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THE THEATRE OF PUNISHMENT: CASE STUDIES IN THE POLITICAL FUNCTION OF CORPORAL AND CAPITAL PUNISHMENT

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ABSTRACT

Michel Foucault famously argued that punishment was an expression of power—a way for the State to shore up and legitimize its political authority. Foucault attributed the historical shift away from public torture and corporal punishment, which occurred during the 19th century, to the availability of new techniques of social control; however, corporal and capital punishment (what we term “shock punishment”) persists in many penal systems to this day, suggesting that these countries have for some reason not fully undergone this penal evolution. Using the experiences of Hong Kong and Singapore as case studies, we attempt to explain why this is the case.

We argue that, while a range of factors contribute to why countries employ shock punishment, retention is often linked to the political stability of a government’s rule. Punishment, as a visceral expression of power, makes shock punishment particularly appealing to States grappling with political insecurity. In the post-war period, Hong Kong’s colonial government did not feel their rule challenged to the same extent as the newly independent government in Singapore. The result is two radically divergent stories with regards to corporal punishment, with Hong Kong abolishing the practice altogether in 1991 and Singapore not only

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retaining it, but greatly expanding its usage. As further support for our thesis, we offer empirical data regarding the use of shock punishment and the political freedom of the societies that retain it. We identify a fairly robust, positive correlation between the use of shock punishment and authoritarian and semi-authoritarian governments desperate to legitimize their rule. The final conclusion we reach is that, while many factors undoubtedly contribute to the retention of shock punishment, its expressive power plays a significant role in why many States continue to employ it.

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INTRODUCTION

In 1994, an American teenager, Michael Fay, was convicted of theft and vandalism in a Singaporean Court and sentenced to six lashes with a moistened rattan cane.¹ For many Westerners, the ensuing media circus and international attention Fay's plight attracted brought to light a practice that had long been abolished in many Western jurisdictions—that of judicial corporal punishment. Indeed, the past two centuries have seen a dramatic shift away from physical harm in the punishment of criminals toward a more rehabilitative approach.² Yet, despite this development, corporal punishment endures well into the modern era.³ Indeed, most Westerners would be utterly shocked at how common whipping, beating, caning, and even wounding and amputation are as forms of sentencing in many penal systems. The penal evolution away from corporal and capital punishment to the penitentiary system that began in Europe and the United States around the end of the 18th century is examined in detail in Michel Foucault's seminal work, *Discipline and Punish*.⁴ Foucault attributes these prison reform movements not to an increase in humanitarian concern but to the availability of new mechanisms of social control. For Foucault, punishment is an expression of power—the highly ritualized ceremonies that accompanied corporal and capital punishment were a conduit through which the State communicated and thereby reinforced the legitimacy of its rule. The political function of this kind of *shock punishment* (a term we use henceforth to describe both corporal and capital punishment) continues to play an influential role in its retention.⁵ Indeed, to understand why these forms of punishment doggedly persist into the modern age, their powerful expressive nature must be taken into account.

The thesis this Article proposes is this: there is a link between the retention of shock punishment and the perceived legitimacy of a

1. Philip Shenon, *Singapore Journal; A Flogging Sentence Brings a Cry of Pain in U.S.*, N.Y. TIMES (Mar. 16, 1994). Fay's sentence of six lashes was eventually reduced to four after official U.S. requests for judicial leniency. CYNDI BANKS, PUNISHMENT IN AMERICA: A REFERENCE HANDBOOK 139 (2005).

2. See KATHLEEN AUERHAHN, SELECTIVE INCAPACITATION AND PUBLIC POLICY: EVALUATING CALIFORNIA'S IMPRISONMENT CRISIS 23–25 (2012).

3. Henceforth, where the term corporal punishment is used, it is meant to connote judicial corporal punishment.

4. MICHEL FOUCAULT, DISCIPLINE AND PUNISHMENT (1979).

5. The term “shock punishment” should not be construed as a comment on retributivism as a theory of punishment. That is to say, it is not to imply that the only use of these forms of punishment is to shock. Yet this shock value cannot be denied. Thus, out of expository convenience, the term shock punishment is employed because it accurately captures the effect of both of these visceral forms of punishment.

government's rule. Governments that feel their authority is threatened find shock punishment's expressive power appealing in the face of political insecurity. Thus, authoritarian and semi-authoritarian States consistently tend to employ shock punishment. This is nothing new. Throughout history, monarchs and tyrants strove to fortify the legitimacy of their rule through appeals to such things as divine right and natural law—shock punishment has always been another tool by which to bolster their power, one readily used. In the modern era, political legitimacy typically comes in the form of liberal democracy and the electoral mandate the ballot provides. As such, liberal democracies simply do not need to resort to shock punishment to shore up the legitimacy of their rule. Such governments have no use for what we may call the *theatre of punishment*. With political liberalism the role of shock punishment as a means to express power becomes less significant.

It is important, however, to clarify what we are not arguing. First, we are not arguing that shock punishment tends to persist in non-democratic States because the public is unable to voice its rejection of it.⁶ Our argument is more nuanced: the democratic State does not feel the legitimacy of its rule is in question, and so is naturally less invested in the retention of shock punishment. Second, we are not arguing that all countries that retain shock punishment do so merely to shore up their political authority. There are many factors that contribute to the retention of shock punishment. These range from colonization, to religion, fear of crime, a lack of effective policing, a belief in its deterrent value, or a simple normative commitment to retribution. Rather, our argument is that the semiotics of punishment is one of many contributing factors, but, as we argue, quite often a significant one. Lastly, we are not contending that all States that employ shock punishment are “unfree;” rather, we are pointing out—and this is an important point—that the vast majority of unfree States employ shock punishment.⁷ Finally, implicit in our approach is the assumption that the political legitimacy of authoritarian and semi-authoritarian States is typically more open to question than that of liberal democracies. While some may contest this point we feel it is, for the most part, a reasonable assumption.

6. The ability of the public to shape public policy has not shown itself to be a critical factor in abolition. Indeed, abolition in Europe occurred in the face of popular support for it. See ROBERT BLECKER, *THE DEATH OF PUNISHMENT: SEARCHING FOR JUSTICE AMONG THE WORST OF THE WORST* 276 (2013).

7. See *infra* table 7.

To support our thesis, we first examine the use of shock punishment in Hong Kong and Singapore. For our purposes, Hong Kong and Singapore are perfect cases studies: both are former British Crown colonies; both are small, East Asian city-states;⁸ both inherited the English Common Law; both are highly developed capitalist economies; they are comparable in both geographic size and size of population; and they are demographically both predominantly Chinese.⁹ Despite these similarities, they followed radically different trajectories with regards to the retention of judicial corporal punishment in the decades after the Second World War, with Hong Kong finally abolishing the practice in 1989 and Singapore actually greatly expanding its usage.¹⁰ A salient difference between these two former British colonies is the sense of political legitimacy enjoyed by their respective governments. This, we argue, largely accounts for why Hong Kong eventually abolished shock punishment while Singapore has retained it. Governments whose authority is besieged are not eager to discard the expressive power that shock punishment delivers.

There are various theories that seek to explain the penal evolution away from shock punishment. There is one we might associate with the Marxist tradition, which posits that as economies advance, becoming more affluent, elites no longer need to rely as much on terror to control the population.¹¹ Another perspective, very much associated with Emile Durkheim, argues that as societies shift from religious and collectivist values to individualism and the rule of law, shock punishment conflicts with those values.¹² We are not dismissing these theories; rather, we are simply highlighting the semiotic function of shock punishment as an alternative or, perhaps, as an explanation. We develop our argument in three parts. Part I discusses Foucault's thinking in more detail and the penal transition he describes. Part II then examines the use of corporal

8. The term "State" is used here somewhat loosely. Since 1997, Hong Kong has officially been a Special Administrative Region of the People's Republic of China. However, because shock punishment was abolished in Hong Kong before the Handover, our analysis with respect to Hong Kong is limited to before its return to the PRC.

9. Comparing the penal practices of Hong Kong and Singapore is not without precedent precisely because they are so ideally suited to the task. See, e.g., Jeffrey Fagan et al., *Executions, Deterrence, and Homicide: A Tale of Two Cities*, 7 J. EMPIRICAL LEGAL STUD. 1, 3 (2010).

10. See WING HONG CHUI, T. WING LO, UNDERSTANDING CRIMINAL JUSTICE IN HONG KONG 9 (2013). For the case of Singapore, see *infra* note 113 and accompany text.

11. See Jonathan Simon, *Mass incarceration: From Social Policy to Social Problem*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 40 (Joan Petersilia & Kevin R. Reitz eds., 2012) (citing scholarship that argues that the transition towards mass incarceration as the prevailing form of punishment may be attributed to shifting economic conditions).

12. *Id.* at 43 (referencing as distinctly Durkheimian the position that this penal evolution occurred as a result of a conflict in societal values).

punishment in Hong Kong and Singapore, arguing that the issue of political legitimacy helped shaped their relationship with corporal punishment. Part III then explores empirical data regarding the global use of corporal and capital punishment (with an emphasis on capital punishment) in relation to the political and social freedom of the societies that retain it. We identify a fairly robust, positive correlation between the use of shock punishment and authoritarian and semi-authoritarian governments. Of course, correlation is not causation; however, the consistency of this finding provides a substantial degree of credibility to the thesis that the political function of shock punishment plays a role in its retention. The final conclusion we reach is that, while many factors contribute to the retention of shock punishment, its expressive power plays a role in why States continue to employ these forms of punishment.

I. THE “SPECTACLE OF THE SCAFFOLD”

A. *Punishment as Political Marketing*

To truly appreciate Foucault’s thinking, we need to consider the historical use of punishment. Public displays of corporal punishment have featured prominently in penal history.¹³ The communicative quality of shock punishment has served a distinctly political function.¹⁴ These public displays of punishment, the more savage the better, possessed an unmistakable mass marketing component. With typical literary flair, Foucault referred to this as the ‘spectacle of the scaffold.’¹⁵ Indeed, spectacle is a fitting description. To properly appreciate this, it is useful to consider how punishment was historically employed. In England, for example, the *spiked heads* of murderers and traitors were displayed for the public on the gate of *London Bridge*, a practice dating back to the early 14th century.¹⁶ In their use of crucifixion as a means of execution, the

13. JASON PHILIP COY, *STRANGERS AND MISFITS: BANISHMENT, SOCIAL CONTROL, AND AUTHORITY IN EARLY MODERN GERMANY* 8 (2008).

14. This communicative aspect should not be confused with the literature on the expressive power of punishment—that is judicial punishment’s capacity to signal a collective moral sentiment. For examples of this literature, see Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354–56 (1997); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995). This communicative aspect of punishment should also not be confused with the work of Anthony Duff, who argues that criminal punishment is a vital mode of moral communication and thus a normative justification for punishment. Our project here is not normative—it is entirely descriptive.

