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## Han Law and the Regulation of Interpersonal Relations: “The Confucianization of the Law” Revisited

One of several reasons why Western historians were slow to take Chinese law seriously as an area of study was their mistaken assumption that Chinese law was static (and hence timelessly unedifying).<sup>1</sup> Certain long-term continuities of Chinese law are striking – as but one example among many, consider the technical term *yan* 讞, “to review a case/to submit a case for review,” which seems to have been used, albeit not always in exactly the same sense, for a good two millennia<sup>2</sup> – but newly available documents, combined with a more open-minded approach to the material, have revealed significant discontinuities that demand historical explanation.

For example, in a recent article, Xing Yitian 邢義田 has observed:

The statutes and ordinances of the Qin and Han [dynasties] have long since ceased to be transmitted. For a long time, we have been forced to rely on fragmentary documents from the Qin and Han, if not from later than the Qin and Han, as well as Confucian canons and commentaries, in order to reconstruct some understanding of the Qin and Han laws and system of human relations. One result of [proceeding] like this is that we are unconsciously influenced by the ethical principles of Confucian canonical ideals. And thence we imagine that the ethics of ancient times [must have been the

<sup>1</sup> Cf. William P. Alford, “Law, Law, What Law? Why Western Scholars of China Have Not Had More to Say about Its Law,” in *The Limits of the Rule of Law in China*, ed. Karen G. Turner et al., Asian Law Series 14 (Seattle and London: University of Washington Press, 2000), 49f.

<sup>2</sup> The definition of *yan* in *Shuowen jiezi* 說文解字 (where it is written with a water radical) is “to make an argument about [someone’s] guilt” 讞辜; see Jiang Renjie 蔣人傑, *Shuowen jiezi jizhu* 說文解字集注, ed. Liu Ruishen 劉銳審 (Shanghai: Guji, 1996), 11A.2405. In late imperial times, it tends to mean “to render a (final) verdict,” especially after review (as in *qiuyan* 秋讞, “verdicts after review at the Autumn Assizes”), whereas in early imperial times, it tends to mean “to report on a case” or “to refer a (difficult) case to a superior body for review.”

same]. 秦漢律令失傳久矣。長久以來，大家被迫依據秦漢甚至秦漢以後的片斷文獻和儒家的經典及注疏，去重建對秦漢法律和人倫秩序的認識。這樣的一個結果是，不知不覺會受到儒家經典理想中倫理原則的影響，由此去推想古代的倫理。<sup>3</sup>

Xing then focuses on the Confucian system of determining precedence in family matters on the basis of the relative mourning obligations spelled out in the ancient *Vestments of Mourning* (*Sangfu* 喪服), which is now transmitted as a chapter in the compendium called *Ceremonies and Rites* (*Yili* 儀禮). Although most scholars have assumed that this conception of power relations was widespread in ancient times, Xing shows that it was not incorporated into the legal system until the Taishi 泰始 reforms of AD 267. Xing's larger point, namely that many features of Confucianized society did not take root in China until relatively late, is echoed in other recent publications; Keith N. Knapp, for example, has argued "that the basic features of Chinese religious life, such as ancestor worship and mourning practices,"<sup>4</sup> were Confucianized over the course of the late Han and Six Dynasties, far later than many scholars might have supposed.

The following pages will attempt to sketch this process of Confucianization through the lens of Han-dynasty law. The thesis is that in pre-Han and early Han sources, law was regarded as an administrative tool used by the state to protect its real-political interests. But long before the fall of the dynasty, law had come to be regarded by many writers, including officials of state, as an implement of moral instruction.<sup>5</sup> The surviving sources stress the role of Dong Zhongshu 董仲舒 (ca. 198–ca. 107 BC) in this transition.

But a methodological clarification is necessary at the outset. The idea of "the Confucianization of the law," a phrase coined by T'ung-

<sup>3</sup> "Qin huo Xi Han chu hejian an zhong suojian de qinshu lunli guanxi – Jiangling Zhangjiashan ersiqihao mu *Zouyan shu* jian 180–196 kaolun" 秦或西漢初和姦案中見到的親屬倫理關係 – 江陵張家山二四七號墓《奏讞書》簡 180–196 考論, in *Chuantong Zhongguo falü de li-nian yu shijian* 傳統中國法律的理念與實踐, ed. Liu Liyan 柳立言, Zhongyang Yanjiuyuan Lishi Yuyan Yanjiusuo huiyi lunwenji 8 (Taipei, 2008), 125.

<sup>4</sup> "Borrowing Legitimacy from the Dead: The Confucianization of Ancestral Worship," in *Early Chinese Religion*, Part Two: *The Period of Division (220–589 AD)*, ed. John Lagerwey and Lü Pengzhi, *Handbuch der Orientalistik* IV.21–2 (Leiden and Boston: Brill, 2010), I, 144.

<sup>5</sup> Such historical changes, it should be noted, cannot be detected by relying either on the received literature or on excavated texts alone. For example, the chapter on "The Laws of the Empire" in Michael Loewe, *The Government of the Qin and Han Empires: 221 BCE–220 CE* (Indianapolis and Cambridge, Mass.: Hackett, 2006), 119–34, is based entirely on the documents from Shuihudi and Zhangjiashan, and hence has virtually nothing to say about the last four hundred years of the Han dynasty.

tsu Ch'ü in his *Law and Society in Traditional China* (1961),<sup>6</sup> needs to be unpacked and carefully defined. To take the easier problem first: “law” must refer not just to written laws such as statutes and ordinances (*lǜlìng* 律令), but to legal practice more broadly framed, including principles of adjudication and the diverse intellectual conceptions of law and its functions. This is true for a general and a specific reason. Generally, the problem with relying on statutes and ordinances for information (in any legal culture) is that they do not tell us how they were interpreted; not only can interpretations of the same law vary substantially from one courtroom to the next, but it is the prevailing interpretation of the law, not the law itself, that affects people’s lives most directly. More specifically, in the case of Chinese law, statutes are especially deceptive in that they tended to remain on the books for centuries, even after having been qualified by so-called “particulars” (*lǐ* 例, or “sub-statutes,” in the more usual English translation), if not rendered entirely obsolete by common practice. Moreover, the widespread Chinese practice of reasoning by analogy requires a historian to understand not only what the statutes said, but which statutes were cited as models in ostensibly unrelated classes of legal cases.<sup>7</sup>

Yet more complex is the notion of “Confucianization.” Ch’ü emphasized the tension between ritual and law, which he regarded, simplistically, as Confucian and Legalist, respectively.<sup>8</sup> And, in Ch’ü’s telling, Confucianism and ritualization eventually triumphed. Ch’ü did not merely invent this distinction between ritual and law: Jia Yi 賈誼 (201–169 BC), for example, wrote that “ritual prohibits [misconduct] before it has occurred; law prohibits it after it has occurred” 夫禮者禁於將然之前，而法者禁於已然之後。<sup>9</sup> But Ch’ü’s account does not capture the essence of Confucianization either in theory or in practice. It is, in fact, remarkable how rarely Han jurists appealed to ritual in their

<sup>6</sup> *Law and Society in Traditional China*, Le Monde d’Outre-Mer Passé et Présent: Première Série, Études 4 (Paris and the Hague: Mouton, 1961), 267–79.

<sup>7</sup> For a cogent overview of the different categories of legal sources, with their relative strengths and weaknesses, see Matthew H. Sommer, *Sex, Law, and Society in Late Imperial China*, Law, Society, and Culture in China (Stanford: Stanford University Press, 2000), 17–26.

<sup>8</sup> The distinction between *li* and *fa* as representative of Confucian and Legalist thinking remains commonplace in scholarly discussions of traditional Chinese law; for examples, see Deborah Cao, *Chinese Law: A Language Perspective* (Aldershot, U.K., and Burlington, Vt.: Ashgate, 2004), 62ff.; Léon Vandermeersch, *Études sinologiques*, Orientales (Paris: Presses Universitaires de France, 1994), 209–20; and Luke T. Lee and Whalen W. Lai, “The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist,” *The Hastings Law Journal* 29.6 (1978), 1308ff.

