illuminates the importance of death penalty statistics as a site of body count politics and highlights state resistance to the disclosure of data as a political tactic used by states seeking to neutralize this shaming.

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

China's secrecy laws show that resistance to disclosure is one tactic in the global arena of body count politics. China cannot stifle the transnational collection and publication of death penalty data in the service of global abolition, but it can withhold its own data from global rankings. While data on capital punishment is less than complete for many countries—for reasons ranging from regime reluctance to low state capacity and poor record keeping (Pascoe 2016, 198)—China is one of only three countries (along with Vietnam and Belarus) that formally classifies death penalty statistics as state secrets (Amnesty International 2017, 2).

China introduced its first state secrecy law in 1951, soon after the founding of the People's Republic in 1949, but the regulations that most directly restrict the release of death penalty data were introduced in the 1990s, amidst the global rise of indicator culture (Human Rights in China 2007, 9). Secrecy regulations in China introduced to govern courts (1995) and prosecutors (1996) are structured in a manner that prevents the aggregation of quantified data into a national-level indicator that other countries may judge (Human Rights Watch 2007, 138–59). These regulations designate "annual or monthly statistics on national cases involving the sentencing, ratification or implementation of the death penalty" as secrets generally (146). The level of secrecy corresponds to a jurisdictional hierarchy of aggregation. Death penalty data at the intermediate court level, which correspond to trials of the first instance that take place across hundreds of courts, are deemed "secret." Data from high courts, which correspond to trials of the second instance and include all capital cases throughout a province, are designated "highly secret." National-level data from the Supreme People's Court (SPC), which

undertakes the final review of capital cases, are labeled "top secret." Ironically, the release of top secrets (*juemi*) can itself be a capital offense (Human Rights in China 2007, 48). Simply put, the closer a particular Chinese death penalty statistic approximates the indicator of annual national executions, the more severely its disclosure is sanctioned.

China's refusal to disclose its own annual statistics does not stop other entities from making guesses. Amnesty International estimates that China executes thousands of people every year, making it the world's leading executioner by total volume and among the most active executioners on a per capita basis (Amnesty International 2018, 6).[2] The Dui Hua Foundation, a US-China human rights NGO, publishes an annual estimate that is reportedly based on connections with government sources. In 2018, the Dui Hua Foundation (2018) estimated that China executed two thousand people, down from twelve thousand in 2002. Scholars are also intensely interested in China's death penalty statistics (Lu and Miethe 2007; Johnson and Zimring 2009; Xiong 2016). There is little academic dispute of international estimates that place the annual number in the low thousands (but see Lim 2018).

China objects to foreign estimates about its use of the death penalty, but it provides inconsistent explanations for its own refusal to provide this data. These explanations showcase a number of tactics in the playbook of body count politics. At some points in the past, Chinese spokespeople have claimed that China does not collect national-level data on capital punishment at all. The state does now collect national-level data on capital punishment as a matter of course through the death penalty review process, and the introduction of state secrecy laws intended to prevent the disclosure of death penalty statistics indicates that the state has been collecting data for much longer. China's spokespeople also sometimes claim that China already releases its death penalty data. This claim is formally true but practically useless. Official government statistical yearbooks provide a single statistic on the total number of people who received sentences ranging from five years imprisonment up to capital punishment (for example, SPC 2018). Since capital sentences are included in this statistic, authorities are correct that the information is indeed published, but there is no practical way of ascertaining what portion of sentences of five years or more are capital sentences. Most recently, Chinese spokespeople have claimed that China does not disclose its death penalty statistics because Chinese citizens would be outraged at how little capital punishment is used. As one SPC judge puts it, "[i]f we made the statistic public, the common people would feel we kill too infrequently, and this also would not be appropriate."[3]