15. FOUCAULT, *supra* note 4, at 32–72.

16. JOHN A. NAGY, *REBELLION IN THE RANKS: MUTINIES OF THE AMERICAN REVOLUTION* 99 (2007).

Romans in their brutal efficiency literally turned the condemned into billboards heralding the power of the Empire.¹⁷ The Romans often strategically placed crucifixion sites at busy thoroughfares to amplify this effect.¹⁸ The macabre shock value of crucifixion was perhaps rivalled by the English technique of having the offender hanged, drawn and quartered, where the condemned was publically strung up to the point of death, disembowelled, then cut into four pieces (a punishment reserved for high treason).¹⁹ The gibbet served a comparable marketing function, with the offender typically left to swing upon the scaffold in public view for days.²⁰ In 18th century England, bodies “remained on the gibbet for weeks or months, sometimes until the bones became weathered and brittle and collapsed.”²¹ Britain’s Murder Act of 1752 allowed the bodies of those convicted of serious misdemeanours to be hung by a chain.²² Authorities would often douse the body in tar to protect it from the elements and thereby preserve it for public viewing.²³

Punishment was meted out in the form of elaborate, almost theatrical, performances carried out in public that incorporated “a profusion of formulaic, ritualized elements.”²⁴ Public hangings, beheadings, and expulsion ceremonies “were elaborate performances intended to display communal norms as well as power relations.”²⁵ Indeed, public executions were stagecraft that any modern marketing agent would applaud. The condemned was brought before the crowd in a carnival-like atmosphere, where he or she was subjected to jeers and public condemnation in a well-choreographed re-affirmation of the community’s normative standards.²⁶ Non-lethal public punishments “communicated the offender’s crime to the watching crowd, and via gossip, to the entire community.”²⁷ Punishments, such as whipping at “the cart’s tail” where offenders were fastened to a cart and led through busy thoroughfares while being whipped, were

17. See MARTIN HENGEL, *CRUCIFIXION IN THE ANCIENT WORLD AND THE FOLLY OF THE MESSAGE OF THE CROSS* 50 (1977) (for the deterrent function of crucifixion). Crucifixion was widely employed in the ancient world: crucifixion was common among the Persians, the Greeks, the Assyrians, the Scythians, the Taurians, the Celts, the Germani, and the Britanni. See *id.* at 22–23.

18. ALISTER E. MCGRATH, *CHRISTIANITY: AN INTRODUCTION* 22 (2006).

19. JEAN KELLAWAY, *THE HISTORY OF TORTURE AND EXECUTION* 50 (2003).

20. SHULAMITH SHAHAR, *WOMEN IN A MEDIEVAL HERETICAL SECT: AGNES AND HUGUETTE THE WALDENSIANS* 114 (2001).

21. KELLAWAY, *supra* note 19, at 53.

22. *Id.* at 52.

23. *Id.* at 53.

24. See COY, *supra* note 13.

25. *Id.*

26. ERIC POSNER, *LAW AND SOCIAL NORMS* 103 (2002).

27. *Id.* at 104.

designed to achieve maximum public exposure.²⁸ Other practices, such as “riding the stang” and the “scold’s bridle” also involved parading the offender through busy streets advertising their crime.²⁹

Public participation often played a crucial role in the marketing strategy of punishment, reinforcing the impression that the fate of the punished represented the collective sentiment of society and widespread support for the State.³⁰ This was an expression of implied public support for the authority structure of the State—a tacit acknowledgment of its legitimacy. The pillory where the offender was physically restrained in a public venue is a great example of the marketing component of corporal punishment. Pillories were usually placed on high platforms to ensure maximum exposure and typically used during lunch hours when the streets were at their busiest.³¹ To draw a large crowd, music was sometimes played as the offender was marched to the pillory.³² The malefactor was restrained within the pillory beneath a written notice of his or her crime³³ as the crowd pelted the offender with excrement, mud, rotten fruit, eggs, entrails of slaughtered animals, and other unsavoury objects.³⁴ Similarly, whipping audiences also participated in the punishment: “the severity with which the executioner wielded his whip depended on how loud the observers shouted.”³⁵ Indeed, “the publicity of whipping was clearly meant to influence the crowd as much as it did the convict.”³⁶ Public participation confirmed the legitimacy of both the ceremony of punishment and the State that administered it.

Public shaming is usually thought of in terms of retributive justice or deterrence; however, parading the offender before the public was also a potent expression of State power. While we are conditioned to view the condemned as the target of the act, in truth the primary target for these rituals was the public. The State utilized normative deviance as an opportunity to express its power. In this sense, the offender’s punishment

28. ROBERT BRINK SHOEMAKER, *THE LONDON MOB: VIOLENCE AND DISORDER IN EIGHTEENTH-CENTURY ENGLAND* 79, 81–82 (2007).

29. DANIEL DIEHL, MARK P. DONNELLY, *THE BIG BOOK OF PAIN: TORTURE & PUNISHMENT THROUGH HISTORY* 200 (2009).

30. SHOEMAKER, *supra* note 28, at 79.

31. KELLAWAY, *supra* note 19, at 64.

32. ARDIS BUTTERFIELD, *CHAUCER AND THE CITY* 136 (2006).

33. *Id.*

34. SHOEMAKER, *supra* note 28, at 84. *See also* ANDREW TODD HARRIS, *POLICING THE CITY: CRIME AND LEGAL AUTHORITY IN LONDON, 1780–1840* 61 (2004); IAN MORGAN, *OLDE NOTTINGHAMSHIRE PUNISHMENTS* 20 (2012).

35. *Id.*

36. SHOEMAKER, *supra* note 28, at 79, 84.

was (and indeed still is) an important medium of communication. There is a marketing function of the “spectacle of scaffold” and it helps explain why it took the form it did.

B. Punishment in Transition

The West’s transition from corporal punishment and other torture techniques to a more reform-oriented, rehabilitative approach to punishment is a point of fascination for Foucault. Opening with a brutally graphic description of the 1757 torture and execution of Robert-Francois Damiens (who had been convicted of attempted regicide), Foucault proceeds to contrast this graphic event with a description of the regimented, reformatory prison life that came into fashion in the 19th century with the use of prisons becoming more widespread.³⁷ Foucault explores the historical shift away from what he calls a “culture of spectacle,”—a penal system based upon shock punishment—to a system where punishment and discipline are internalized and woven into the social institutions through which the character of modern man is shaped—what Foucault understands as a “carceral culture.”³⁸

1. The Birth of the Prison and the Semiotics of Power

The carceral culture represents an evolving system of subjugation. According to Foucault, it is a more sophisticated technique of social subjugation.³⁹ In describing the carceral culture, Foucault employs Jeremy Bentham’s famous Panopticon—a prison designed in such a way that inmates are visible at all times to a central watchtower, but cannot themselves tell if they are actually being watched at any given time.⁴⁰ The result is a system where inmates discipline themselves and order is achieved without the need for brutal forms of physical punishment. Foucault employs the image of the Panopticon as a chilling metaphor for the carceral culture.⁴¹ Foucault applies this model at the societal level, where people are disciplined into policing themselves into prescribed normalcy through various institutions, such as schools, administrative

37. See Parts 1 & 2, FOUCAULT, *supra* note 4.

38. DEBORAH BROCK, AMANDA GLASBEEK, CARMELA MURDOCCA, CRIMINALIZATION, REPRESENTATION, REGULATION: THINKING DIFFERENTLY ABOUT CRIME 17 (2014).

39. See generally FOUCAULT, *supra* note 4.

40. BROCK, *supra* note 38, at 17–19.

41. *Id.*

bureaucracies, and particularly the family.⁴² Modern society, Foucault argues, is one marked by these institutionalized systems of discipline and control. It is a *panoptic society*.

For Foucault, the State was the primary beneficiary of shock punishment. Such theatrical displays had a distinctly socio-political function. Foucault opined, “[t]he public execution is to be understood not only as a judicial, but also as a political ritual. It belongs, even in minor cases, to the ceremonies by which power is manifested.”⁴³ Foucault sees the body of the condemned as a graphic display of State authority and the brutal subjugation of anyone who would defy that authority. He argues that such displays of brutality were used to achieve very specific effects, not just in regards to crime suppression but also with respect to political ends. The elaborate ceremony of corporal punishment was a drama designed to promote the idea of the State’s majesty and its absolute authority in deciding the fate of the individual, displayed and acted out in the most brutal and impactful manner. Such “performances” underscored the intense asymmetry between the power of the individual and the power of the State. Indeed, judicial torture viscerally displayed the sublime power of the State upon the body of the offender. The carefully choreographed ceremony of punishment, as Foucault calls it, was a powerful semiotic tool.⁴⁴ In an age saturated and awash with images of simulated brutality, it is difficult to appreciate how unique an opportunity punishment was for the State. There were few things in ages past that could rival the graphic force of taking a body, turning it inside out, using its fluids, its pain and its convulsions to create a three dimensional experience for the audience. It was a vivid performance and the physical pain of the offender played a critical role in the theatre of punishment. Indeed, the ceremony of punishment was a precious marketing opportunity for the State: it combined religious, military, and political authority in a dramatically visceral event that could be repeatedly performed.

Of course, a core purpose of these public displays of punishment was simple deterrence. Foucault’s genealogy of punishment does not dismiss this: “men will remember public exhibition, the pillory, torture and pain duly observed.”⁴⁵ But this is a limited understanding of deterrence. Our conception of deterrence should be expanded beyond the mere deterrence of crime. What is captured in a broader conception of deterrence is that

42. FOUCAULT, *supra* note 4, at 216.

43. *Id.* at 47.

44. *See generally id.*

45. *Id.* at 34.

judicial punishment deters individuals from challenging the authority of the State itself. It shores up, cements, and legitimizes the State's political authority—sanctifying its position of supremacy over the individual. Through the medium of punishment, the State wins tacit acknowledgement as the rightful administrator of punishment—the ultimate expression of domination over the individual. When this comes in the form of corporeal punishment, this messaging component is heightened. It is underscored with the sting of the whip or the bruising of the cane. Indeed, it is literally the State 'beating' the citizen child into submission—a primal and unmistakable expression of dominance. This effect is even more intense in the case of judicial execution. It is telling that, upon seizing political power, new regimes so often engage in mass public executions as way to solidify their fledgling authority. The Revolutionary Tribunal in the French revolution, the Bolsheviks in Russia, the communist revolution in China—these are but a handful of examples. Foucault argues that “in the ceremonies of the public execution, the main character was the people, whose real and immediate presence was required for the performance.”⁴⁶ Indeed, in these ritualized ceremonies, the public punishment of the condemned was far less about the offender and more about those who witnessed it. Shock punishment is primal, visceral, and unsophisticated. But this is exactly why it is such an effective means of communication and social control.

2. *Extending Foucault's Model*

Effective but not ideal, Foucault highlights the drawbacks inherent in shock punishment. He argues that the social disturbances that often accompanied public punishment such as riots, often in support of the condemned, were a threat to the State.⁴⁷ The ceremony of shock punishment often backfired, becoming an occasion for the public to express their collective dissatisfaction with the power structure. Thus, Foucault argues, the availability of new “technologies of power” that allowed for more sophisticated and pervasive techniques of social control and discipline were adopted by the State.⁴⁸ The prison was an archetype of this but it was equally manifest in other institutions of social regimentation—lunatic asylums, schools, factories, workhouses, army

46. *Id.* at 57.