<sup>9</sup> “Jia Yi zhuan” 賈誼傳, in *Hanshu* 漢書 (Beijing: Zhonghua, 1962), 48.2252. See also Charles Sanft, “Rituals That Don’t Reach, Punishments That Don’t Impugn: Jia Yi on the Exclusions from Punishment and Ritual,” *Journal of the American Oriental Society* 125.1 (2005), 31–44.

arguments. Rather, the records that can be regarded as evidence of Confucianized law are always based, explicitly or implicitly, on two tenets: (1) the purpose of law is moral instruction; and (2) the textual foundation of law must be the Confucian canons (which hence override any conceivable statute or decree).<sup>10</sup> In Han times, the most frequently cited Confucian source was the *Springs and Autumns* (*Chunqiu* 春秋), especially the so-called “Gongyang 公羊 tradition,” which was an exegesis on the Confucian text.<sup>11</sup>

The animating concern of Confucianized legal thinking was to pursue order and harmony through the regulation of interpersonal relations. In this respect, it was irreconcilably opposed to the older model of imposing order by enumerating each subject’s obligations to the state, and enforcing these obligations through clearly prescribed rewards and punishments. In other words, for Confucians, effective law stipulates not just people’s obligations to the state, but more fundamentally their obligations to each other – which are themselves determined by the nature of their relationship. An early text of unknown date and authorship, but supremely famous (and perhaps, for that very reason, overlooked by historians), lays out the Confucian view:

Because the ancients desired to make their brilliant virtue shine throughout the world, they first ordered their states; desiring to order their states, they first regulated their families; desiring to regulate their families, they first cultivated themselves; desiring to cultivate themselves, they first rectified their minds; desiring to rectify their minds, they first made their intentions sincere; desiring to make their intentions sincere, they first brought about knowledge. Bringing about knowledge lies in investigating things. After things are investigated, knowledge is brought about; after knowledge is brought about, one’s intentions are sincere; after one’s intentions are sincere, one’s mind is rectified; after one’s mind is rectified, one cultivates oneself; after one has cultivated oneself, one’s family is regulated; after one’s family is regulated, the state is ordered; after the state is ordered, the world is at peace. 古之欲明明德於天下者，先治其國；欲治其國者，先齊其家；欲齊其家者，先脩其身；欲脩其身者，先正其心；欲正其心者，先誠其意；欲誠其意者，先

<sup>10</sup> On this point, see, e.g., Gao Heng 高恆, *Qin Han fazhi lunkao* 秦漢法制論考 (Xiamen: Xiamen Daxue, 1994), 178–93.

<sup>11</sup> Cf. Guo Changbao 過常寶, “*Chunqiu jueyu*: Hanru huayu quanli de goucheng he shijian” 《春秋決獄》漢儒話語權力的構成和實踐, *Beijing Shifan Daxue xuebao: Shehui kexue ban* 北京師範大學學報：社會科學版 2010.1, 73.

致其知。致知在格物；物格而後知至；知至而後意誠；意誠而後心正；心正而後身脩；身脩而後家齊；家齊而後國治；國治而後天下平。

The text is *Great Learning* (*Daxue* 大學).<sup>12</sup> This paragraph, the core of the text, narrates by *sortes* how to bring about peace in the world: one must go back logically, step by step, to the elemental act of “investigating things” – as the opaque phrase *gewu* 格物 is usually understood. It can also mean “to make things arrive” or “to come to things”; since *gewu* is obviously pivotal in this text, commentators have been debating its precise meaning for centuries. Confucians of a rationalist bent have held that it means understanding the underlying patterns of the cosmos by studying the rhythms and correspondences of things in nature. Then one attains knowledge, whereupon one can make one’s intentions sincere, rectify one’s mind, cultivate oneself, regulate one’s family, order one’s state, and finally bring peace to the world.<sup>13</sup>

*Great Learning* not only affirms that the ultimate end of the Confucian moral project, namely good government in all quarters of the world, can be achieved in this manner, but also implies that it cannot be achieved by any *other* process. The only way to achieve world peace is to begin by cultivating yourself, and then spread your morality outwards, through your own family, to your body politic around you and finally the rest of the world. Nothing will be accomplished by going in the other direction.

If the origin of *Great Learning* seems too insecure for it to be trusted as a historical source,<sup>14</sup> consider that Mencius affirmed the same idea in two juxtaposed passages (*Mencius* 4A.4 and 4A.5):

Mencius said: “If you love others, but they are not intimate [with you], reflect on your humanity; if you bring order to others, but they are not orderly, reflect on your wisdom; if you treat others with ritual, but they do not respond, reflect on your reverence. Whenever your actions are unsuccessful, you must reflect and seek [the cause] in yourself. If your person is rectified, the world will come home to you. It is said in the *Odes*: ‘Forever may he live up

<sup>12</sup> The following discussion is taken from Paul R. Goldin, *Confucianism*, Ancient Philosophies 9 (Berkeley and Los Angeles: University of California Press, 2011), 31ff.

<sup>13</sup> Daniel K. Gardner, *Chu Hsi and the Ta-hsueh: Neo-Confucian Reflection on the Confucian Canon*, Harvard East Asian Monographs 118 (Cambridge, Mass., and London, 1986), is a fine study of *Great Learning* and its influence on Confucians of later ages.

<sup>14</sup> Itano Chōhachi 板野長八, *Jukyō seiritsushi no kenkyū* 儒教成立史の研究 (Tokyo: Iwanami, 1995), 210–16, dates *Great Learning* to the time of Emperor Wu of Han 漢武帝, and observes its affinities with the thought of Dong Zhongshu; these conclusions correspond well with those of the present article.

to the Mandate [i.e. of Heaven], and seek for himself many blessings.”<sup>15</sup> 孟子曰：「愛人不親反其仁，治人不治反其智，禮人不答反其敬。行有不得者，皆反求諸己；其身正，而天下歸之。詩云：『永言配命，自求多福。』」

Mencius said: “There is an enduring adage among the people; they say: ‘The world, the state, the family.’ The root of the world is in the state; the root of the state is in the family; and the root of the family is in the self.” 孟子曰：「人有恆言，皆曰：『天下國家。』天下之本在國，國之本在家，家之本在身。」

The conviction that self-cultivation and exemplary relations within the family form the basis of moral excellence in the wider world is fundamental to Confucian thinking. Han Confucians did not typically cite *Great Learning* (though they would increasingly cite Mencius), but their desire for a legal culture that encouraged self-cultivation and harmonious relations within the family is evident throughout their writings, and is especially conspicuous when contrasted with the ideology of the Qin and early Han.

What I mean, then, by “the Confucianization of the law” is a process by which the legal system, comprising not only statutes and ordinances, but also principles of legal interpretation and legal theorizing, came to reflect the view that the law must uphold proper interactions among people, in accordance with their respective relationships, in order to bring about an orderly society. This is quite different from Ch’ü’s own use of the phrase, but it is more precise and more suitable for analytical purposes.<sup>16</sup>

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In order to understand how Han law evolved, it is necessary to observe where it came from. Fortunately, our knowledge of pre-imperial law was greatly enhanced in 1975 by the discovery of legal texts in the tomb of a minor administrator named Xi 喜 in a tomb at Shuihudi 睡虎地. These documents afford a glimpse of not only the Qin administrative machine, but also the legal thinking undergirding it; that is to say, we

<sup>15</sup> A quote from Mao 235.