While the claim that Chinese citizens would be upset about declining executions may seem farfetched, it points to an important truth: indicators may carry different meanings for different audiences. Because the annual number of executions is a shallow secret, the Chinese state may gain political advantage from keeping the exact figure concealed and then sending different signals to different constituencies, suggesting to a domestic audience that the state frequently executes offenders while hinting to foreign stakeholders that the number is falling. It is noteworthy that, even though

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

3. Unpublished interview with Western journalist (transcript on file with author).

international sources suggest that the number of annual executions has been declining for quite some time (Dui Hua Foundation 2018; Johnson and Zimring 2009, 237–38)—a fact that would seem to boost China's international reputation—China nonetheless keeps a veil of shallow secrecy over the number rather than claim credit by publishing its own statistics.

It may be the case that, even if executions have fallen dramatically, China still gains strategic international advantage by engaging in a body count politics of nondisclosure for a number of reasons. First, since the number is likely far larger than that of any other country in the world, China would still face criticism if it disclosed an exact figure. Whether the number is ten thousand or one thousand, China would remain at the top of the rankings. Second, even if the number is currently declining, the Chinese state might decide to increase executions in the future. Because international estimates lack precision, secrecy allows the Chinese state maneuverability in domestic policy with less international scrutiny. China's leaders, for example, could launch another major tough-on-crime "strike hard" campaign premised on capital punishment without facing immediate global criticism in response to a documented uptick in executions (Trevaskes 2010). Finally, as long as the number remains a shallow secret, the Chinese state retains considerable power to shape public estimates of that figure. Well-placed informants, for example, might confidentially provide a figure that is slightly below the true number or confirm a solid trend line where the indicator actually exhibits more annual variation. China benefits from popular international coverage indicating that executions have fallen drastically in the twenty-first century.[4]

China's strategy of death penalty secrecy may be valuable in some areas, but it is costly in others. To maintain this secret, the state must continue to prevent disclosure of precise data about its legal system. And this opacity works at cross-purposes with other state objectives, such as domestic legal reform.

THE STUDY

Background: Reform in Law and Data

China's continued resistance to international calls for disclosure of death penalty data stands in tension with its domestic policy of rapid capital punishment reform in the twenty-first century. The biggest reform took place in 2007, when the SPC reestablished central review of all death penalty decisions.[5] The central review process provides that every death sentence handed down at trial by a provincial High Court undergoes a final, independent, substantive review in Beijing that can take months or years to complete. Each case is assigned to one of five criminal divisions of the court based on a combination of geography and case type. A collegial panel of three judges from the assigned division manages each case (Ren 2014). A presiding judge on the panel reviews the full case record, conducts a final interview with the condemned, collects supplementary

4. For popular coverage, see, for example, *The Economist* 2013.

5. The SPC previously held the power of final review but devolved this power to the provinces in 1983 as part of a nation-wide crime-control campaign (Trevaskes 2012).

evidence, and, reportedly, sometimes even travels to the scene of the crime to clear up gaps in the record (X22).[6] The panel provides a recommendation to the head of the court division, who in turn submits a decision to the head of the SPC, who issues the final death warrant (Ren 2014).

Death penalty reform has had a significant impact on capital punishment in China. In a rare formal admission, the SPC reported that, in the year that it reinstituted central review, death sentences declined by 30 percent (*Xinhua* 2008).[7] Despite a lack of aggregated indicator data, recent estimates by both international and Chinese experts suggest that, while China remains the world's leading executioner state in absolute numbers, executions have dropped precipitously since 2007 (Amnesty International 2017; Dui Hua Foundation 2018). The estimated decline in executions accompanies a raft of qualitative changes to death penalty law and procedure, including reduction in the number of capital-eligible offenses, heightened due process in capital cases, increased legal representation for capital-eligible defendants, and expanded guiding jurisprudence on capital sentencing (Smith and Jiang 2019).