47. See BARRY SMART & MICHEL FOUCAULT: CRITICAL ASSESSMENTS 76 (2002).

48. See generally FOUCAULT, *supra* note 4.

barracks, and hospitals.⁴⁹ All represented a new architecture of social control; however, Foucault's account does not adequately explain why shock punishment stubbornly persists to this day (albeit in a highly moderated fashion) in societies around the world that have fully developed these technologies of power. That is, it is not clear why some States have not fully transitioned away from a culture of spectacle.

These States usually sanitize the brutality of shock punishment, often shielding the public from directly witnessing the act, or adopting less macabre techniques of execution such as lethal injection. Even with these modifications, the communicative power of shock punishment is still deftly harnessed in that a population knows full well that citizens who defy the law are subject to the lash of the whip or the judiciary's noose. In some countries executions are not even performed out of public view. In fact, public exposure is maximized. Saudi Arabia, for example, performs public floggings and beheadings on a regular basis: "the condemned are beheaded, normally on Fridays, in one of the main squares in Riyadh, at the rate of about one a week."⁵⁰ Executions before large crowds also occur in Iran, China, North Korea, and Thailand.⁵¹ In the case of China, during one prominent anti-crime campaign⁵² in 2001 there were nationwide mass sentencing rallies,⁵³ held in public sports stadiums, market places, schools, factories, and community halls.⁵⁴ More recently, China seems to have moved away from these public spectacles;⁵⁵ however, the case of Singapore is particularly interesting: the inability of Foucault's model to map onto the example of Singapore—a highly modern, economically advanced State with all the trappings of a carceral state—suggests that there is a catalyst that we are missing.

49. NICK CROSSLEY, REFLEXIVE EMBODIMENT IN CONTEMPORARY SOCIETY: THE BODY IN LATE MODERN SOCIETY 40 (2006).

50. GARRETT G. FAGAN, THE LURE OF THE ARENA: SOCIAL PSYCHOLOGY AND THE CROWD AT THE ROMAN GAMES 69 (2011).

51. *Id.*

52. Beginning in the 1980s the Chinese government launched periodic anti-crime campaigns that target specific crimes such as drug trafficking, known as Yanda, or "strike hard." Public sentencing events play a key role in such campaigns. Susan Trevaskes, *Public Sentencing Rallies In China: The Symbolizing of Punishment and Justice in a Socialist State*, 39 CRIME, LAW & SOCIAL CHANGE 359, 363 (2003). See also LENA ZHONG, COMMUNITIES, CRIME SOCIAL CAPITAL IN CONTEMPORARY CHINA 138 (2013).

53. Susan Trevaskes, *Public Sentencing Rallies in China: The Symbolizing of Punishment and Justice in a Socialist State*, 39 CRIME, LAW & SOCIAL CHANGE 359, 372 (2003).

54. *Id.* at 361, 374.

55. See SUSAN TREVASKES, THE DEATH PENALTY IN CONTEMPORARY CHINA 162–63 (2012); KAM C. WONG, POLICE REFORM IN CHINA 62 (2011).

Our point is that shock punishment, if properly modulated, is still useful to States that feel the need to shore up their political legitimacy. Thus it is not surprising that we see the persistence of shock punishment in a softened form—enough to still harness the benefits of shock punishment while mitigating its hazards. There is a cost-benefit aspect to the use of shock punishment. If handled correctly, employing shock punishment may still provide a net benefit for States compelled to utilize all available mechanisms to project power; however, for a politically secure State not desperate to shore up its legitimacy, shock punishment does not provide any net benefit—it provides only net negatives. Thus, a critical factor regarding the use of shock punishment is how secure a government feels with respect to its rule. We argue that the rise of pluralistic democracy was the primary impetus for the penal transition from a culture of spectacle to a carceral culture, not because it gave voice to a public hunger for penal change (indeed, in many abolitionist countries there was in fact overwhelming majority support for judicial execution),⁵⁶ but because democratically-elected governments feel more secure in the legitimacy of their rule and thus no longer have a pressing need to compensate by employing such unsophisticated “marketing” tactics. It should not be surprising, therefore, that the Western abandonment of shock punishment more or less coincided with the rise of pluralistic democracies. Governments already legitimized by the ballot are susceptible to policy capture by well-organized reformers pressing to abolish shock punishment, even if these reformers represent a minority. Indeed, this was very much the European experience: abolition was an “elite-driven enterprise” that was pushed through in spite of popular sentiment.⁵⁷

C. An Incomplete Transition: Hong Kong and Singapore

Indeed, the shift in punishment Foucault describes is somewhat murky when one considers the continued use of corporal punishment in places such as Hong Kong and Singapore well into recent times. The process of abolition in Hong Kong unfolded far more slowly, and with regards to

56. In the case of abolition of the death penalty, the following examples illustrate this point: when France abolished the death penalty in 1981, 62% of the French public supported retention; in 1975, eleven years after the UK ended common applications of judicial execution, 82% of the public wanted to restore it; in Italy, France, and Sweden, attitudes tend to be more or less evenly split.

See THOMAS S. MOWLE, *ALLIES AT ODDS?: THE UNITED STATES AND THE EUROPEAN UNION* 107 (2004).

57. *Id.*

Singapore, shock punishment has not been abandoned at all, and in fact does not appear to be going anywhere. Granted, the techniques employed in caning obviously in no way approach the level of brutality seen in 18th Century France, yet the fact remains that the central purpose of caning is the infliction of physical pain on the subject and crucially, as we argue, the expression of power. The fact that the use of caning increased almost exponentially in Singapore in the decades since independence would seem to go against Foucault's model. We would expect to find a panoptic society in modern-day Singapore. Yet that is not what we find at all. The Panopticon is certainly present in the case of Singapore. In fact, the power of the State is pervasive and in many ways Singapore is a model panoptic society. It is a modern, economically developed nation with all the technologies of power firmly in place—yet both corporal and capital punishment remain and are extensively utilized.

For Britain, the use of corporal punishment had for centuries been an ingrained part of British culture, often associated with stern schoolmasters and misbehaving pupils⁵⁸ in addition to its use in judicial settings.⁵⁹ Its use as a legal tool of English judicial justice can be traced to the Whipping Act, passed in 1530 by Henry VIII, which stipulated that vagrants be publicly stripped and whipped “till the body be bloody by such whipping.”⁶⁰ Corporal punishment was a means for States of the era, including England, to consolidate control over their populations; since the States were relatively weak and had only small numbers of personnel at their disposal, the “violence that could be deployed by [these] minimalist states” played a key role in exercising that control.⁶¹ Prisons of the era were not seen as places for rehabilitating offenders, but as holding facilities where convicts would await their sentences to be carried out (whether corporal or capital in nature).⁶² As already explained, change finally came in the late 18th and 19th centuries, when new schools of thought emerged advocating regimented daily routines designed to reform prisoners; the results would yield many new and innovative designs,

58. Corporal punishment in schools is not a focus of this writing, but it is worth pointing out that while its use in judicial or prison-related functions lingered in Britain well into the 1940s and 1960s respectively, it would remain a fixture in schools for even longer. Its use in British schools, for example, was only banned as recently as 1999. *BBC Timeshift: Crime and Punishment—The Story of Corporal Punishment* (BBC television broadcast Apr. 4, 2011)

59. *Id.*

60. MATTHEW PATE & LAURIE A. GOULD, CORPORAL PUNISHMENT AROUND THE WORLD 31 (2012).

61. *BBC Timeshift*, *supra* note 58.

62. *Id.*; DAVID TAYLOR, CRIME, POLICING AND PUNISHMENT IN ENGLAND, 1750–1914 145 (1998).

including Bentham's Panopticon.⁶³ While, again, prison design would progress greatly by the 19th century and with it a focus on reforming the offender, the use of corporal punishment would continue in Britain long after most of Europe had abolished it.⁶⁴ Thus, by the time Britain became the center of a large, global empire, corporal punishment in public, whether it be convicts in pillories or public floggings, was an entrenched aspect of criminal punishment and had been exported to colonies throughout the Empire.

While Foucault's theory of punishment is complex, for our purposes, the question is a simple one: why do some modern penal systems still maintain and employ techniques drawn from the culture of spectacle, the era of penal punishment that used the offender's body as a conduit to express the commanding power of the State? In the case of Hong Kong and Singapore, why has one former British colony divested itself of all vestiges of the culture of spectacle while the other has felt compelled to retain it? Indeed, the culture of spectacle very much survives in Singapore in a residual, muted form.

II. THE CASE OF CORPORAL PUNISHMENT IN HONG KONG

Understanding the political function of corporal punishment, it makes sense that, even well past its decline in the United Kingdom, the British Empire continued to employ judicial corporal punishment in their colonial holdings—for it was here that their authority and the legitimacy of their rule was most open to local challenge. Indeed, the progressive changes mentioned above were very slow to find their way into the colonies, and when they did arrive, their implementation was equally slow. Approaches to corrections and punishment in Hong Kong evolved with time, often reflecting similar changes in Britain, only further delayed. For instance, upon the construction of Hong Kong's first prison in 1841 (one of the first permanent Western structures built in the colony), European prisoners were afforded markedly better treatment.⁶⁵ The reasoning behind this was to better facilitate self-reflection and hopefully encourage the offender to mend his ways, in accordance with the latest penal attitudes in Britain and

63. *Id.*

64. See FOUCAULT, *supra* note 4, at 10.

65. Frank Dikötter, 'A paradise for rascals': Colonialism, punishment and the prison in Hong Kong (1841–1898), in 'THE ULTIMATE MASTERS OF THE CITY': POLICE, PUBLIC ORDER AND THE POOR IN COLONIAL BOMBAY, C. 1893–1914 50 (Prashant Kidambi ed., 2004).

elsewhere in Europe;⁶⁶ however, the situation was markedly different in the lower levels where ethnic Chinese prisoners were kept. Viewed as inferior to their European counterparts, and thus incapable or unworthy of such an opportunity to reflect, a harsher, more severe punishment was enforced and all prisoners were kept in a large, common cell.⁶⁷ The prevailing attitude among the British of the era was that “the Chinese were not deterred from crimes by ‘lenient’ British criminal justice.”⁶⁸ This mentality was extended to corporal punishment, which was at that time a sentenced carried out on the Chinese publicly. Indeed, public floggings were a daily event in the early decades of British rule, with as many as 50 public floggings in a single day being commonplace, usually arbitrarily and without due process.⁶⁹ By contrast, European expatriate members of the colony were accorded the benefit of proper hearings and trials at the Supreme Court.⁷⁰ Judicial punishment in early Colonial Hong Kong reflected a delayed importation of the shifts in criminal punishment that Europe had experienced, which Foucault writes of in *Discipline and Punish*. With respect to corporal punishment, however, the practice would continue for well over a century.