<sup>16</sup> For other recent reflections on “the Confucianization of the law,” see Huang Yuansheng 黃源盛, *Han Tang fazhi yu rujia chuantong* 漢唐法制與儒家傳統, Lizhai fashi yanjiu 1 (Taipei: Yuanzhao, 2009), 107–12; Huang Jingjia 黃靜嘉, “Zhongguo chuantong fazhi zhi rujiahua zhi dengchang, tixihua ji tuqiong – Yi Cheng Shude bian Liang Han Chunqiu jueyu anli wei qierudian” 中國傳統法制之儒家化之登場·體系化及途窮 – 以程樹德編兩漢春秋決獄案例為切入點, in Liu Liyan, 162–63 and 222–25; and Michael Nylan, “Notes on a Case of Illicit Sex from Zhangjashan: A Translation and Commentary,” *Early China* 30 (2005–06), 43ff. Nylan understands Confucianization as “moralization,” but this is too broad; the Confucianization of the law proceeded along specific ideological lines.

may never know how effectively these texts were implemented in the halls of justice across the empire, but their implied attitude toward the law and its role in society is distinctive. The authors of the Shuihudi texts envisioned the state as an empire built on the labor of clerks,<sup>17</sup> deriving its power from thorough and accurate record-keeping.<sup>18</sup> All subjects were to be registered with the government, so that their various obligations to the state, including tax and statutory labor (*yao* 徭),<sup>19</sup> could be systematically assessed. The state's material resources, down to quotidian tools, were to be meticulously accounted for as well. At the same time, the Shuihudi manuscripts specify not so much crimes as various categories of punishable failure for which people could "be held responsible" (the translation that I would urge for the technical term *zuo* 坐).<sup>20</sup> For many types of failure, a lack of intent or even a lack of knowledge was not accepted as an excuse.<sup>21</sup>

Let us begin with what might be called the cardinal Qin statute, the Statute on Registration (*fu lü* 傅律):

<sup>17</sup> Cf. Bu Xianqun 卜憲群, "Cong jiandu kan Qindai xiangli de liyuan shezhi yu xingzheng gongneng" 從簡牘看秦代鄉里的吏員設置與行政功能, in *Liye gucheng, Qinjian yu Qin wenhua yanjiu – Zhongguo Liye gucheng, Qinjian yu Qin wenhua guoji xueshu yantaohui lunwenji* 里耶古城·秦簡與秦文化研究 — 中國里耶古城·秦簡與秦文化國際學術研討會論文集 (Beijing: Kexue, 2009), 109–10. The clerical empire of the Qin and Han was surely the terrestrial model for what Michel Strickmann has called the "paperwork empire" of the religious Daoist imagination. See his *Chinese Magical Medicine*, ed. Bernard Faure (Stanford: Stanford University Press, 2002), 5; and *Chinese Poetry and Prophecy: The Written Oracle in East Asia*, ed. Bernard Faure, Asian Religions and Cultures (Stanford: Stanford University Press, 2005), 5.

<sup>18</sup> Nor were the Qin laws unprecedented in this respect. The Baoshan 包山 manuscripts, from nearly a century earlier, in Chu 楚, also exhibit profound concern for accurate record-keeping, as in an account of a case of horse-stealing that includes information about the procedure for preparing and serving arrest warrants: *Baoshan Chujian* 包山楚簡 (Beijing: Wenwu, 1981), 25 (strips 120–23). Cf. Susan Roosevelt Weld, "Grave Matters: Warring States Law and Philosophy," in *Understanding China's Legal System: Essays in Honor of Jerome A. Cohen*, ed. C. Stephen Hsu (New York and London: New York University Press, 2003), 160f.; and, more extensively, Chen Wei 陳偉, *Baoshan Chujian chutan* 包山楚簡初探 (Wuhan: Wuhan Daxue, 1996), 132–49.

<sup>19</sup> See Gao Heng, *Qin Han fazhi lunkao*, 113–24.

<sup>20</sup> In contrast to A.F.P. Hulswé's "to be adjudicated": see his *Remnants of Ch'in Law: An Annotated Translation of the Ch'in Legal and Administrative Rules of the 3rd Century B.C. Discovered in Yun-meng Prefecture, Hu-pei Province, in 1975*, Sinica Leidensia 17 (Leiden: E.J. Brill, 1985), 239 (*et passim*). Although "to be adjudicated" is currently used in American administrative parlance to mean "to be found by a court to have committed an offense" – see David Kaiser and Lovisa Stannow, "The Rape of American Prisoners," *New York Review of Books* 57.4 (March 11, 2010) – this is neither the original nor still primary sense of the term. "To adjudicate" means merely to make a legal decision on the basis of argumentation and admissible evidence. An adjudication could certainly result in a defendant's acquittal.

More recently, Ye Shan 葉山 [Robin D.S. Yates] and Li Andun 李安敦 [Anthony J. Barbieri-Low], "Zhangjiashan falü wenxian Yingyi fangfalun ji tiaozhan" 張家山法律文獻英譯方法論及挑戰, tr. Guo Mianyu 郭勉愈, *Jianbo* 簡帛 4 (2009), 471, have suggested the translation "liable" for *zuo*.

<sup>21</sup> Thus I disagree with Li Jing 栗勁, *Qinlü tonglun* 秦律通論, Faxue congshu (Ji'nan: Shan-dong renmin, 1985), 163.

For concealing youths who are of age, as well as for carelessness in registering the disabled, the village chief and the elders shall redeem the punishment of being shaved.<sup>22</sup> When commoners ought not to be [registered as] senior, or when they have reached seniority and no request is submitted [on their behalf], those who dare to engage in conspiracy or fraud shall be fined two suits of armor. If the village chief and the elders do not report [such cases], they shall each be fined one suit of armor, and the members of the group of five shall be fined one shield per household. All are to be banished.<sup>23</sup> 匿敖童，及占癰不審，典、老贖耐，·百姓不當老，至老時不用請，敢爲詐僞者，貲二甲；典、老弗告，貲各一甲；伍人，戶一盾，皆遷之。<sup>24</sup>

Banishment was a relatively severe punishment in Qin times<sup>25</sup> – most punishments consisted of a mulct, as well as a fixed term of hard labor for particularly serious infractions – and its appearance in this statute bespeaks the government’s anxiety over official misconduct in registering the populace. What distinguished the Qin state from the more feckless states that had preceded it (and that it annexed over the course of its rise to power) was its efficiency in mobilizing its resources, of which the labor and military service afforded by the populace were among the most important.<sup>26</sup> Failures in the area of registration thus threatened the very foundations of the bureaucratic machine, and had to be punished accordingly.

All this registration and documentation required considerable amounts of stationery. Official requests were always to be made in writing,<sup>27</sup> and the Shuihudi texts even include a section detailing the acceptable modes of procuring writing materials.<sup>28</sup> There seems to

<sup>22</sup> I.e. they shall be forced to pay the statutory fine commensurate with the punishment of being shaved.

<sup>23</sup> Compare the translation in Hulsewé, *Remnants of Ch'in Law*, C 20. See also “Falü da-wen” 法律答問 (strips 147 and 165), *Shuihudi Qinmu zhujian*, 127 and 132; Hulsewé, *Remnants of Ch'in Law*, D 125 and D 175.

<sup>24</sup> “Qinlü zachao” 秦律雜抄 (strips 32–33), in *Shuihudi Qinmu zhujian* 睡虎地秦墓竹簡 (Beijing: Wenwu, 1990), 87. The bullet printed before the characters “百姓” represents an unexplained punctuation mark in the original text.

<sup>25</sup> Cf. Xu Fuchang 徐富昌, *Shuihudi Qinjian yanjiu* 睡虎地秦簡研究, Wen shi zhe xue jicheng 287 (Taipei, 1993), 299–314; and Li Jing, 284–86.

<sup>26</sup> Cf. Mark Edward Lewis, *Sanctioned Violence in Early China*, SUNY Series in Chinese Philosophy and Culture (Albany, 1990), 53–67.

<sup>27</sup> “Qinlü shibazhong” 秦律十八種 (strip 188), *Shuihudi Qinmu zhujian*, 62; Hulsewé, *Remnants of Ch'in Law*, A 98.

<sup>28</sup> “Qinlü shibazhong” (strips 131–32), *Shuihudi Qinmu zhujian*, 50; Hulsewé, *Remnants of Ch'in Law*, A 77.



have been an entire bureau of government devoted to training clerks, whose campus was off limits to those who did not belong. Moreover, clerks were not to be assigned menial tasks;<sup>29</sup> this would be wasting a valuable state resource.

Proper registration was crucial for another reason: not everyone had the same legal status, and different status entailed different rights and responsibilities. The Statute on Registration, we remember, stipulated an important right: to be registered as “senior” (*lao* 老), and hence exempt from certain duties, at the appropriate age (probably sixty).<sup>30</sup> Failing to acknowledge as “senior” someone who qualified was thus a violation of his or her rights, while registering as “senior” someone who did *not* qualify was tantamount to defrauding the state of that person’s moiety of labor.