The reasons for the reform are overdetermined. Certainly, international condemnation may have played a role directly (by raising pressure on central leadership) and indirectly (by increasing awareness about the issue among judicial elites) (Trevaskes 2012; Miao 2013). But China's leaders also faced domestic pressures. China's "strike hard" state crime control policy expedited conviction and execution and removed SPC oversight of provincial court verdicts in capital cases. By the 2000s, national leaders became concerned that they lacked control over the lower courts, while Chinese citizens were shocked by the revelations of wrongful conviction and even wrongful execution (Trevaskes 2010; J. He 2016). While China's central leadership can weather protracted international criticism, domestic challenges to state legitimacy and stability—such as mistrust of court power or a lack of central oversight over local court actors—represent a more significant existential threat.

In the midst of claims that China has made a "turn against the law," death penalty reform is not an exceptional instance of a pivot to legal liberalism (Minzner 2011). Rather, death penalty reform fits with the flexible repertoire of seemingly democratic initiatives that authoritarian regimes have deployed to maintain a hold on political power in the twenty-first century (Diamond 2002; Levitsky and Way 2010). Authoritarian regimes such as China have been particularly adept at harnessing the power of courts (Gallagher 2017, 21–51). Empowered courts in authoritarian regimes can increase state legitimacy, attract foreign investment, deflect criticism of human rights abuses, promote dispute resolution, and channel local information to leaders (Ginsburg and Moustafa 2008; Moustafa 2014). These benefits may incentivize authoritarian states to increase

6. Each interview is cited in this article with an X followed by the interview number in the author's record.

7. China's criminal law contains two types of capital sentences. A sentence of immediate execution is a conventional death sentence that will result in execution. By contrast, a sentence of suspended execution (otherwise known as death with two-year reprieve) is a nominal death sentence that is typically later reduced to a prison term. Suspended death sentences are not subject to Supreme People's Court (SPC) review (Smith and Jiang 2019, 76). Because the reduction in death sentences may refer to a mix of the two penalties, the 2007 reduction in death sentences may not be equivalent to a 30 percent decrease in executions.

domestic transparency, accountability, and indicator culture through law and courts as means to an end of continual rule. Death penalty reform has served as a vehicle for many of these domestic governance goals by increasing central control over local courts and boosting court legitimacy and consistency.

But the domestic governance advantages that the Chinese state enjoys through death penalty reform and the wider principles that animate reform pose a challenge to the imperative of secrecy over death penalty indicator data. Prior to 2007, the central government could plausibly argue that because death penalty review was decentralized—handled by the provincial courts—Beijing did not possess precise national data on capital punishment. In other words, China could claim it did not keep count. Now that death penalty review is consolidated under the SPC in Beijing, this claim no longer holds; annual data is nothing more than the record of the SPC death penalty review rulings. In fact, some commentators have heralded central review as a mechanism for just this type of disclosure. A 2007 article on death penalty reform opined:

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

Not only has central review made the excuse of unavailable data untenable, it has also surely made the logistics of actual data secrecy harder to maintain. To facilitate death penalty reform, the SPC drastically expanded and centralized its legal infrastructure. The SPC moved its criminal court operations to a separate high-rise office building in downtown Beijing to accommodate this new work. Between 2005 and 2007, the court hired large cohorts of new judges to oversee death penalty review (X69). Hundreds of judges and administrators now staff the death penalty review division. Since condemned defendants may also hire counsel to represent them on review as part of this new process, thousands of lawyers potentially visit the building every year. The SPC established a single site in order to consolidate death penalty review. In the process, the SPC also consolidated national-level data as a work product.

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

According to a former judge in the SPC, the only officials formally privy to the official statistics are the presiding judges (*tingzhang*) of the five criminal divisions of

the SPC or officials of more senior rank (X69). For all other staff, the files and figures that they encounter daily must be treated as both the quotidian work material of the job and a forbidden secret of the highest order. We know that, when output is quantified, actors and institutions react. What reactions occur when the Death Penalty Division of the SPC must simultaneously carry on the business of capital punishment review in a culture of indicators and prevent disclosure of a statistic that is at the heart of that work? This study charts those effects.