A. A Slow Period of Change

The period following the Second World War saw the first concrete efforts at abolishing corporal punishment in Hong Kong. An evolving view on human rights in the sphere of public international law would be one of the key sources of the change. In the immediate aftermath of World War II, the Western powers, including the United Kingdom, began placing a greater emphasis on the subject of human rights in their rhetoric. Indeed, the carnage and destructive scale of the war prompted a concerted effort by these powers to gain some type of international consensus to codify the protection of human rights, as well as further the cause for international peace.⁷¹ This resulted in the formation of the United Nations, which superseded the League of Nations, as well as the signing and ratification of

66. HONG KONG CORRECTIONAL SERVICES DEPARTMENT, CUSTODY AND CORRECTION: DEVELOPMENT OF HONG KONG'S PENAL SYSTEM 15 (Sau-ching Au Yeung & Jeffrey Chow eds., 2011).

67. *Id.*

68. STEVE TSANG, A MODERN HISTORY OF HONG KONG 47 (2004).

69. *Id.* at 48.

70. *Id.*

71. STEPHEN HALL, FOUNDATIONS OF INTERNATIONAL LAW 621 (2012).

several notable rights-related treaties.⁷² Among the most notable of these treaties to come into force was the International Covenant on Civil and Political Rights (ICCPR) in 1976, seen by many as “the most juridically significant of all human rights instruments in the United Nations System.”⁷³ Article 7 of the ICCPR provides that “no-one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment”, and in Hong Kong, the ICCPR was to take effect through the implementation of the *Hong Kong Bill of Rights Ordinance* (Cap 383), and later after 1997, Article 19 of the Basic Law.⁷⁴ This, along with concurrent developments in Hong Kong itself, discussed below, would finally signal the end of corporal punishment in the Colony.

Though an end to caning was in sight for Hong Kong in the years after the war, it would still be decades before abolition finally arrived. Not long after the United Kingdom abolished corporal punishment in 1948, the British Government decided to likewise abolish it in all of its Crown Colonies, although special deference would be given to the local circumstances of each colony.⁷⁵ At this time, Hong Kong still employed caning with a high degree of frequency, but even then its use was beginning to decline. For example, in 1950, Hong Kong reported 405 cases of judicial corporal punishment, the second highest among the colonies of the entire British Empire, behind only Nigeria.⁷⁶ This was, however, still a dramatic drop from the previous year’s 4,367 floggings.⁷⁷ These last decades of British rule in Hong Kong saw numerous progressive advances in economic and social development in Hong Kong, with major improvements made to infrastructure, housing, social services, an overall rise in the standard of living, as well as a comprehensive reduction in government corruption;⁷⁸ however, where corporal punishment was concerned, the era also reflected a State unwilling to release its hold on punishing the bodies of convicts. While a greater degree of socio-political stability was setting in, Hong Kong was not without its incidents of social unrest. For example, a series of public riots triggered by different events shook the colony in the post-war period, in 1956, 1966,

72. PEU GHOSH, *INTERNATIONAL RELATIONS* 224 (2013).

73. HALL, *supra* note 71, at 628.

74. *Id.*

75. UK PARLIAMENT, *CORPORAL PUNISHMENT IN HONG KONG*, HOUSE OF LORDS DEBATE, AUGUST 1 (1951).

76. *Id.*

77. *Id.*

78. *See, e.g.*, JOHN MARK CARROLL, *A CONCISE HISTORY OF HONG KONG* 172–76 (2007) (detailing anti-corruption efforts in the colony).

1967, and 1981.⁷⁹ Quite likely, these incidents made the colonial government less inclined to abandon their use of shock punishment. As justification for its continued retention of shock punishment during this period, the colonial government argued that there was an unwillingness of the native Chinese population to adopt the lenient rehabilitative measures employed in Britain and elsewhere in the West.⁸⁰

A Report by a Government Committee set up to examine the use of corporal punishment in the Colony in 1966 was one of Hong Kong's first serious public discussions on the practice and its merits.⁸¹ Citing studies conducted by the Hong Kong Government as well as the Government of the United Kingdom, the Report recognized the importance of retaining a punitive element in even reformatory forms of punishment, but cast doubt on whether corporal punishment alone, a purely retributive form of punishment, could be effective if there was no other point to it other than deterrence. The Report found:

No form of punishment should be retained merely on retributive grounds. Therefore corporal punishment, which is retributive, cannot be justified unless it possesses some other attribute. It is certainly not reformatory, but it is punitive, and as such may have some value as a deterrent. As a penalty containing no element of reform, corporal punishment can only be justified if we are satisfied that its deterrent value is greater than that of any other form of punishment, which carries an element of reform.⁸²

Indeed, it would appear that the “slackening of the hold” on the body that had ended for so many jurisdictions in Europe a century earlier, had begun to occur in Hong Kong, stopping just short of a full repeal.⁸³ While the Report supported the idea of a complete abolition of caning, it curiously also added that because the public would oppose complete abolition, that there be a three year trial run instead.⁸⁴

The Report also asserted that a good deal of the public's support for corporal punishment was based on inaccurate notions of its effectiveness

79. For a precise chronology of these incidences, as well as other major events in the history of colonial Hong Kong, see MING K. CHAN, *PRECARIOUS BALANCE: HONG KONG BETWEEN CHINA AND BRITAIN, 184–1992*, 1999–214 (1994).

80. See generally S. YOUNG (GOVERNMENT PRINTER), *REPORT OF THE COMMITTEE TO EXAMINE THE LAW AND PRACTICE RELATING TO CORPORAL PUNISHMENT IN HONG KONG*, GOVERNMENT REPORT (1966).

81. See generally *id.*

82. *Id.*

83. *Id.* at 11.

84. *Id.* at 11–12.

as a deterrent and on the mistaken idea that there were no other alternative means of rehabilitating offenders.⁸⁵ This was particularly true for the public's view of young offenders, who, it was felt, should be spared the protracted and potentially damaging experience of prison and would be better off with the brief pain and humiliation of caning instead;⁸⁶ however, the Report acknowledged that, even in the mid 1960s, there were many alternative rehabilitative measures in place in Hong Kong's criminal justice system.⁸⁷ The report delved into great detail concerning the Training Centres and Reform Schools used to treat juvenile offenders, for example.⁸⁸ The Report also made recommendations as to the further expansion of their use in juvenile criminal justice, and also suggested that efforts be made to increase the public's awareness of these programs and institutions.⁸⁹

Interestingly, the advocacy of institutionalized discipline here over the use of bodily harm at the hands of the State are reminiscent of Foucault's Panopticon model. It is also clear that a Foucaultian shift in the philosophy of punishment in Hong Kong was taking place—from a focus on retributive punishment to one that emphasized rehabilitative techniques—even a full 25 years before the actual repeal of the Corporal Punishment Ordinance. Still, even with this belief in the public's misinformed idea of the criminal justice system and the committee's apparent belief in the merits of abolition, considerable deference was still given to the use of the cane.⁹⁰ Although it is never explicitly stated, it could be surmised that authorities were not keen to enact drastic changes in the penal law, recognizing the somewhat precarious nature of foreign rule. Indeed, the political function of corporal punishment in Hong Kong was an important consideration for colonial rule. Authorities were not anxious to discard the stern hand of colonial rule expressed through corporal punishment. Indeed, even under the relatively stable rule of colonial Hong Kong, the political usefulness of judicial corporal punishment was appreciated.

B. The Demise of Corporal Punishment in the Colony

By the 1980s, the Government was still mulling over what to do with the practice of corporal punishment. In his testimony before the

85. *Id.* at 5.

86. *Id.*

87. *See generally id.*

88. *Id.*

89. *Id.* at 22.

90. *Id.* at 11.

Legislative Council in 1984, Secretary for Security Gordon Mortimer reported that Government studies had shown a lack of evidence supporting the effectiveness of corporal punishment over alternative forms of punishment, as well as a decreasing frequency of its use.⁹¹ Mortimer went on to say that among those few who had experienced caning, a substantially higher percentage of them had re-offended than those offenders who had been sentenced to alternative forms of punishment.⁹² Despite all of this, however, he concluded his testimony by saying that the Government would merely continue to “monitor statistics” and that he was “not in a position” to determine whether or not abolition was necessary.⁹³ Again, the prevailing perception, even in the late 1980s, remained that the local Chinese people required “stern but benevolent” forms of authoritarian rule and the Government continued with this same discourse.⁹⁴

Despite the Government’s contradictory stance on the matter, in practice, canings had become ever less common as the postwar decades went by. For juvenile criminals, figures show that in 1978, there were 1.2 caning sentences handed down for every 100,000 juveniles sentenced, comprising 0.6% of the total convicted.⁹⁵ By 1987, that number was down to zero.⁹⁶ In fact, for the whole of 1987 only one adult was sentenced to caning, and another eight in 1988.⁹⁷ Indeed, flogging had become relatively rare, and increasingly, members of the judiciary, legal community, and Corrections Services Department had come to dislike the practice, with magistrates often finding themselves faced with the difficult choice of either sending juveniles to prison or having them sentenced to caning and subsequently released afterward for certain offences.⁹⁸ Speaking to the *Los Angeles Times* in 1989, one Hong Kong lawyer said that “[m]agistrates loathe to send young boys to prison . . . They hate

91. HONG KONG LEGISLATIVE COUNCIL, OFFICIAL REPORT OF THE PROCEEDINGS: JULY 25 1984, 1292 (1984).

92. *Id.*

93. *Id.* at 1293.

94. Barbara Basler, *Hong Kong Journal: A Victorian Relic, Flogging, Arouses New Distaste*, N.Y. TIMES (Jan. 25, 1989), available at <http://www.nytimes.com/1989/01/25/world/hong-kong-journal-a-victorian-relic-flogging-arouses-new-distaste.html?pagewanted=print>.

95. Patricia Gray, *Juvenile Crime and Disciplinary Welfare*, in CRIME AND JUSTICE IN HONG KONG, 32 (Jon Vagg & Harold Traver eds., 1991).

96. *Id.*

97. Daniela Deane, *Use of ‘the Cane’ Lives On: In Parts of Asia, Flogging Still Exists*, LA TIMES (June 18, 1989), available at http://articles.latimes.com/print/1989-06-18/news/mn-3705_1_caning-flogging-hong-kong.