A good example of the linkage between legal status and legal responsibility is the following item:

A murderer enters Party A’s house and wounds A with murderous intent. A cries out, “Bandits!” but his four neighbors, the village chief, and the village elders have all gone out and are absent, and they do not hear A crying “Bandits!” Question: Is it appropriate to sentence them? If the investigation shows that his four neighbors were absent, it is not appropriate to sentence them, but it is appropriate to sentence the village chief and the elders even though they were absent.<sup>31</sup> 賊入甲室，賊傷甲，甲號寇，其四鄰、典、老皆出不存，不聞號寇，問當論不當？審不存，不當論；典老雖不存，當論。<sup>32</sup>

By virtue of their legal status, the village chief (*dian* 典) and elders were expected to respond to a hue and cry, and were punished if they failed to do so, even if they were absent at the decisive moment. Chiefs and elders who knew that they would be out of town were manifestly required to leave behind a workable protocol for responding to alarms. Ordinary people, however, did not have the same degree of responsibility, and thus would not be punished for failing to hear A’s call for help. A legal system that apportioned responsibility according to legal status was predicated on an extensive and incorrupt system of registration.

<sup>29</sup> “Qinlü shibazhong” (strip 191), *Shuihudi Qinmu zhujian*, 63; Hulsewé, *Remnants of Ch’i in Law*, A 101.

<sup>30</sup> Gao Min 高敏, *Yunmeng Qinjian chutan* 雲夢秦簡初探 ([Zhengzhou]: Henan renmin, 1979), 24f.

<sup>31</sup> Compare the translation in Hulsewé, *Remnants of Ch’i in Law*, D 81.

<sup>32</sup> “Falü dawen” (strip 98), *Shuihudi Qinmu zhujian*, 116.

The Shuihudi texts discuss many types of what I would call status-related responsibilities. Artisans, for example, had various special responsibilities: they (and their overseers) were responsible for the works that they produced<sup>33</sup> and for properly certifying construction materials as fit or unfit for use.<sup>34</sup> Many such special responsibilities related to military provisions<sup>35</sup> and assuring the integrity of defense installations.<sup>36</sup> Government officials, not surprisingly, had the most status-related responsibilities of all.<sup>37</sup> If unaccounted deficits were found in a dismissed official's treasury, his subordinates would be held responsible, because monitoring government records was part of their job.<sup>38</sup> Officials were responsible for the government resources in their charge, including hides and leather,<sup>39</sup> grain,<sup>40</sup> animals such as horses and oxen,<sup>41</sup> and even the conduct of convict laborers and government slaves.<sup>42</sup> Officials would also be held to their estimates of building costs.<sup>43</sup>

Finally, government officials had the responsibility to recognize people's legally specified rights, and would be punished for disregarding them. It would be utterly wrong to suppose there was no concept of rights in the Qin empire. The key is that all rights were granted by the state; they were not inalienable and did not derive from any postulated higher power. We have already seen that the aged had the right to be registered as "senior" and that officials would be held responsible for seeing to the relevant paperwork. Similarly, criminal juveniles were to

<sup>33</sup> E.g., "Qinlü zachao" (strips 17-18), *Shuihudi Qinmu zhujian*, 83; Hulsewé, *Remnants of Ch'in Law*, C 11.

<sup>34</sup> "Qinlü zachao" (strips 24-25), *Shuihudi Qinmu zhujian*, 85; Hulsewé, *Remnants of Ch'in Law*, C 15.

<sup>35</sup> E.g., horses: "Qinlü zachao" (strips 9-10), *Shuihudi Qinmu zhujian*, 81; Hulsewé, *Remnants of Ch'in Law*, C 6.

<sup>36</sup> "Qinlü zachao" (strips 40-42), *Shuihudi Qinmu zhujian*, 90; Hulsewé, *Remnants of Ch'in Law*, C 26.

<sup>37</sup> Cf. Xu Fuchang, 445-53.

<sup>38</sup> "Qinlü shibazhong" (strips 82-85 and 169-71), *Shuihudi Qinmu zhujian*, 39-40 and 58; Hulsewé, *Remnants of Ch'in Law*, A 41 and A 82. Cf. also "Qinlü shibazhong" (strips 174-75), *Shuihudi Qinmu zhujian*, 59; Hulsewé, *Remnants of Ch'in Law*, A 87.

<sup>39</sup> "Xiaolü" 效律 (strip 42), and "Qinlü zachao" (strip 16), *Shuihudi Qinmu zhujian*, 73 and 83; Hulsewé, *Remnants of Ch'in Law*, B 18 and C 10.

<sup>40</sup> "Qinlü shibazhong" (strips 21-43 and 165-67), *Shuihudi Qinmu zhujian*, 25-30 and 57-58; Hulsewé, *Remnants of Ch'in Law*, A 19-30 and A 83.

<sup>41</sup> "Qinlü shibazhong" (strips 13-20), "Xiaolü" (strip 44), and "Qinlü zachao" (strips 27-31), *Shuihudi Qinmu zhujian*, 22-24, 74, and 86-87; Hulsewé, *Remnants of Ch'in Law*, A 7, A 9, B 20, C 17-19.

<sup>42</sup> "Qinlü shibazhong" (strips 77-79 and 148-50), *Shuihudi Qinmu zhujian*, 38 and 53-54; Hulsewé, *Remnants of Ch'in Law*, A 39 and A 70.

<sup>43</sup> "Qinlü shibazhong" (strips 122-24), *Shuihudi Qinmu zhujian*, 47; Hulsewé, *Remnants of Ch'in Law*, A 64.

be sentenced as such, even if they had already become legally recognized adults at the time of their sentencing,<sup>44</sup> though they could still be executed for murder.<sup>45</sup> Conscientiously investigating and prosecuting alleged misconduct was an official's responsibility,<sup>46</sup> because every defendant had the right to a fair inquest and to be punished only for crimes which he or she really committed. Officials who unduly detained suspects<sup>47</sup> or overburdened households for emergency military service<sup>48</sup> were to be punished as well.

There were, in addition to status-related responsibilities, various kinds of collective responsibility through which relatives and associates of a criminal would be punished together. To take an example of what was called "linked responsibility" (*lianzuo* 連坐): a man's household – defined as those who dwelled with him (*tongju* 同居), including his servitors – would be held responsible if he committed a crime,<sup>49</sup> as would the dependents of a disgraced official.<sup>50</sup> The Statute on Registration examined above referred to the "group of five" (*wu* 伍); while it is unclear from the Shuihudi laws precisely how these groups were determined (and what responsibilities they shared), it is evident that, for certain offenses, all five were to be held collectively responsible, on the assumption that they were responsible for monitoring one another and reporting misconduct. (More recently discovered texts from Liye 里耶 promise to shed more light on the "groups of five.")

Wives were especially vulnerable to being punished through linked responsibility for two reasons: first, as members of their husband's household, they were held responsible for his conduct purely on principle; and second, it is clear that, in the eyes of the law, they were thought to have private knowledge of their husband's doings, and a correspondingly weighty responsibility to report misconduct that would otherwise

<sup>44</sup> "Falü dawen" (strip 6), *Shuihudi Qinmu zhujian*, 95; Hulsewé, *Remnants of Ch' in Law*, D 5.

<sup>45</sup> "Falü dawen" (strip 67), *Shuihudi Qinmu zhujian*, 109; Hulsewé, *Remnants of Ch' in Law*, D 54.

<sup>46</sup> "Falü dawen" (strips 33–36 and 93), *Shuihudi Qinmu zhujian*, 101–2 and 115; Hulsewé, *Remnants of Ch' in Law*, D 27–28 and D 77. Cf. Momiyama Akira 羽山明, *Chūgoku kodai soshō seido no kenkyū* 中國古代訴訟制度の研究, Tōyōshi kenkyū sōkan 68 (Kyoto: Kyōto Daigaku gakujutsu shuppansha, 2006), 53–116.

<sup>47</sup> "Qinlü shibazhong" (strips 135f.), *Shuihudi Qinmu zhujian*, 51; Hulsewé, *Remnants of Ch' in Law*, A 68.

<sup>48</sup> "Qinlü zachao" (strip 39), *Shuihudi Qinmu zhujian*, 89; Hulsewé, *Remnants of Ch' in Law*, C 25.

<sup>49</sup> "Falü dawen" (strip 22), *Shuihudi Qinmu zhujian*, 98; Hulsewé, *Remnants of Ch' in Law*, D 19.