Data and Methods

In this study, I draw on multiple sources of data that I gathered for a larger project on death penalty reform in China. Research took place during eighteen months of fieldwork between 2015 and 2019 at six sites across four provinces in China. These sites were selected to include every stage of death penalty adjudication—from first instance trials at intermediate-level courts to central death penalty review by the SPC. The primary source data includes interviews I conducted in Chinese with seventy-three stakeholders in China's death penalty system. Informants include judges, prosecutors, court personnel, NGO staff, legal academics, and lawyers who have handled capital cases. Each interview is cited in this article according to an interview number preceded by an X (for example, X10). In addition to interview data, I gathered primary case data from *China Judgments Online*, a new online database discussed in more detail below. I ran queries on this database, analyzed 573 available capital cases, and also reviewed individual cases of interest. Secondary data for the project includes a range of Chinese language source materials including state regulations, media reports, and academic literature.

I proceed inductively by examining three recent legal reform initiatives. For each initiative, data analysis was conducted according to what Sally Engle Merry (2016, 38) terms an "ethnography of an indicator." The ethnography of the indicator provided here includes a description of the available indicator data, an account of the institution that shaped it, and conversations with legal actors about how the presence or absence of quantitative data relates to the qualitative aims of the initiative.

Findings

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

Transparency

My analysis shows that efforts at case transparency pose a problem for death penalty secrecy: if the court releases all death penalty decisions, it also reveals the total number of executions; yet if the court releases no death penalty decisions, it undermines its own commitment to transparency. Access to court documents has historically been limited in China. This was not only the case for overtly sensitive cases such as those involving the death penalty but also for the millions of more mundane civil and criminal cases that take place in China every year (Heilmann 2017, 141–42; Liebman et al. 2019, 5–6). Early in the twenty-first century, advocates encouraged transparency initiatives as a tool to fight corruption (Liebman et al. 2019, 7). Provincial courts began experimenting with the publication of court records, and the SPC eventually built on those initiatives to create a comprehensive national project (7). In 2013, the SPC set up a national central database and website, *China Judgments Online*, to upload decisions from all levels of Chinese courts. Today, the website contains over fifty million legal documents and is reputed to be the largest state repository of legal documents in the world (*China Daily* 2017).

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

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

Although death penalty decisions are not categorically exempt from disclosure, as a matter of procedure, death penalty documents are supposed to be released only upon

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

While death penalty review decisions are a miniscule portion of the court documents produced across all courts in China annually, they nonetheless comprise a significant portion of the SPC's legal decisions. The SPC is primarily an administrative oversight body, tasked with a wide range of policy leadership and relatively little case adjudication. For some perspective, the SPC has fewer than four hundred judges overall, and more than a third of the work in the criminal division is dedicated primarily to death penalty review.[8] Death penalty review is thus not a marginal judicial activity in China's highest court.

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

Faced with the competing imperatives of secrecy and transparency, the SPC has decided to split the difference. The SPC has posted 674 death penalty review documents—most of them decisions—to its website.[9] The bulk of these decisions fall between the years 2012 and 2014. The decisions constitute more than a token disclosure. After all, the SPC has disclosed more legal documents about the death penalty since 2013 than it has in the previous six decades. But the cases are also an evasion. Unless confirmed as a total disclosure—or provided in conjunction with a denominator statistic—these cases sidestep the main international concern in seeking death penalty information. Given that even the lowest estimates indicate that China executes thousands of people every year, the total documents, which span more than half a decade, represent fewer total records than a single year's full disclosure. And that is precisely the point. The SPC has met a symbolic threshold for disclosure, but it has also avoided providing enough case records to reveal any aggregate data or to even validly estimate the parameters of bias in the data disclosed.