98. See Basler, *supra* note 94.

caning too. But their hands are tied.”⁹⁹ Additionally, with the Handover fast approaching, discussions within the legal community regarding the need for “judicial house cleaning” began to gain greater traction.¹⁰⁰ In 1990, when the repeal of the *Corporal Punishment Ordinance* was finally set in motion, Secretary Mortimer’s successor, Alistair Asprey, explained that the Courts had only used their power to award such sentences on 23 occasions over the previous five years, with none up until that point for 1990 alone.¹⁰¹ This is contrasted with Mortimer’s reporting of 17 for 1984, during his previously mentioned testimony. Asprey further testified that this was because the Courts considered the practice to be “unnecessary and outdated,” with numerous other available sentencing options “better [able to] achieve the penal objectives of punishment, deterrence and rehabilitation.”¹⁰² He went on to say in his report that the Government now agreed with that sentiment, and recommended the repeal of the *Corporal Punishment Ordinance*. Although he does not cite a source, he indicates that much of the public favored alternative methods of punishing criminals, marking a major shift in the colonial government’s willingness to capitulate to popular sentiment.¹⁰³ Together with the formal abolition of capital punishment in the Colony in 1993, it could finally be said that, in Hong Kong, the State had released its hold on the body of the convict.¹⁰⁴

In the case of Hong Kong, we see a slow transition away from the spectacle of the scaffold—one marked by fits and starts, stymied by a lingering sense of insecurity on the part of the colonial rulers. Yet, notwithstanding the almost reflexive, defensive attitude of colonial rule, the relative socio-political stability of Hong Kong allowed for the transition to eventually take hold, first in practice and then in statute, with the complete abolition of corporal punishment in the colony. This was, however, markedly not the case with Singapore.

99. See Deane, *supra* note 97.

100. See Basler, *supra* note 94.

101. HONG KONG LEGISLATIVE COUNCIL, OFFICIAL REPORT OF PROCEEDINGS: 11 JULY 1990 87 (1990).

102. *Id.*

103. *Id.*

104. Hong Kong’s use of the death penalty is not a primary focus of this paper but it is worth noting here that in practice, there had been no executions carried out in Hong Kong since 1966, following the UK’s abolition in 1965. See DANNY GITTINGS, INTRODUCTION TO THE HONG KONG BASIC LAW 286 (2013). Capital punishment is discussed again in Part IV.

III. THE CASE OF CORPORAL PUNISHMENT IN SINGAPORE

Singapore's use of corporal punishment is also a product of its colonial heritage, although, unlike Hong Kong, Singapore's legal system was derived not only from the British common law but also the Indian Penal Code. Founded by Sir Stamford Raffles in 1819, Singapore did not enter the Empire as a Crown Colony but rather as a trading post of Raffles' employer, the British East India Company, and then as one of the Straits Settlements, which was essentially an extension of British India, before finally becoming a Crown Colony in 1867.¹⁰⁵ Throughout this period, the use of corporal punishment, particularly caning, continued to expand, but it is the even greater expansion of its use in the postwar era that is of particular note.¹⁰⁶

A. *The Cold War Politics of the Cane*

Singapore traversed a very different path than Hong Kong in the postwar period that would have consequences for Singapore's justice system, including the expanded use of corporal punishment. This development, however, has as much to do with the geopolitics of the era as it does with its colonial past. As a newly independent State in the 1960s, the Government of Singapore extensively employed the practice of caning.¹⁰⁷ This can be explained by the small and weak State's need to resort to the use of violence to maintain control and lend legitimacy to the city-state's style of authoritarian rule. Indeed, Jothie Rajah makes that very argument, linking the ruling People's Action Party's (PAP) expansion of corporal punishment laws in Singapore with an explicit narrative of a vulnerable nation state in need of strict methods of punishment.¹⁰⁸

Set against the backdrop of then-contemporary politics, Singapore's postwar use of corporal punishment was inextricably linked to legitimizing its rule. For example, in the same year that Hong Kong's 1966 report on corporal punishment was being finalized, Singapore passed the Vandalism Act of 1966, among the first pieces of legislation passed after Independence.¹⁰⁹ The Act, which for the first time made the ordinarily minor crime of property offences punishable by caning, is deeply rooted in

105. See PATE & GOULD, *supra* note 60, at 115.

106. *Id.* at 116.

107. PETER WILSON, ECONOMIC GROWTH AND DEVELOPMENT IN SINGAPORE 142 (2002).

108. See generally JOTHIE RAJAH, AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE (2012).

109. *Id.* at 66–69 (providing a good outline of the Act's development).

the geopolitical climate in which the newly formed Republic found itself. Rajah cites the Act as an attempt by the rightwing, pro-capitalist PAP to curb the influence of the more left-leaning Barisan Sosioalis, then bent on disseminating anti-U.S. posters and signage as part of the leftist “Aid Vietnam” campaign against U.S. aggression.¹¹⁰ Such acts were equated with common acts of vandalism in public discourse. Indeed, here we can discern how the criminal act is merged together with the political sphere, and morphed into a narrative about a new nation vulnerable to outside threats.

The period in which Singapore achieved Independence in 1965 was fraught with political and social unrest. After a turbulent split with Malaysia, and the Konfrontasi with Indonesia,¹¹¹ among other things, the new Republic found itself faced with another threat—that of leftists and communists.¹¹² Although the anti-communist Prime Minister Lee Kuan Yew intended for Singapore to be a non-aligned State, Lee still felt communism to be a viable threat to the Republic, citing his ideological belief in the Domino Theory.¹¹³ Writing of his support of the US involvement in nearby Indochina, Lee explained,

Singapore would be gravely threatened if South Vietnam were to fall into the hands of the communists, threatening Cambodia, Laos, and Thailand. The insurgency would spread into Malaysia, with serious consequences for Singapore. We could not subscribe to this high-minded ideology [of non-alignment] when it had serious consequences for our future.¹¹⁴

Thus, with Singapore designated as a rest and recreation destination for American service personnel deployed to South Vietnam from 1966 onward, the PAP attempted to keep their socialist political opponents as quiet as possible, and expanding the colonial-era corporal punishment laws was a key part of this endeavor.¹¹⁵ For Lee, hosting American military personnel even in small numbers (Lee notes that the 20,000 servicemen visiting per year constituted a mere seven percent of the total

110. *Id.* at 69.

111. *Id.* at 21–22.

112. *Id.* at 67.

113. CHENG GUAN ANG, *SOUTHEAST ASIA AND THE VIETNAM WAR* 25–26 (2009). The Domino Theory put forward the idea that if any one country was to fall to communism, then so too would its neighbours.

114. LEE KUAN YEW, *FROM THIRD WORLD TO FIRST: SINGAPORE AND THE ASIAN ECONOMIC BOOM* 412–14 (Harper Business ed., 2011) (2000).

115. *See* RAJAH, *supra* note 108, at 67.

tourist traffic into Singapore at that time) was a tacit way to support a war effort he viewed as vital to the national security of his country.¹¹⁶ His deep-seated fear of Singapore's vulnerability to communist influence, entrenched in Cold War ideology, was palpable: "if America disengaged, the tide would go against all non-communist countries . . . [and a]fter that, with fraternal communist parties in control, the communists would cut our throats in Singapore."¹¹⁷ The need of the young Singaporean government to convey strength took on a sense of deep urgency.

Acts of left-wing groups like the Barisan Sosioalis, including distribution of pro-communist posters and slogans, were perceived as a clear and present danger to the nation. Rajah directly links passage of the Vandalism Act with the PAP's greater overall aim of equating the party with the nation, thereby putting any political opposition as "anti-national."¹¹⁸ Dissent had to be dealt with using the pain and humiliation of punishment against the body. Speaking before Parliament, Lee explained the threat posed by the "vandals":

Flaunting the values of his ideology, he [(the vandal)] is quite prepared to make a martyr of himself and go to [prison] . . . But if he knows he is going to get three of the best, I think he will lose a great deal of enthusiasm, because there is little glory attached to the rather humiliating experience of having to be caned.¹¹⁹

This is also a clear application of what Foucault describes as "the body of the condemned man [becoming] the place where the vengeance of the sovereign [is] applied, the anchoring point for a manifestation of power."¹²⁰ Indeed, Singapore's use of caning possessed an unmistakable political function. The purpose was not simply punishment; it was the physical humiliation and domination of those who opposed the regime.

B. Asian Values: Singapore again under Siege

Even in the post-Cold War world, Singapore's government continued to perceive itself as a highly vulnerable nation needing the protection of strict disciplinary measures for punishment; the only difference was that

116. See YEW, *supra* note 114, at 453.

117. *Id.* at 457.

118. See RAJAH, *supra* note 108, at 80.

119. Lee Kuan Yew, *Singapore Parliamentary Debates, August 26 1966*, in JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE* 75 (2012).

120. See FOUCAULT, *supra* note 4, at 55.

this time the context of political opposition was removed from the narrative.¹²¹ Nowhere was this more plainly illustrated than in the case of Michael Fay, an American juvenile sentenced to caning under the same Vandalism Act in 1994, in what was an incident that received widespread international attention at the time.¹²² Here, Rajah notes a shift in the rhetoric employed by the Singaporean authorities in their application of the Vandalism Act, reframing the context into one of Asian values and degenerate Western morals.¹²³ Speaking to the *Straits Times* after the resulting uproar from the American news media, as well as an appeal by US President Bill Clinton for leniency, Lee Kuan Yew, now Senior Minister of Prime Minister Goh Chok Tong's cabinet, explained the state's view of the situation proclaiming "[the United States] dares not restrain or punish individuals, forgiving them for whatever they've done . . . [which is] why the whole country is in chaos."¹²⁴ He explained that Singapore, by contrast, believed in a government that protected society for the greater good.¹²⁵ He went on to say that the United States was plagued by social problems such as "[d]rugs, violence, unemployment and homelessness, all sorts of problems in its society", making it an unsafe country without internal peace.¹²⁶ Lee attributed this to the Western ideal of serving individual interests, rather than a focus on the group, as endorsed by Eastern cultures.¹²⁷

Crucially, the State would take this East-West clash of values as a new threat to the nation. A youngster from Hong Kong attending school in Singapore, Shiu Chi Ho, was also convicted and sentenced to caning during the Fay affair.¹²⁸ In addition to placing Governor Chris Patten in the somewhat ironic position of asking for clemency over a form of punishment Hong Kong had itself only recently abolished,¹²⁹ the State in Singapore sought to use the differences between Fay and Shiu to contrast so-called "Asian values" with Western moral decline.¹³⁰ Commenting on

121. See RAJAH, *supra* note 108, at 90.

122. JOEL KRIEGER, *THE OXFORD COMPANION TO COMPARATIVE POLITICS* 366 (2012).

123. RAJAH, *supra* note 108, at 91.

124. *US Reaction to Fay Case Shows It Dare Not Punish Criminals*, THE STRAITS TIMES (Apr. 13, 1994), in JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE* 105 (2012).

125. *Id.*

126. *Id.* at 104.

127. *Id.*

128. *Id.* at 91.