<sup>50</sup> "Falü dawen" (strip 60), *Shuihudi Qinmu zhujian*, 107; Hulsewé, *Remnants of Ch' in Law*, D 48.

go undetected.<sup>51</sup> The details were complex, but ordinarily the wife of a convicted criminal would be confiscated by the government, and in practice this meant being sold into slavery.<sup>52</sup> A wife would escape such confiscation if she reported her husband's wrongdoing before it came to light (*xian gao* 先告).<sup>53</sup>

This emphasis on responsibility as opposed to guilt was not incompatible with a highly developed concept of criminal intent.<sup>54</sup> The classic case focuses on a defendant who stole a goat with a rope around its neck: was he to be charged for stealing the value of the goat, or the value of the goat plus that of the rope? The answer is that because the defendant clearly intended to steal the goat, not the rope around its neck, he should be charged for stealing only the value of the goat.<sup>55</sup> The penalties for forcing a lock likewise depended on the perpetrator's intentions.<sup>56</sup> Someone who was unaware that his guest was a thief, similarly, was not to be charged with any wrongdoing.<sup>57</sup>

Modern readers are thus likely to ask why a legal system that recognized the difference between knowingly and unknowingly abetting a criminal, and between intentionally and unintentionally killing a stranger, should still frequently have held people responsible for crimes that they themselves did not commit. The answer is that guilt and responsibility were not treated alike. Bystanders who failed to intervene while witnessing a violent crime would be held *responsible*,<sup>58</sup> even if they did not bear any *guilt* for the crime itself. And one reason why the state distributed responsibility so widely was surely that it did not

<sup>51</sup> See, for example, the various entries that deal with a wife's knowledge of her husband's thieving: "Falü dawen" (strips 14–18), *Shuihudi Qinmu zhujian*, 97–98; Hulsewé, *Remnants of Ch'in Law*, D 13–16.

<sup>52</sup> "Falü dawen" (strip 116), *Shuihudi Qinmu zhujian*, 121; Hulsewé, *Remnants of Ch'in Law*, D 96. Wang Shunu 王書奴 argued that such women would often end up serving in government brothels; see *Zhongguo changji shi* 中國娼妓史 (1935), reprinted in *Zhongguo hunyin shi, Zhongguo changji shi* 中國婚姻史・中國娼妓史, Jiuji xinkan (Changsha: Yuelu, 1998), 31–33.

<sup>53</sup> "Falü dawen" (strip 170), *Shuihudi Qinmu zhujian*, 133; Hulsewé, *Remnants of Ch'in Law*, D 149.

<sup>54</sup> Cf. esp. Tomiya Itaru, *Kodai Chūgoku no keibatsu: Sarekōbe ga kataru mono* 古代中國の刑罰：觸體が語るもの, Chūkō shinsho 1252 (Tokyo: Chūō Kōronsha, 1995), 117–26; also Huang Yuansheng, 142–44.

<sup>55</sup> "Falü dawen" (strip 29), *Shuihudi Qinmu zhujian*, 100; Hulsewé, *Remnants of Ch'in Law*, D 24.

<sup>56</sup> "Falü dawen" (strips 30–31), *Shuihudi Qinmu zhujian*, 100; Hulsewé, *Remnants of Ch'in Law*, D 25. Cf. Charles Sanft, "Notes on Penal Ritual and Subjective Truth under the Qin," *Asia Major* (third series) 21.2 (2008), 46f.

<sup>57</sup> "Falü dawen" (strip 10), *Shuihudi Qinmu zhujian*, 96; Hulsewé, *Remnants of Ch'in Law*, D 9.

<sup>58</sup> "Falü dawen" (strip 101), *Shuihudi Qinmu zhujian*, 117; Hulsewé, *Remnants of Ch'in Law*, D 83.

consider people as free. People were subjects, not citizens,<sup>59</sup> and retained their very lives only at the state's pleasure. One consequence of being a subject of the Qin state was that you were responsible for living up to the code implied by the surviving texts from Shuihudi. (Though they are rare, there are so-called "strict liability" crimes even in the United States today – such as statutory rape, which in many states is an applicable charge even in cases where the defendant did not know the minor's age. Most other crimes require the establishment of *mens rea* for conviction.)<sup>60</sup>

The Qin empire took pains to regulate marriage for one decisive reason: marriage was a matter of registration and legal status – and not, I would submit, because the state was particularly interested in regulating household relations. Knowing who was married to whom was crucial because, as we have seen, wives were held responsible for their husband's conduct. In addition, wives of husbands with ranks of merit (called *jue* 爵)<sup>61</sup> enjoyed special rights: for example, a husband of the rank *gongshi* 公士 or above was explicitly entitled to surrender that dignity in exchange for the liberation of his wife if she had been sentenced to penal servitude.<sup>62</sup> It would have been impossible to keep track of such rights and responsibilities without bureaucratic instruments to verify which woman was married to which man. Thus divorces

<sup>59</sup> I take this distinction from *The Social Contract* of Jean-Jacques Rousseau (1712–1778), I.6: *The Social Contract and Discourses*, tr. G.D.H. Cole (1889–1959), rev. and augmented by J.H. Brumfit and John C. Hall, *Godwit Political Philosophy* ([Markham, Ont.]: Fitzhenry & Whiteside, 1986), 193.

<sup>60</sup> See the discussion of *mens rea* in Markus D. Dubber, *Criminal Law: Model Penal Code*, Turning Point (New York: Foundation, 2002), 60–80.

<sup>61</sup> I am indebted to Yuri Pines for the rendering "ranks of merit." Hulsewé, *Remnants of Ch' in Law*, 8 *et passim*, called them "aristocratic ranks," but this is misleading. The very foundation of aristocracy in Europe is the association of this status with special birthrights, but the ranks of the Qin empire were more like tokens of privilege that were awarded by the state for various kinds of meritorious service, and could be both forcibly stripped and voluntarily forfeited (in exchange for leniency in punishment). Moreover, Qin ranks seem to have been inheritable only by a single heir (e.g., "Fali dawen" [strip 72], *Shuihudi Qinmu zhujian*, 110; Hulsewé, *Remnants of Ch' in Law*, D 58), whereas in Europe the social privileges of gentle birth were not normally withheld from any of an aristocrat's (legitimate) children, even though they did not inherit the same titles. On inheritance of rank in the Zhangjiashan corpus (which expands on the logic of the Shuihudi laws), see Liu Xinning 劉欣寧, *You Zhangjiashan Hanjian Ernian lüling lun Hanchu de jicheng zhidu* 由張家山漢簡《二年律令》論漢初的繼承制度, *Guoli Taiwan Daxue wenshi congkan* 133 (Taipei, 2007), 23–92; Gao Min, "Cong Ernian lüling kan Xi Han qianqi de cijue zhidu" 從《二年律令》看西漢賜爵制度, in *Zhangjiashan Hanjian Ernian lüling yanjiu wenji* 張家山漢簡《二年律令》研究文集 (Guilin: Guangxi Shifan Daxue, 2007), 60–66; and Yun Jae Seug 尹在碩, "Shuihudi Qinjian he Zhangjiashan Hanjian fanying de Qin Han shiqi houzi zhi he jiaxi jicheng" 睡虎地秦簡和張家山漢簡反映的秦漢時期後子制和家系繼承, *ibid.*, 325–41.

<sup>62</sup> "Qinlü shibazhong" (strips 155–56), *Shuihudi Qinmu zhujian*, 55; Hulsewé, *Remnants of Ch' in Law*, A 91.

were to be reported immediately (by both parties)<sup>63</sup> and polyandry was harshly punished.<sup>64</sup>

But once a marriage was properly concluded, the state wished to know as little as possible about domestic affairs. There was a crime called fornication (*jian* 奸), which probably meant what it did in later eras, namely sexual congress with a married woman by a male other than her husband<sup>65</sup> – but it was clearly not unexceptionally prosecuted, as we learn from an important entry stating that if two men injured each other in a fight over a woman with whom they had both fornicated, she was not to be charged with any crime.<sup>66</sup> It seems to have been necessary for someone to observe fornicators *in flagrante delicto*, and to capture them on the spot and bring them to the magistrate's office, for the state to give the matter any heed.<sup>67</sup> (It was not unusual for ordinary people to make arrests.)

In the home, husbands and fathers were granted substantial discretionary power. A husband's authority over his wife was limited to the extent that he could not severely injure her with impunity,<sup>68</sup> but otherwise his discipline would have to be borne unquestioningly. A father's authority over his children was even greater. He could not kill his child without authorization,<sup>69</sup> but if he wished to have his son executed for unfiliality (*buxiao* 不孝), he could walk into the local government office and fill out the appropriate form.<sup>70</sup> Moreover, if a father did abuse his children in any criminal manner, the offense would have to be reported by someone other than the children themselves, for they were debarred from testifying against their parents.<sup>71</sup> Such matters were called *fei gong-*

<sup>63</sup> "Falü dawen" (strip 169), *Shuihudi Qinmu zhujian*, 133; Hulsewé, *Remnants of Ch'in Law*, D 148.