The SPC has also redacted any information that might allow researchers to infer anything about the total number of executions from the available documents. The court

8. According to the SPC's own organizational chart, available at http://www.court.gov.cn/jigou-fayuanbumen.html.

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

has never publicly revealed the selection process for the cases it releases. Even former judges themselves either profess ignorance of how the cases are selected or indicate that a SPC office posts cases following certain criteria until a quota is met (X69 and X30). The documents themselves are also conspicuously lacking in classificatory information. Published cases typically include case numbers that may be used to help identify gaps in a published docket, but the SPC death penalty review documents do not (Liebman et al. 2019, 12).

The SPC's partial disclosure shows how, in a regime of quantification, secrecy about an indicator produces secrecy around the release of seemingly qualitative, nonnumeric materials such as death penalty case verdicts. If the court's commitment to transparency (or the appearance of transparency) were completely hollow, it could have carved out an explicit disclosure exception for death penalty cases or, alternatively, declined to publish any death penalty verdicts. The SPC did not take this approach. But the scope of the published documents is also evidence of the limits on the possibility for reform under the state's mandate prohibiting disclosure of death penalty statistics. In a world where cases are numbers, how might the court plausibly be more transparent in its death penalty decisions while still adhering to state secrecy laws? It cannot. This double bind demarcates a limit on authoritarian legal transparency under a regime tactic of nondisclosure on an international stage.

Legal Representation

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

According to China's CPL, criminal defendants have the right to hire counsel at trial. However, most defendants either cannot afford a lawyer or do not see value in retaining one. The rate of criminal defense representation in China is low. It is estimated that only about one-third of all criminal defendants have legal representation at trial (N. He 2014, 79–80; Wu and Guo 2016, 48–49). The CPL also provides for legal aid representation for certain types of indigent defendants, such as the mentally disabled. Importantly, the law also provides for legal aid for all defendants facing the possibility of an indeterminate life sentence or death sentence (CPL 2018, Article 35). In 2018, the SPC and the Ministry of Justice jointly announced an initiative to expand a pilot program to provide legal aid to all indigent defendants. Estimates suggest that the program will provide legal aid in an additional four hundred thousand criminal cases a year (Yan 2018).

As with the transparency initiative, the new universal representation initiative is a reform rooted in the dialectics of authoritarian legality. More than 99 percent of criminal defendants in Chinese courts are convicted. While it is not clear how legal representation might affect case outcomes in this context, leaders are deeply concerned about how public perceptions of the court impact the legitimacy of the state. In recent years, wrongful convictions have become a flashpoint for public doubts about the integrity of the judicial

system (Nesossi 2017). In an interview about the new initiative, a Ministry of Justice spokesperson explained that "providing a full criminal defense to accused people—a major incentive to promote judicial reform—has played an essential role in safeguarding the suspects' legitimate rights, and effectively avoids miscarriages of justice" (Yan 2018).

Given that the death penalty can produce an irreversible miscarriage of justice—wrongful execution—one would expect that a judicial system concerned with perceptions of fairness would begin reform by extending the fullest possible legal representation to the condemned. This approach seems sensible in light of the high-profile wrongful execution cases such as that of Nie Shubin, who made headlines in 2005, just as the SPC's death penalty reform was being formulated (Nesossi 2017, 145). Why does the SPC not institute universal representation for the death penalty review, which is the procedure with the highest stakes? As a matter of law, there is in fact some ambiguity on this point, as it remains unclear whether SPC review is technically an "adjudication," which would trigger procedural rights to counsel, or is merely a "verification," which reaches a far lower procedural threshold (Li 2014, 25–29). As a matter of practice, the SPC allows defendants to hire counsel in death penalty review cases but does not provide indigent defendants who do not hire counsel with legal aid representation, although it could easily do so.