129. *Id.*

130. See RAJAH, *supra* note 108, at 104; Mark Hughes, *Britain lodges clemency plea in caning case*, SOUTH CHINA MORNING POST, (May 10, 1994), available at <http://www.scmp.com/article/73566/britain-lodges-clemency-plea-caning-case>.

the matter to the press, Lee noted that Fay was the child of divorced parents whereas Shiu's were not and had, in his view, expressed a properly Confucian embarrassment at the publicity generated by the affair and their son's punishment by caning.¹³¹ The State's perceived notions of the dangers presented by Western morality were perhaps best illustrated by comments made by Prime Minister Goh, when he described Singapore's rising divorce rates, and the alleged resulting rise in single parenting, drug use and juvenile delinquency, as threats to the country that could be stopped by corporal punishment in the home and by extension, elsewhere in society.¹³² The belief was that maintaining corporal punishment inside and outside of the home, was key to preventing society from spiraling into moral decay.¹³³ The State likened its role as punisher of convicts to that of a parent spanking a misbehaving child: "the punishment which would normally be meted out to children can now be meted out to the adult delinquents actually responsible."¹³⁴ In effect, the public and domestic spheres were merged into a single entity. This insistence that the family, as a societal institution, be used to help keep society in check, is captured in Foucault's model.

Lee Kuan Yew also stressed the importance of avoiding the appearance of treating Fay differently due to his status as a foreign national: "if we did not cane this boy because he was American, how could we cane our own offenders?"¹³⁵ Indeed, the concurrent public discourse on the Fay affair, as reported in the press, also emphasized the importance of treating these foreign offenders "like any Singaporean offender."¹³⁶ The feedback from readers, presented by the newspapers, showed an overwhelming support for the State's handling of the situation, which Rajah describes as a "discourse [that] constructed a public demand for 'justice' a 'justice' that involved subjecting the 'foreigners' to severe punishment."¹³⁷ This display of public support, in turn, can be seen as a constructed attempt at showing popular local consent for citizens to be subject to this type of retributive

131. Weng Kam Leong, *Biggest Crisis Has Brought Family Even Closer*, THE STRAITS TIMES (Aug. 7, 1994), in JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE* 106 (2012).

132. See RAJAH, *supra* note 108, at 109.

133. *Id.* at 110.

134. Lee Kuan Yew, *Singapore Parliamentary Debates, 26 August 1966*, in JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE* 77 (2012).

135. See YEW, *supra* note 114, at 214.

136. See RAJAH, *supra* note 108, at 96.

137. *Id.*

punishment, essentially legitimizing State subjugation.¹³⁸ In effect, the perception of a vulnerable nation in need of the strong guiding hand of the State, originally set against the Cold War backdrop, reasserted itself—this time framed in a clash of Eastern and Western values. Once again, Singapore felt besieged—this time in the form of a cultural threat.

Today, Singapore continues to employ judicial caning with great frequency. In 1993, the year before the Fay affair, Singapore courts ordered a total of 3,244 caning sentences;¹³⁹ by 2007, that figure had rocketed to 6,404.¹⁴⁰ The figures have since decreased in the years since, but the numbers still remain very high, with 2,318 ordered in 2011.¹⁴¹ Unlike the rights-conscious and more Western-influenced Hong Kong, it is perhaps unlikely that Singapore will be repealing its laws on corporal punishment in the near future, particularly given the government's strong advocacy of what it sees as Asian values.¹⁴² Pate and Gould explain that such shared values have ensured the survival of corporal punishment in Singapore, citing the Government-published *Shared Values White Paper of 1991*,¹⁴³ which indicates that Singapore's understanding of human rights is viewed through a lens of "[n]ation before community and society above self: Putting the interests of society ahead of the individual."¹⁴⁴ In contrast, Hong Kong's ratification of human rights treaties, such as the ICCPR, and ICESCR, in the 1990s, show a much more Western-oriented view of human rights. Singapore is party to neither treaty.¹⁴⁵ Both judicial corporal punishment and judicial execution are legal in Singapore.¹⁴⁶ The divergence between the two former Crown Colonies in this area is likely to remain for some time, ensuring that the State will continue to retain a hold on the body of the convict in Singapore.

138. *Id.*

139. US DEPARTMENT OF STATE, SINGAPORE HUMAN RIGHTS PRACTICES, 1994 (1995) at 3/14.

140. US DEPARTMENT OF STATE, 2007 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SINGAPORE (2008).

141. US DEPARTMENT OF STATE, 2011 HUMAN RIGHTS REPORTS: SINGAPORE (2012).

142. See PATE & GOULD *supra* note 60, at 116.

143. Shared Values, White Paper. 2 Jan 1991.

144. See PATE & GOULD *supra* note 60, at 116.

145. Roland Rich, *An Appreciation of the Human Rights Situation in Southeast Asia*, in THE CRISIS OF DEMOCRATIC GOVERNANCE IN SOUTHEAST ASIA, 173 (Aurel Croissant & Marco Bunte eds 2011).

146. See *infra* Table 1, 2.

IV. EXPLANATION AND ANALYSIS: THE POLITICAL FUNCTION OF THE SCAFFOLD IS ALIVE

A. *Hong Kong and Singapore may be Distinguished in Terms of Political Insecurity*

The divergent experiences of Hong Kong and Singapore can be distinguished in terms of the perceived vulnerability of their governments' rule. The more a government's rule is threatened, the more that government will be inclined to employ shock punishment as a way to bolster their authority. In the case of both Hong Kong and Singapore, the potential frailty of foreign rule helped drive policymakers to employ both corporal and capital punishment if only for the strong messaging component these forms of punishment possess. However, the disparity between the two colonies in terms of political stability eventually caused Hong Kong to abolish all forms of shock punishment and Singapore to maintain it well beyond its independence from Great Britain. While Hong Kong was not without its incidences of social unrest, the colonial government in Hong Kong did not feel their rule challenged to the same extent as the newly independent government in Singapore. The result was two divergent stories in their respective use of shock punishment.

The independent government in Singapore saw a need for corporal punishment as a means of shoring up their rule, first as a new, vulnerable State besieged by external political threats, then later as one in danger of decline by way of corrupting foreign morals. Unlike Hong Kong, which enjoyed relative stability during the postwar period, this era saw the newly independent Singapore largely left to fend for itself in the highly polarized geopolitical climate of the Cold War. Faced with what it perceived to be a palpable threat to national security, the State saw the fledgling Republic as a vulnerable new nation in need of strict laws to protect itself from a communist takeover. Decades later, by the time of the Michael Fay incident, the nature of the threat shifted, but, in principle, remained the same in terms of fueling the authorities' inclination to employ severe, retributive punishment. The Cold War had ended, but *moral* threats to the nation and ultimately to the government's authority remained, and the State sought to bolster its image as a bulwark of Asian values in the face of encroaching moral degeneracy from the West. This illustrates that it was largely ideological forces that has driven the retention of corporal punishment in Singapore well into the 21st century. Crucially, it was ideology rooted in the ongoing political insecurity of the State.

Hong Kong, while certainly not without its share of social problems, nevertheless had the comparative luxury of relative stability, which enabled its government and judiciary to cautiously embrace a more rehabilitative, rights-oriented penal philosophy. As foreign rulers, the British administration in Hong Kong ensured a steady import of Western liberal ideas, especially those related to rights and concepts of justice. The British authorities were also inclined to adopt a measure of pragmatism, and implement penal reform in a gradualist manner. The Hong Kong Government's official justification for the continued use of caning well into the 1980s was that Hong Kong's predominantly Chinese population would never settle for anything less than corporal punishment for the relevant offences, and that simple jail time would not be an ineffective deterrent, however mistaken the Government felt that sentiment was. Indeed, this would prove to be the sole, stubbornly entrenched justification for retaining corporal punishment in the Colony, long after all other justifications, such as its deterrence and the value of retribution, had lost considerable credibility. There was, however, a political subtext to this justification: corporal punishment was a means to highlight the stern hand with which the colonial masters ruled its colony.

Equally important were the wider political considerations of the period. With the transfer of sovereignty fast approaching, it became apparent that the British Government was keen to accelerate the application of international discourse on the Western concept of human rights to Hong Kong and conduct "judicial house cleaning."¹⁴⁷ The story of corporal punishment in postwar Hong Kong can be characterized by a steady, if delayed, application of the progressive shifts Europe had experienced over the past century, especially in the time following the end of World War II.

Key to this gradual shift away from corporal punishment was the relative social and political stability that Hong Kong enjoyed as a British colony. However, the vulnerability of colonial rule was never absent from consideration. In Hong Kong's postwar era, Colonial authorities retained corporal punishment largely as a result of a struggle to balance Western concepts of human rights and justice with a pragmatic desire to not undermine their rule. Underlying this struggle was the political function of punishment as an instrument to project the power of colonial rule. This considerably slowed the process of abolition. Corporal punishment was used extensively in the British colonies largely because such visceral forms of punishment are potent expressions of power that colonial rulers

147. See Basler, *supra* note 94.

were eager to project; however, because Hong Kong enjoyed a relatively stable socio-political atmosphere, retention did eventually give way to abolition. The Singaporean experience is starkly different. Singapore's authorities used corporal punishment far more resolutely as a means of protecting the legitimacy of its rule against its perceived vulnerability as a newly-formed nation. The underlying difference between Hong Kong's experience and that of Singapore is one of political and social stability. Under the colonial protection of British rule and the stability it afforded, while the process was slow, Hong Kong eventually abolished both corporal and capital punishment; under embattled independent rule, Singapore retained and even stepped up its use.

Singapore is an example of a penal system that has not fully transitioned to a carceral culture. Vestiges of the scaffold remain in the form of shock punishment where the power of the State is still displayed directly upon the body of the offender. While caning is carried out within the prison, its efficacy as a primal expression of authority remains, if slightly muted. Singaporeans are well aware that corporal punishment is delivered with the blows of a rattan cane and executions carried out by hanging behind the walls of the prison. Singapore is a fascinating case as it is perhaps the most economically developed State of significant size that still employs corporal punishment. Indeed, the theory referenced in the introduction that economic development spurs a penal transition away from shock punishment does not seem to apply very well to the case of Singapore. The remainder of the Article will present empirical data regarding the global use of judicial corporal and capital punishment in relation to the political and social freedom of the societies that retain it. While not without anomalies, the data shows a fairly robust correlation between the authoritarian character of a country and the use of shock punishment. This seems to support our thesis.

B. The Global Use of Judicial Corporal Punishment

Judicial corporal punishment is a quintessential expression of State power in that it is the act of physical domination over the individual. Fines and imprisonment communicate a similar message; however, the visceral shock value of physical violence is unrivaled as a medium through which to underscore the authority of the State. As such, the use of corporeal punishment tends to linger in modern States whose political authority is less robust and vulnerable to challenge. While the legitimacy of Democratic governments is not as open to dispute on this front, the political legitimacy of non-democratic, one-party-rule States is not as

secure. Indeed, it is for this reason that authoritarian, and semi-authoritarian regimes work hard at shoring up the legitimacy of their rule through appeals to patriotism, historical claim, religious divine right, external threats, or political ideology. Shock punishment as a conduit through which to express the power of the State is but another tool in the toolkit of such States to cultivate the perception of political strength. A look at the States that retain corporal punishment supports this claim. The majority of countries that employ corporal punishment lack a substantial degree of political and social freedom.