<sup>64</sup> "Falü dawen" (strip 167), *Shuihudi Qinmu zhujian*, 132; Hulsewé, *Remnants of Ch'in Law*, D 146.

<sup>65</sup> See Sommer, 31–36.

<sup>66</sup> "Falü dawen" (strip 173), *Shuihudi Qinmu zhujian*, 134; Hulsewé, *Remnants of Ch'in Law*, D 152.

<sup>67</sup> Cf. Ulrich Lau, "The Scope of Private Jurisdiction in Early Imperial China: The Evidence of Newly Excavated Legal Documents," *Asiatische Studien* 59.1 (2005), 348. The texts preserve a form for reporting fornication: "Fengzhen shi" 封診式 (strip 95), *Shuihudi Qinmu zhujian*, 163; Hulsewé, *Remnants of Ch'in Law*, E 25.

<sup>68</sup> "Falü dawen" (strip 79), *Shuihudi Qinmu zhujian*, 112; Hulsewé, *Remnants of Ch'in Law*, D 64.

<sup>69</sup> "Falü dawen" (strips 69–70), *Shuihudi Qinmu zhujian*, 109; Hulsewé, *Remnants of Ch'in Law*, D 56.

<sup>70</sup> "Fengzhen shi" (strips 50–51), *Shuihudi Qinmu zhujian*, 156; Hulsewé, *Remnants of Ch'in Law*, E 18.

<sup>71</sup> "Falü dawen" (strips 104–5), *Shuihudi Qinmu zhujian*, 118; Hulsewé, *Remnants of Ch'in Law*, D 87.

*shi gao* 非公室告, which in practice meant “accusations beyond official jurisdiction.”<sup>72</sup> Thus I would explain the considerable privileges that the state accorded male heads of household not as a vestige of Confucianism, as one often reads<sup>73</sup> – otherwise, it should be noted, there is no trace of Confucian thinking in the Shuihudi texts – but as a consequence of the fact that the state did not regard the prosecution of household crimes as a warranted application of its laws. A man could not wantonly injure his wife or kill his children, for that would be depriving the state of the victims’ labor, but as long as he acted within these wide bounds, the state was not yet prepared to encroach on his traditional authority. To repeat: the Shuihudi laws focus on people’s obligations to the state, not people’s obligations to each other.

To the extent that other legal documents from Qin times have been published and analyzed, this concept of law seems to be confirmed as generally valid for the Qin state. The manuscripts from Liye, for example, are invaluable for revealing many aspects of administrative procedure that the Shuihudi texts do not broach, but they do not make a point of addressing interpersonal relations either. Rather, they are concerned with household registration,<sup>74</sup> written communication between government offices in different districts,<sup>75</sup> the use of government property,<sup>76</sup> and so on. Similarly, the Longgang 龍崗 material, found in a Qin tomb not far from Shuihudi, deals largely with trespassing and poaching in government parks.<sup>77</sup> Against this backdrop, one can easily understand the observation of Xunzi 荀子 (ca. 310–ca. 210 BC) that the Qin laws were undeniably effective, but that the state needed to

<sup>72</sup> The best explanation of this term is Lau, “The Scope of Private Jurisdiction in Early Imperial China,” 344f.; Hulsewé, *Remnants of Ch’in Law*, 148f., called it “unofficial denunciation,” reflecting a misunderstanding, I think, of *gongshi*. The point is not that the denunciation itself was unofficial, but that the denunciation would have prompted a case that the government offices categorically refused to hear.

<sup>73</sup> E.g., Gao Heng, “Gongyang Chunqiu xue yu Zhongguo chuantong fazhi” 公羊春秋學與中國傳統法制, in Liu Liyan, 4. A more persuasive interpretation is Cao Feng 曹峰, “Shuihudi Qinjian suojian dui ‘xiao’ de chongshi” 睡虎地秦簡所見對“孝”的重視, *Guoxue xuekan* 國學學刊 2009.3, 101–7.

<sup>74</sup> Cf. Chen Jie 陳掣, “Liye ‘huji jian’ yu Zhanguo moqi de jiceng shehui” 里耶“戶籍簡”與戰國末期的基層社會, *Lishi yanjiu* 歷史研究 2009.5, 23–40; Lai Ming-chiu 黎明釗, “Liye Qinjian: Huji dang’an de tantao” 里耶秦簡：戶籍檔案的探討, *Zhongguoshi yanjiu* 中國史研究 2009.2, 5–23; and Zhang Chunlong 張春龍, “Liye Qinjian suojian de huji he renkou guanli” 里耶秦簡所見的戶籍和人口管理, *Liye gucheng, Qinjian yu Qin wenhua yanjiu*, 188–95.

<sup>75</sup> E.g., J1(6)2; Wang Huanlin 王煥林, *Liye Qinjian jiaogu* 里耶秦簡校詁 (Beijing: Zhongguo wenlian, 2007), 27–29. See also Wang Guihai 汪桂海, “Cong Xiangxi Liye Qinjian kan Qin guan wenshu zhidu” 從湘西里耶秦簡看秦官文書制度, *Liye gucheng, Qinjian yu Qin wenhua yanjiu*, 141–49.

<sup>76</sup> E.g., J1(8)134; Wang Huanlin, 157–68.

<sup>77</sup> *Longgang Qinjian* 龍崗秦簡 (Beijing: Zhonghua, 2001).

recruit more Confucian officials (and implement their counsel) before it could hope to achieve universal dominion.<sup>78</sup>

This lengthy review of Qin law is justified by the recent archaeological discovery of legal documents from a tomb at Zhangjiashan 張家山 (unearthed in 1983 and partially published in 2001),<sup>79</sup> which substantiate the testimony of traditional sources that the early Han state adopted Qin administrative procedures.<sup>80</sup> As is now well known, these documents, which date from the time of Empress Dowager Lü 呂太后 (d. 180 BC), cite many of the same statutes as the Shuihudi laws, at times nearly *verbatim*.<sup>81</sup> Moreover, their implied attitude toward household affairs was even more *laissez-faire* than that of the Qin laws.<sup>82</sup> Whereas the Shuihudi laws mandated punishment for a husband who seriously injured his wife, the Zhangjiashan laws would not consider it a crime unless he used a blade.<sup>83</sup> Children and slaves could not report their parents or masters for crimes within the household; if they did so, they were to be summarily executed and their accusations dismissed.<sup>84</sup> The logic of collective responsibility remained in place: a man's wife and dependents would be confiscated by the government (i.e. enslaved) if he were sentenced to penal labor.<sup>85</sup> And the emphasis on clerical ac-

<sup>78</sup> E.g., Wang Xianqian 王先謙 (1842–1918), *Xunzi jijie* 荀子集解, ed. Shen Xiaohuan 沈嘯寰 and Wang Xingxian 王星賢, *Xinbian Zhuzi jicheng* (Beijing: Zhonghua, 1988), 4.8.117–21 (“Ruxiao” 儒效) and 11.16.302–4 (“Qiangguo” 彊國).

<sup>79</sup> *Zhangjiashan Hanmu zhujian (ersiqi hao mu)* 張家山漢墓竹簡(二四七號墓) (Beijing: Wenwu, 2001). Two tombs, numbered 247 and 336, were reported to contain Han legal documents, but nothing from tomb 336 has been published yet. See, e.g., Li Xueqin and Xing Wen, “New Light on the Early Han Code: A Reappraisal of the Zhangjiashan Bamboo-Slip Legal Texts,” *Asia Major* (third series) 14.1 (2001), 125n.3.

<sup>80</sup> For two useful surveys of the relevant sources, see Sun Xiao 孫筱, *Liang Han jingxue yu shehui* 兩漢經學與社會 (Beijing: Zhongguo shehui kexue, 2002), 41–70; and Chen Suzhen 陳蘇鎮, *Handai zhengzhi yu Chunqiu xue* 漢代政治與《春秋》學, Beijing Daxue xueshu zhuan-zhu congshu (Beijing: Zhongguo guangbo dianshi, 2001), 56–66.