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

What do people involved in the death penalty review process say about how often lawyers participate? Most of the people I interviewed were deeply reticent about offering estimates. Indeed, an initial observation about work in a regime of what might be described as quantitative nondisclosure is that it induces reluctance about any quantitative discussion whatsoever. Former SPC judges (individuals who have firsthand

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

knowledge of defense lawyer participation) declined to provide representation rates. Meanwhile, death penalty lawyers who had capital trial experience but not capital review experience regularly stated (incorrectly) that either counsel is not permitted during death penalty review or that all defendants are provided legal aid defense during this process. Trial lawyers are not the only people who made this claim. A prominent criminal procedure scholar in Beijing also incorrectly stated that all defendants have counsel at final review (X66). Even the SPC itself remains either oblivious or evasive in public comments on this point. As recently as late 2018, a spokesperson for the SPC inaccurately claimed in an interview with a Western journalist that legal aid was provided in all death penalty review cases.[11] When people do venture concrete estimates about representation, they vary. A law professor with some experience estimated that 10–20 percent of death penalty review cases involve counsel (X68). An extremely experienced lawyer who had handled a large number of review cases suggested that less than one-third of defendants have counsel during death penalty review (X52). The wide variety of responses may indicate how little information is available, even to participants in the system. Or it may indicate that people are hesitant to share what they know, especially with a foreign researcher. Both explanations show the evidence of body count politics on insiders in China's death penalty system.

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

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

11. Unpublished interview (on file with author).

Procedural Justice

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

Due process issues in capital cases can make national news and provoke public concern, especially when the defendant is viewed as a victim. In 2013, Zeng Chengjie, dubbed "China's Bernie Madoff," was executed after reportedly defrauding investors in a massive Ponzi scheme. Many people questioned Zeng's guilt and alleged that his conviction was politically motivated. Zeng's case drew popular outrage not just for the imposition of a death sentence but also for the manner in which it was carried out. Zeng's family was not notified before his execution, prompting outrage. When Zeng's daughter Zeng Xian learned about his execution, she launched a high-profile social media campaign, including a hunger strike in Beijing. In Zeng's case, local authorities waffled in explaining why they did not notify the family. The official explanation—that Zeng did not want his family notified and that contact information for the family was not available—strains credibility. Zeng's daughter believes the authorities were trying to hide an injustice (Lau 2013).

Perhaps Zeng's case struck a popular nerve because it is easy to imagine the pain of not seeing a loved one before an execution, but, as a matter of criminal procedure, a more troubling fact is that, until 2019, lawyers for the condemned were not notified of a client's execution even after it took place.[12] Numerous lawyers recounted stories in which a client was put to death and they were not told (see, for example, Tian and Chen 2013, 299–314; see also X7 and X22). One Beijing lawyer recounted an incident in which he was retained by a condemned inmate's family to represent the man on

12. The SPC implemented new guidelines for the handling of death penalty cases on September 1, 2019 ("Guanyu Sixing Fuhe Yiji Zhixing Chengxuzhong Baozhang Dangshiren Hefa Quanyi de Ruogan Guiding" [Several provisions of the Supreme People's Court on protection of parties' lawful rights and interests during death penalty review and enforcement procedures]). The guidelines indicate that, after the SPC issues a capital review judgment, the lower court is required to send a copy to the lawyer within five days of announcing the verdict (Article 5). Since this regulation was passed after I conducted my fieldwork, I do not have data concerning what lawyers think of the guidelines and their implementation.

appeal. He flew down to the province to visit his client and was informed at the jail that his client had been executed the previous day (X7).