Below is a tabulated list of countries that have not abolished corporal punishment as a penal sentence.¹⁴⁸ The form of the corporal punishment as well as the venue is also listed. The term “flogging” here is used as an umbrella term that may include a range of instruments, such as: whip; strap; cane; birch; cat o’ nine tails; rattan; or rod. The degree of political freedom of each country is also shown. This rating is taken from Freedom House’s annual report.¹⁴⁹ Countries are rated on a scale of 1 to 7, with 1 representing the highest and 7 the lowest level of freedom. Nations are then classified as “Free”, “Partly Free”, or “Not Free.” The designations correspond to the rating in the following manner: “Free” (1.0-2.5), “Partly Free” (2.51-5.5), or “Not Free” (5.51-7.0). Countries highlighted in grey are considered fully-free States (i.e. a perfect rating of one).

TABLE 1: STATE PUNISHMENT VENUE AND FREEDOM RATING

Afghanistan	flogging/amputation	public / private	6
Antigua and Barbuda	Flogging	n/a	2
Barbados	Flogging	Private	1
Botswana	Flogging	Private	2.5
Brunei	Flogging	n/a	5.5
Burma*	Flogging	n/a	5.5
Dominica	Flogging	Private	1
Eritrea**	Flogging	n/a	7
Grenada	Flogging	n/a	1.5
Guyana	Flogging	Private	2.5
Iran	flogging/amputation	public / private	6

148. This is based on data current as of summer 2014, and is provided by the GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN, available at <http://www.endcorporalpunishment.org/pages/frame.html>.

149. At arriving at the number, we have averaged together the two parameters Freedom House uses—political rights and civil liberties. See *Freedom in the World 2014*, FREEDOM HOUSE, available at <http://www.freedomhouse.org/report/freedom-world/freedom-world-2014>.

Libya	flogging/amputation	n/a	4.5
Malaysia	Flogging	Private	4
Maldives	Flogging	n/a	4.5
Mauritania	flogging/amputation	n/a	5.5
Nigeria	Flogging	public / private	4
Pakistan	Flogging	n/a	4.5
Qatar	flogging/amputation	n/a	5.5
Saint Kitts and Nevis	Flogging	Private	1
Saint Vincent and the Grenadines	Flogging	Private	1
Saudi Arabia	flogging/amputation	public / private	7
Singapore	Flogging	Private	4
Somalia	flogging/amputation	public/private	7
Sudan	Amputation/wounding	n/a	3
Tanzania	Flogging	Private	7
Tonga	Flogging	n/a	2
Trinidad and Tobago	Flogging	Private	2
Tuvalu	Flogging	n/a	1
United Arab Emirates	Flogging	public / private	6
Yemen	flogging/amputation	n/a	6
Zimbabwe	Flogging	Private	5.5

* It is unclear if Penal Code 1957, which stipulates that young offenders may be caned, has been repealed.

** There is no provision for corporal punishment in the Penal Code; however, it appears that provisions for whipping have yet to be repealed from the Criminal Procedure Code (article 392), the Whipping Act and the Citizenship Act.

Out of the thirty-one countries that have not abolished corporal punishment, twenty-six (83.8%) are not considered fully-free States. Only five (16.1%) are categorized as fully-free societies. With regard to the eleven States that retain corporal punishment as a form of sentencing that are regarded as free (not necessarily fully free), it is unclear to what extent corporal punishment is actually applied in practice. Actual application almost certainly varies significantly between national penal systems. In some cases, it may be a matter of a law remaining “on the books” but in practice rarely if ever employed. Unfortunately, this data is not available in any comprehensive manner for corporal punishment. This is because there is a paucity of scholarship of a comparative nature regarding the precise use of corporal punishment.¹⁵⁰ We speculate that there is almost certainly a marked difference between the frequency of its application in countries such as Saudi Arabia and Iran to that of tiny island-states in the Caribbean such as Antigua and Barbuda and Saint Kitts and Nevis where

150. NIGEL RODLEY & MATT POLLARD, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 427 (2009).

its inclusion in the penal code is likely more a function of colonial inheritance than a robust, modern penal practice. Moreover, the range of offenses subject to judicial corporal punishment also varies between States. Saudi Arabia is of particular note in that there is in fact no written Penal Code and courts wield tremendous discretion as to what crimes are punishable by corporal punishment.¹⁵¹ In any case, it is difficult to assess these claims without access to more detailed empirical data. What is clear is that a sizeable majority of countries that employ corporal punishment share a common feature—they are not fully-free States, and most are authoritarian regimes, or illiberal democracies such as Singapore.¹⁵²

C. The Global Use of Judicial Execution

While it is difficult to get precise data with regards to the global use of judicial corporal punishment, such data is readily available for judicial execution; a far richer pool of empirical research is available regarding the death penalty. Indeed, in the case of the death penalty, a pattern emerges with reference to authoritarian regimes and their use of execution that supports our thesis.

Below is a list of all States that currently retain the death penalty for ordinary crimes.¹⁵³ States considered fully free are highlighted in grey.

TABLE 2: STATE FREEDOM RATING

Afghanistan	6
Antigua and Barbuda	2
Bahamas	1
Bahrain	6
Bangladesh	3.5
Barbados	1
Belarus	6.5
Belize	1.5
Botswana	2.5
Chad	6.5
China	6.5
Comoros	3.5

151. PETER O. NWANKWO, *CRIMINOLOGY AND CRIMINAL JUSTICE SYSTEMS OF THE WORLD: A COMPARATIVE PERSPECTIVE* 158 (2011).

152. An illiberal democracy is a governing system that, while affording the right to vote to its citizens, severely curtails civil liberties. See Fareed Zakaria, *The Rise of Illiberal Democracy*, *FOREIGN AFFAIRS* 22–43 (1997).

153. See *Abolitionist and Retentionist Countries*, AMNESTY INTERNATIONAL, available at <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries#retentionist>. This data is current as of summer 2014.

Cuba	6.5
Democratic Republic of the Congo	2.5
Dominica	1
Egypt	5.5
Equatorial Guinea	7
Ethiopia	6
Gambia	6
Guatemala	3.5
Guinea	5
Guyana	2.5
India	2.5
Indonesia	3
Iran	6
Iraq	5.5
Jamaica	2.5
Japan	1
Jordan	5.5
Kuwait	4.5
Lebanon	4.5
Lesotho	2.5
Libya	4.5
Malaysia	4
Nigeria	4
North Korea	7
Oman	5.5
Pakistan	4.5
Qatar	5.5
Saint Kitts and Nevis	1
Saint Lucia	1
Saint Vincent and the Grenadines	1
Saudi Arabia	7
Singapore	4
Somalia	7
South Sudan	6
Sudan	7
Syria	7
Thailand	4
Trinidad And Tobago	2
Uganda	5
United Arab Emirates	6
United States of America	1
Viet Nam	6
Yemen	6
Zimbabwe	5.5

Out of the fifty-six countries that currently retain the death penalty for ordinary crimes, forty-eight (85.7%) are considered as not fully-free societies. Our contention is that the theatre of punishment is just one contributing factor for retention, but in many cases a significant one. Other

factors may explain the eight fully-free societies (14.2%) that retain judicial execution. What the data shows, however, is that a fairly robust correlation exists between how unfree a State is and the likelihood that they will employ the death penalty. It should be noted that this distribution diverges significantly from the global distribution of freedom rankings for all countries.

A comparison of the general global distribution of freedom versus freedom rating in relation to legality of death penalty.

TABLE 3: STATUS OF SOCIETY AND GLOBAL DISTRIBUTION OF EXECUTING STATES

Fully-free societies	33.5%	14.2%
Not fully-free societies	74.8%	85.7%

As of 2014, out of the 195 countries rated from Freedom house, 146 (74.8%) are not considered fully-free societies, and forty-nine (33.5%) are considered fully-free societies.¹⁵⁴ The correlation between the freedom rating of States and their actual use of execution is also clear from the data, as seen in the table below.

Below is a list of States that performed executions between 2007 and 2011 showing the actual number of executions carried out.¹⁵⁵ Each country's freedom rating from Freedom House is also shown. States considered as fully free (i.e. a rating of one) are highlighted in grey.

TABLE 4: STATE EXECUTIONS AND FREEDOM RATING

China*	Thousands (unclear)	6.5
Iran	1,663	6
Saudi Arabia	423	7
Iraq	256	6
United States	220	1
Pakistan	171	4.5
Yemen	152	6
Korea (North)	105	7
Vietnam	58	6
Libya	39	4.5
Afghanistan	34	6
Japan	33	1

154. This covers the period from January 1 through December 31, 2013. *Freedom in the World 2014*, *supra* note 149.

155. See "The Death Penalty", AMNESTY INTERNATIONAL, available at <https://www.amnesty.org/en/what-we-do/death-penalty/>.

Syria	33	7
Sudan	30	7
Bangladesh	28	3.5
Somalia	23	7
Egypt	12	5
Indonesia	11	2.5
Belarus	9	6.5
Equatorial Guinea	7	7
Sudan (South)	5	5.5
Botswana	4	2.5
Oman	4	5.5
Singapore	4	4
Bahrain	2	6
Malaysia	2	4
Thailand	2	4
UAE	2	6
Ethiopia	1	6
Kuwait	1	5
Mongolia	1	1.5
Saint Kitts & Nevis	1	1

* This data is current as of summer 2014. Note that Taiwan, which has judicial execution, is not included here. Similarly, the Palestinian Authority, also an executioner, is absent from this list.

Although these countries retain corporal punishment, they really vary in how frequently they use it. Out of the thirty-two countries that actually performed executions between 2007 and 2011 only three (9.3%) are considered fully-free societies. Twenty-nine (90.6%) are considered to not be fully free. Twenty-seven (84.3%) of the thirty-two are either “not free” or only “partly free” with the solid majority being of those countries being “not free” (76.9%). Among the top ten most prolific executioners, 90% are “not free” societies. Seven of the countries on this list are “unfree.” The only anomaly is the United States, and indeed its inclusion here is curious and one often remarked upon. It speaks to the fact that there is a multiplicity of factors that contribute to the use of shock punishment. The issue of political legitimacy and the need to communicate authority is but one fact; however, the fairly robust correlation between unfree States and use of shock punishment suggests it is a nontrivial factor. It is important, however, that we consider these numbers in relation to size of population: a State with a population of 100,000,000 carrying out one execution and a State with a population of 100,000 carrying out one execution are simply not comparable. This is taken into account in the table below, which adjusts the ranking on a per capita basis.

Below is a list of the top ten most prolific executioners adjusted on a per-capita basis.¹⁵⁶ Note that in the case of China, the number of executions is unclear, as this number is classified and not released. We have used the number of 10,000 based on an estimate of 2,000 executions over a five year period (2007–2011); however, the reader should note that this is only conjecture. Some China watchers speculate that the number may be significantly higher; Amnesty international claims that thousands were executed in 2013 alone.¹⁵⁷ States considered fully free are highlighted in grey.