<sup>81</sup> This is especially clear in Li and Xing, 138ff. Cf. also Cai Wanjin 蔡萬進, *Zhangjiashan Hanjian Zouyan shu yanjiu* 張家山漢簡《奏讞書》研究, Jianbo yanjiu wenku (Guilin: Guangxi Shifan Daxue, 2006), 74–83.

<sup>82</sup> Cf. Zeng Jia 曾加, *Zhangjiashan Hanjian falü sixiang yanjiu* 張家山漢簡法律思想研究 (Beijing: Shangwu, 2008), 90–115.

<sup>83</sup> *Ernian lüling* 二年律令 (strip 32), in Peng Hao 彭浩, et al., eds., *Ernian lüling yu Zouyan shu: Zhangjiashan ersiqi hao Hanmu chutu falü wenxian shidu* 二年律令與奏讞書: 張家山二四七號漢墓出土法律文獻釋讀 (Shanghai: Guji, 2007), 103. Cf. Lau, “The Scope of Private Jurisdiction in Early Imperial China,” 337; and Yun Jae Seug, “Zhangjiashan Hanjian suojian de jiating fanzui ji xingfa ziliao” 張家山漢簡所見的家庭犯罪及刑罰資料, *Zhongguo gudai falü wenxian yanjiu* 中國古代法律文獻研究 2 (2004), 54f.

<sup>84</sup> *Ernian lüling* (strip 133), in Peng Hao et al., 146. Cf. Lau, “The Scope of Private Jurisdiction in Early Imperial China,” 345.

<sup>85</sup> *Ernian lüling* (strips 174–75), and *Zouyan shu* (strips 122–23), in Peng Hao et al., 159 and 360, respectively. Cf. Lau, “The Scope of Private Jurisdiction in Early Imperial China,” 336.



curacy is no less visible in these materials than in the Qin laws from Shuihudi.<sup>86</sup>

Thus although the Zhangjiashan legal texts have not yet been studied as fully as those from Shuihudi, the preliminary inference is that the two corpora seem to be very similar in their particulars, and virtually identical in their general understanding of the function of law in society. One fascinating case, however, suggests that different ideas may have been brewing at the time. As it has already attracted worldwide scholarly attention, and has been studied line by line in two publications,<sup>87</sup> it is not necessary to reproduce the text in full here.

The case involves a young widow who was mourning her dead husband in her mother-in-law's house when she retired with an unnamed male to a private room and had intercourse with him overnight. The mother-in-law, disgusted, reported her to the authorities the next morning, but after she was arrested, no one knew what crime to charge her with. Clearly, extramarital sex was normally thought to constitute fornication only if the woman's husband were still alive. In the end, the woman in this case was let go, on the argument that her legally enforceable obligations to her husband ended with his death. The jurist seems to have been building on the attested Qin concept that dependents of a deceased master are not to be confiscated for his crimes.<sup>88</sup> That is to say, normal responsibilities end at his death.

Beforehand, however, other legal officials had reached a tentative verdict finding the widow guilty of some degree of unfiliality (*buxiao*). The relevant passage is particularly difficult to understand, but their willingness to charge her with unfiliality implies that they regarded the victim to have been not her husband, but her offended mother-in-law. By all indications, this would have been an unprecedented leap into the domain of household affairs, as I am unaware of earlier laws regulating the behavior of widows towards their mothers-in-law. Moreover, the text of this tentative verdict is unusual in one other respect:

They reached this verdict: A wife honors her husband; she should be ranked after his parents. But when Party A's husband died, she

<sup>86</sup> See, e.g., Tomiya Itaru 富谷至, *Bunsho gyōsei no Kan teikoku: Mokukan, chikukan no jidai* 文書行政の漢帝國：木簡・竹簡の時代 (Nagoya: Nagoya Daigaku, 2010), 108–11. I am indebted to Wicky Wai Kit Tse 謝偉傑 for this reference.

<sup>87</sup> See both Xing and Nylan; also Lau, "Han-zeitliche Rechtsentscheidungen als Auskunftsquellen zur Stellung der Frau," in *Frauenleben im traditionellen China: Grenzen und Möglichkeiten einer Rekonstruktion*, ed. Monika Übelhör, Schriften der Universitätsbibliothek Marburg 94 (Marburg, Germany, 1999), 48ff.

<sup>88</sup> "Falü dawen" (strips 106–8), *Shuihudi Qinmu zhujian*, 118–19; Hulsewé, *Remnants of Ch'in Law*, D 88–90.

did not grieve passionately; she committed consensual fornication with a man by the side of the deceased.<sup>89</sup> 當之：妻尊夫，當次父母，而甲夫死，不悲哀，與男子和奸喪旁。<sup>90</sup>

No document from Shuihudi ever prescribes appropriate emotions. The preliminary verdict conveys the sense that even if this widow could not be formally charged with fornication, she still behaved inappropriately and should be punished for it. But this evinces a fundamentally different conception of the law and its role in society. The Qin legal system would hardly have bothered with this widow because she was not in default with respect to any of her mandated obligations to the state. But now, evidently, some officials considered this approach inadequate; in their view, a person who does something wrong should be punished even if he or she did not violate any law. This appears to be a nascent sentiment of Confucianization.<sup>91</sup>

As mentioned above, the older reasoning won out, and the widow was released; moreover, the fact that the case was included in a legal handbook suggests that the government was aware of this newer way of thinking and went out of its way to oppose it. But numerous records show that, within a few decades, the newer understanding of the law had come to overwhelm the older idea that the law did no more than regulate people's obligations to the state.

For example, in 150 BC, Liu Wu 劉武, Prince Xiao of Liang 梁孝王, was accused of plotting to assassinate a courtier named Yuan Ang 袁盎, who had dissuaded Liu Wu's older brother, the Emperor Jing 景帝 (r. 188–141 BC), from designating Liu Wu as Crown Prince. Through a chain of intermediaries, Liu Wu persuaded the Emperor to drop the charge; the argument cited precedents from the *Springs and Autumns* in which lawgivers did not punish guilty relatives: "according to the *Springs*

<sup>89</sup> Compare the translation in Nylan, 31.

<sup>90</sup> *Zouyanshu* (strip 187), in Peng Hao et al., 374.

<sup>91</sup> In later legal documents from the fully Confucianized Chinese legal system, judges routinely stated how the principals in their cases ought to have felt. For example, in one case from the Song 宋 dynasty, an uncle was chastised for requesting that his dead brothers' heirs be expelled from the family (so that he could gain control of the property): "And yet their paternal uncle, Yang Rui, suddenly wants to expel these heirs, and set up his sons by a concubine as the heirs. How cruel! Supposing he were to take as his pretext that these two nephews were careless and unruly and made the sorts of mistakes youngsters do make, yet he as their paternal uncle should have pitied them and instructed them" 其叔銳一旦欲逐之，而立其孽子，何其忍也！借曰二姪跌蕩，不無子弟之過，為叔父者正當哀矜之，教訓之。See "Xianli yi ding budang yi niezi yi zhi" 先立已定不當以孽子易之, in *Mingong shupan qingming ji* 明公書判清明集 (Beijing: Zhonghua, 1987), 7.206; tr. Brian E. McKnight and James T.C. Liu, *The Enlightened Judgments: Ch'ing-ming chi*, SUNY Series in Chinese Philosophy and Culture (Albany, 1999), 226f., with romanization converted.

and *Autumns*, this is the way of treating one's kin with intimacy” 春秋以爲親親之道也。<sup>92</sup> The underlying Confucian argument, of course, is that obligations between relatives outweigh the letter of the law. The case is notable because Liu Wu never disputed his guilt; rather, his advocate's claim was that his guilt should be overlooked because there were larger principles of interpersonal ethics at stake.<sup>93</sup>

Moreover, the allusion to the *Springs and Autumns* is telling, because it was not long before legal arguments – for both the prosecution and the defense – would be fashioned around judiciously chosen passages from the Confucian canons, especially the *Springs and Autumns*. In one revealing case, both the defendant and the statesman functioning as his accuser cited the *Springs and Autumns* in their briefs. Xu Yan 徐偃 was a scholar-official sent with others to inspect the provinces after some alarming cases of counterfeiting in 117 BC. While on duty, Xu forged an imperial edict (a crime called *jiaozhi* 矯制),<sup>94</sup> presumably in order to impress the locals. Upon his return, Zhang Tang 張湯 (d. 115 BC) demanded that he be put to death. In his defense, Xu used the *Springs and Autumns*:

[Xu] Yan claimed that according to the principle of the *Springs and Autumns*, when a grandee is beyond the borders, if there is some means by which he can pacify the altars of Soil and Millet,<sup>95</sup> or preserve the myriad people, it is permissible for him to usurp authority. 偃以爲春秋之義，大夫出疆，有可以安社稷，存萬民，顛 [=專] 之可也。<sup>96</sup>

As if wise to the ruse, Zhang Tang's deputy, Zhong Jun 終軍, responded with his own skillful citation: “In the *Springs and Autumns* [it is said]: ‘Nothing is outside the king’” 春秋「王者無外」。In fact, this line appears only in the *Gongyang* 公羊 tradition of the *Springs and Autumns*,<sup>97</sup>

<sup>92</sup> “Jia Zou Mei Lu zhuan” 賈鄒枚路傳, *Hanshu* 51.2355.