Why has the SPC been so reticent to notify lawyers when a client has been executed? It is plausible that prior to the 2007 reform some provincial-level courts did not have the records to notify lawyers. Today, though, all capital decisions run through the SPC in Beijing. Every death warrant is signed by the head of the SPC. As a clerical matter, it would be extremely easy to notify counsel at the same time that the execution order is approved. It is possible that the SPC worries that notification of an impending execution might lead a lawyer to turn to the media as a last-ditch effort at reconsideration, as took place in the high profile case of Jia Jinglong, a farmer who enjoyed popular sympathy for killing a Chinese Communist Party official after his house was demolished without compensation (Mai 2016). While many defense lawyers frown on using the court of public opinion in capital cases, some of the most successful death penalty review lawyers count last-minute media campaigns as a vital tool of defense (for example, X1). Another possibility is that the SPC worries that the news will get back to the condemned, who might commit suicide, causing trouble for the local jail (X63). Neither of these rationales, however, justifies the SPC's unwillingness to notify lawyers *after* the execution has taken place (X63).

Individual judges endorse notification of lawyers following executions, despite the additional scrutiny they may face. As a former SPC death penalty judge put it, "even I would prefer that my judgments stay locked in a desk. But that does not conform with [the] rule of law" (X22). And cases such as that of Zeng notwithstanding, the SPC has facilitated greater access for lawyers in the death penalty review process in recent years. The resistance to lawyer notification following execution stands out as a conspicuous omission in this trend. As with limits on case record disclosure and legal representation, limits on lawyer notification likely also have their origins in the numerical threat of aggregation.

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

CONCLUSION

Scholars of quantification show that, although indicators may present as objective, value-neutral facts in the world, numbers are also social phenomena that both influence and are influenced by people and institutions. International efforts to push states to disclose death penalty data are also normative efforts to abolish capital punishment, and NGO attempts to quantify China's ranking as the world's leading executioner state are also mobilizations of a body count politics to influence China to reduce that number. A sustained look at China's refusal to disclose its data reveals that nondisclosure is

not the same as nonquantification. Rather, China's refusal to reveal aggregate death penalty statistics as an international indicator is better understood as a state-level resistance tactic within a global regime of quantification governance and abolitionism.

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

China's death penalty statistics are not only shallow secrets; they are also legal secrets. And as China's leaders increasingly turn to legal reforms as strategies to improve social stability, government accountability, and state efficiency, maintaining shallow secrets in the legal domain becomes increasingly difficult. Unlike shallow secrets in other political areas—such as economic production, natural resources, or military capacity—shallow secrets in law stand in direct conflict with the values of legal transparency and judicial responsibility that China's state leaders want to deploy in domestic governance. While scholars of authoritarian legality traditionally dwell on the theoretical contradictions of illiberal legalism, the body count politics of death penalty secrecy pose a practical, rather than a conceptual, limit on China's ability to harness indicator culture and quantification for instrumental goals in the domestic legal sphere.

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

Tracing the contours of secrecy shows the impossibility of disentangling the qualitative from the quantitative dimensions, as well as the politically meaningful aspects, of legal acts. Publishing a court case, retaining legal counsel, and notifying an individual that an execution has taken place do not appear to be numeric activities. But, in a centralized and uniform legal system, each of these actions is transformed into a data point that may be tallied to arrive at a total. So long as that total is a secret, any new uniform procedure becomes a threat to data secrecy, producing the potential to derive a denominator and, thus, a statistic of social and state significance.

This article has aimed also to thicken our understanding of quantification's effects by providing a concrete "ethnography of an indicator" for participants in the system and

those seeking to intervene in China's capital punishment process (Merry 2016, 38). Although the lawyers and judges I interviewed disclaim personal access to death penalty data or knowledge about death penalty policy decision making in the judiciary, they are all aware of the politics of concealment. Legal actors leap to the logic of data secrecy to explain ambiguities, uncertainties, and stalled reforms involving the death penalty. Quantitative secrecy is not just a constraint imposed upon these actors, but it is also a mode of professional conduct and institutional adaptation and reproduction. It explains the unexplained. Reactivity is the phenomenon of human responsiveness to measurement. The case of death penalty secrecy in China shows that people react not just because they know measurements are disclosed but also because they know they are concealed.

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