TABLE 5: STATE EXECUTIONS PER CAPITA AND FREEDOM RATING

Iran	1,663	48,611	6
Saint Kitts & Nevis	1	51,538	1
Saudi Arabia	423	64,647	7
Equatorial Guinea	7	103,179	7
Iraq	256	127,287	6
China	10,000	136,602	6.5
Libya	39	160,107	4.5
Yemen	152	171,401	6
Korea (North)	105	236,682	7
Somalia	23	453,393	7

When the list is adjusted on a per-capita basis, the ranking changes; however the ratio remains the same: nine of the top ten executioners are unfree States. All of the top ten executioners save Saint Kitts & Nevis are unfree States with a ranking of six or higher. Eight of the nine unfree States have designations of “not free”, the highest possible designation of unfree. The inclusion of Saint Kitts & Nevis here is slightly misleading. Because of its extraordinarily tiny population (51,538) having carried out only one execution between 2007 and 2011, it nevertheless ranks second highest on the list. Compare this to Saudi Arabia ranked immediately below it: it is estimated that, between 2007 and 2011, Saudi Arabia executed 423 offenders. Saint Kitts & Nevi is in fact the eighth smallest country in the world by population.¹⁵⁸ As such, a case could be made that Saint Kitts & Nevis should be treated as an outlier and its inclusion here

156. Calculations are based upon 2014 populations according to the CIA WORLD FACT BOOK, available at <https://www.cia.gov/library/publications/the-world-factbook/>.

157. *Annual Report: China 2013*, AMNESTY INTERNATIONAL (May 23, 2013), available at <http://www.amnestyusa.org/research/reports/annual-report-china-2013>.

158. This is according to the *2013 World Population Data Sheet*, POPULATION REFERENCE BUREAU, available at http://www.prb.org/pdf13/2013-population-data-sheet_eng.pdf.

distorts the data. Yet notwithstanding this, the correlation between the use of judicial execution and the political and civil freedom of a country is unmistakable. It should also be noted that if this data extended back to include the 1990s when Singapore was executing in far larger numbers, with a population from 3 to 4 million (within that period), Singapore would most assuredly be in this top ten when adjusted per capita. Between 1991 and 2001, Singapore executed 322 offenders.¹⁵⁹ In 2004, Amnesty International stated that it believed Singapore “to have the world’s highest *per capita* execution rate, relative to its population.”¹⁶⁰ Another interesting finding is that there is a robust correlation between States that have recently abolished the death penalty for all crimes and a movement in those States towards greater societal freedom, as seen in the following table.

Below is a list of countries that abolished the death penalty for all crimes. Following information is shown: year of abolishment; freedom rating in 1980; and freedom rating in 2014.¹⁶¹

TABLE 6: ABOLITION AND FREEDOM RATING (1980–2014)

Armenia	2003	6	4.5
Turkey	2004	5	3.5
Senegal	2004	4	2
Samoa	2004	4	2
Greece	2004	1	2
Bhutan	2004	5	3.5
Mexico	2005	3	3
Philippines	2005	5	3
Rwanda	2006	6	5.5
Kyrgyzstan	2007	6	5
Albania	2007	7	3
Uzbekistan	2008	6	7
Argentina	2008	6	2
Bolivia	2009	7	3
Burundi	2009	7	5
Togo	2009	7	4
Gabon	2010	6	5.5
Latvia	2012	6	2

159. *Singapore: The Death Penalty—A Hidden Toll of Executions*, AMNESTY INTERNATIONAL, Jan. 15, 2004, at 6, available at <http://www.amnesty.org/en/library/info/ASA36/001/2004>.

160. *Id.* at 5.

161. The data regarding abolition is current as of summer 2014 and based upon data provided by AMNESTY INTERNATIONAL. See <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries#retentionist>. The data regarding freedom rating was based upon Freedom House’s annual reports for those respective years. See *Freedom in the World 2014*, *supra* note 149.

Out of the eighteen countries that abolished the death penalty for all crimes in the last decade, sixteen (88.8%) show a clear progression towards a more free society when their current freedom rating is compared to their freedom rating in 1980. Only two (11.1%), Greece and Uzbekistan, have become less free; however, it should be noted that this was by a degree of one rank in both cases. The States that became freer show an improvement of two to four rankings. All told, this data shows a strong correlation between movement towards a more free society and abolition of execution, but these are just the States that abolished judicial execution (for ordinary crimes) in the last decade. The picture becomes clearer when we exclusively look at a complete list of the States considered most unfree. From it, a robust correlation between societal freedom and the legality of shock punishment becomes evident as shown in the table below.

Below is a list of all countries designated by Freedom House as “not free” with a rating of seven (a rating of seven is most unfree). The list indicates the legality of judicial corporal punishment and execution. States employing neither corporal punishment nor execution are highlighted in grey.

TABLE 7: STATE CORPORAL EXECUTION AND FREEDOM RATING

Saudi Arabia	Yes	Yes	7
Somalia	Yes	Yes	7
North Korea	Yes	Yes	7
Saudi Arabia	Yes	Yes	7
Eritrea	Yes	Yes	7
Central African Republic	No	Yes	7
Equatorial Guinea	No	Yes	7
North Korea	No	Yes	7
Sudan	Yes	Yes	7
Syria	No	Yes	7
Turkmenistan	No	No	7
Uzbekistan	No	No	7

* Amnesty International reports that the last confirmed execution was carried out in 1989. See Amnesty International, *Death Penalty: Countries Abolitionist in Practice*, available at <http://www.amnesty.org/en/death-penalty/countries-abolitionist-in-practice>, last accessed Feb. 25, 2014. However, there is indication that at least one execution may have been carried out between 1999 and 2008. See Luwam Dirar, former advisor to the Minister of Justice of Eritrea, Interview with DPW, DPW Eritrea Doc. I-1, June 20, 2014.

Out of the twelve countries rated as most unfree, ten (83.3%) employ at least execution if not execution and corporal punishment. The fact that such a disproportionate number of unfree States consistently employ shock punishment tells us that these forms of punishment hold a special appeal to

such States. The data shows a robust correlation between the use of shock punishment and States that are unfree. This supports our thesis. It is worth reiterating that our contention is not that all States that employ shock punishment are unfree; rather, our point here is that a high proportion of unfree States employ shock punishment. The correlation between how free a society is (and therefore how legitimized its government is) and its tendency to employ shock punishment is also clear by virtue of its relative absence when we look at societies assigned the highest rating of free (a rating of one). An inverse correlation appears when we examine States that are rated as fully free, as shown in the table below.

Below is a list of all countries designated by Freedom House as fully free (a rating of one is most free). All are electoral democracies. The list indicates the legality of judicial corporal punishment and execution. States employing corporal punishment and/or execution are highlighted in grey.

TABLE 8: STATE CORPORAL EXECUTION AND FREEDOM RATING

Andorra	No	No	1
Australia	No	No	1
Austria	No	No	1
Bahamas	No	Yes	1
Barbados	Yes	Sentenced	1
Belgium	No	No	1
Canada	No	No	1
Cape Verde	No	No	1
Chile	No	No	1
Costa Rica	No	No	1
Cyprus	No	No	1
Czech Republic	No	No	1
Denmark	No	No	1
Dominica	Yes	No	1
Estonia	No	No	1
Finland	No	No	1
France	No	No	1
Germany	No	No	1
Iceland	No	No	1
Ireland	No	No	1
Italy	No	No	1
Japan	No	Yes	1
Kiribati	No	No	1
Liechtenstein	No	No	1
Lithuania	No	No	1
Luxemburg	No	No	1
Malta	No	No	1
Marshal Islands	No	No	1
Micronesia	No	No	1
Nauru	No	No	1

Netherlands	No	No	1
New Zealand	No	No	1
Norway	No	No	1
Palau	No	No	1
Poland	No	No	1
Portugal	No	No	1
Saint Kitts and Nevis	Yes	Yes	1
Saint Lucia	No	Sentenced	1
Saint Vincent and Grenadines	Yes	Sentenced	1
San Marino	No	No	1
Slovakia	No	No	1
Slovenia	No	No	1
Spain	No	No	1
Sweden	No	No	1
Switzerland	No	No	1
Tuvalu	Yes	No	1
United Kingdom	No	No	1
United States	No	Yes	1
Uruguay	No	No	1

Out of the forty-nine countries rated as fully free by freedom house (these are all the States with a rating of one), forty (81.6%) do not employ either judicial corporal punishment or execution. Interestingly, this is comparable to the percentage (83.3%) of countries rated as most unfree that employ either judicial corporal punishment or execution, or both. From among the nine countries that do utilize shock punishment, only three (6.1%) employ both corporal and capital punishment, and from among these three, only one (Saint Kitts and Nevis) actually carried out an execution. That there are free societies that employ shock punishment indicates that there are other factors that contribute to retention. Likewise, there are a variety of factors that may contribute to abolition. For example, Cambodia and Rwanda, both unfree states with an identical freedom house rating of 5.5, have abolished judicial execution. This is very likely attributable to the horrific genocides that both these countries endured in recent history; however, notwithstanding these other factors, a robust correlation seems to exist between the political freedom of a State and use of shock punishment. Of course, correlation is not causation, but the consistency of this finding provides a substantial degree of credence to the thesis that the political function of shock punishment plays a role in its retention. While this correlation has been noted by others, a precise theory as to its cause with reference to the semiotics of shock punishment has not been coherently articulated.

CONCLUSION

Punishment may serve a variety of functions, but its ability to communicate power is unmistakable. Using Hong Kong and Singapore as case studies, we attempted to explain the continued use of corporal punishment, arguing that the expressive power of shock punishment makes it appealing to States coping with political insecurity. While governments that feel their authority threatened are less inclined to give up these forms of punishment, a liberal democracy, more secure in its authority, simply has no need for shock punishment, and so we see a correlation between political legitimacy and the use of shock punishment. For Hong Kong, Foucault's model of penal transition applies in a fairly straightforward manner, although the changes Foucault describes merely took a longer time to fully form than they did in Europe, or even in Britain. So long as corporal punishment remained, the colonial government had at its disposal an inelegant yet effective means to communicate its authority. Yet, because of its relative social and political stability, ultimately, the trajectory of corporal punishment in Hong Kong followed a similar abolitionist path to that of Western nations. Singapore, however, is a different story. It seems the State is not yet ready to discard the expressive power of shock punishment and this is likely to remain the case for the foreseeable future.

There are of course many factors that contribute to the retention of shock punishment and this paper does not deny their import; however, the theatre of punishment helps explain why shock punishment persists in many penal systems. Empirical data regarding the use of shock punishment shows a robust correlation between its use and the political freedom (and therefore legitimacy) of retentionist States. The vast majority of unfree States employ shock punishment. Indeed, there are only a handful of countries that are considered "not free" that do not employ either corporal or capital punishment, or both. Thus, the data suggests that, while many factors undoubtedly contribute to the retention of shock punishment, the political function of shock punishment often plays a significant role in its retention. Indeed, while the brutality of torture and public execution has largely receded into the recesses of history, the political function of the scaffold remains very much alive.