<sup>93</sup> The case is lucidly discussed in Sarah A. Queen, *From Chronicle to Canon: The Hermeneutics of the Spring and Autumn, According to Tung Chung-shu*, Cambridge Studies in Chinese History, Literature and Institutions (Cambridge, 1996), 179–81. See also Guo Changbao, 73.

<sup>94</sup> This was a capital crime under the Zhangjiashan laws: see *Ernian lüling* (strip 11), in Peng Hao, et al., 94. Cf. Sun Jiazhou 孫家洲, “Zailun ‘jiaozhi’ – Du Zhangjiashan Hanmu zhujian zhaji zhi yi” 再論“矯制” – 讀《張家山漢墓竹簡》札記之一, in *Zhangjiashan Hanjian Ernian lüling yanjiu wenji*, 226–37.

<sup>95</sup> A common synecdoche for the state.

<sup>96</sup> “Yan Zhu Wuqiu Zhufu Xu Yan Zhong Wang Jia zhuan” 嚴朱吾丘主父徐嚴終王賈傳, *Hanshu* 64B.2818.

<sup>97</sup> Four occasions: Yin 隱 1, Huan 桓 8, Xi 僖 24, and Cheng 成 12. See *Chunqiu Gongyang zhuan zhushu* 春秋公羊傳注疏 (*Shisan jing zhushu* 十三經注疏), 1.2199C, 5.2219B, 12.2259B, and 18.2295C.

a point whose significance will become clear shortly. Zhang Tang and Zhong Jun understood that it would not have been sufficient merely to press ahead with their charge that Xu Yan violated the law of the land and to ignore his appeal to the *Springs and Autumns*; rather, in the new legal climate, it was necessary to show that Xu was guilty even within the context of canonical Confucian doctrine. Only then could he be cashiered.<sup>98</sup> Less than a century had passed since the Qin dynasty, and yet the basis of legal argumentation was now radically different. There can be little doubt that an official who forged an imperial edict in Qin and even early Han times would have been sentenced promptly and harshly, and without much rumination over what the *Springs and Autumns* might have to say.

The new, Confucianized way of thinking considered not only the defendant's actions, but his or her intentions and state of mind.<sup>99</sup> Identical acts were not regarded as morally equivalent if the circumstances differed.<sup>100</sup> The perceived advantage of this new jurisprudence was that it could judge, and hence regulate, people's moral attitudes more directly than the old method of punishing actions if and only if they violate a specific law. (The Shuihudi and Zhangjiashan materials, as we have seen, also evince a concept of criminal intent, but a defendant's intentions were frequently irrelevant.) As we shall see, *Analects* 2.3 was prominent in the minds of Confucianizers.<sup>101</sup>

The Master said: "If you guide them with legislation, and unify them with punishments, then the people will avoid [the punishments] but have no conscience. If you guide them with virtue, and unify them with ritual, then they will have a conscience; moreover,

<sup>98</sup> Once again, Queen, 173–75, is insightful; see also Gao Heng, "Gongyang Chunqiu xue yu Zhongguo chuantong fazhi," 24f., and Huang Jingjia, 189–91.

<sup>99</sup> The specific phrase *luan xin ding zui* 原心定罪 ("to determine guilt by examining the source of [the defendant's] mind"), much-cited in the secondary literature (e.g., Guo Changbao, 75; Gao Heng, "Gongyang Chunqiu xue yu Zhongguo chuantong fazhi," 30–32; Huang Yuansheng, 131–73), is not, in fact, attested until the very end of the Western Han. The clearest example is probably "Xue Xuan Zhu Bo zhuan" 薛宣朱博傳, *Hanshu* 83.3395f., where it is explicitly identified as "a principle of the *Springs and Autumns*" 春秋之義 (this episode is discussed further below); see also "He Wu Wang Jia Shi Dan zhuan" 何武王嘉師丹傳, *Hanshu* 86.3501. Wang Chong 王充 (AD 27–ca. 100) also used it in "Fu xu" 福虛; text in Huang Hui 黃暉, *Lunheng jiaoshi (fu Liu Pansui jijie)* 論衡校釋 (附劉盼遂集解), Xibian Zhuzi jicheng (Beijing: Zhonghua, 1990), 6.20.263. Similar ideas expressed with slightly different phrasing are, of course, not hard to find in Han sources; see, e.g., Wang Liqi 王利器, *Yantie lun jiaozhu* 鹽鐵論校注, revised edition, Xibian Zhuzi jicheng (Beijing: Zhonghua, 1992), 10.55.567 ("Xingde" 刑德): *luan xin ding zui* 論心定罪.

<sup>100</sup> Cf. Huang Yuansheng, 161.

<sup>101</sup> Cf. Gao Heng, *Qin Han fazhi lunkao*, 210.

they will correct themselves.”子曰：「道之以政，齊之以刑，民免而無恥；道之以德，齊之以禮，有恥且格。」

The disadvantage, however, was that legal culpability was now much more difficult to establish than in the past. Different judges might come to different conclusions about the morality or immorality of a defendant's actions, as they now had to gauge what he or she was trying to do, not simply what he or she did. Basing one's judgments on apposite quotes from the Confucian canons did not yield certainty, as the same quote could, naturally, be interpreted in any number of ways by diverse readers.<sup>102</sup> Moreover, the idea that published laws were only secondary as criteria in the process of establishing guilt led to the prospect that people could be punished without violating any law whatsoever.<sup>103</sup> This is what happened in an illustrative case from around 45 BC:

A woman of Meiyang accused her stepson of unfiliality, saying: “My son often treats me as a wife; he flogs me out of jealousy.”美陽女子告假子不孝，曰：「兒常以我爲妻，妒笞我。」

[Wang] Zun heard this and sent officials to arrest and interrogate [the unfilial son], who confessed. Zun said: “There are no laws in the code about cohabiting with one's mother. This is something that the sages could not bear to write about; it is what the canons call an ‘unprecedented case.’” Zun then went out and sat down at the head of the courthouse. He took the unfilial son and had him hung from a tree and dismembered, ordering five cavalymen to draw their bows and shoot and kill him, so that the officials and the people would be terrified. 尊聞之，遣吏收捕驗問，辭服。尊曰：「律無妻母之法，聖人所不忍書，此經所謂造獄者也。」尊於是出坐廷上，取不孝子縣磔著樹，使騎吏五人張弓射殺之，吏民驚駭。<sup>104</sup>

As I have argued elsewhere, it was not uncommon in ancient China for men to take their father's concubines as their own after his death (the technical term for this is *zheng* 烝), but by Han times the practice was reviled.<sup>105</sup> As this magistrate conceded, however, it was not forbidden by statute, and therefore in order to effect the appropriate legal

<sup>102</sup> Cf. Gao Heng, “Gongyang Chunqiu xue yu Zhongguo chuantong fazhi,” 23f.

<sup>103</sup> Cf. Weizheng Zhu, “Confucian Statecraft in Early China,” tr. Trever McKay, in *Traces of Humanism in China: Tradition and Modernity*, ed. Carmen Meinert, Being Human: Caught in the Web of Cultures: Humanism in the Age of Globalization 6 (Bielefeld, Germany: Transcript, 2010), 32ff.

<sup>104</sup> “Zhao Yin Han Zhang liang Wang zhuan” 趙尹韓張兩王傳, *Hanshu* 76.3227.

<sup>105</sup> Paul Rakita Goldin, *The Culture of Sex in Ancient China* (Honolulu: University of Hawaii Press, 2002), 168n.66; see also 96f. for a discussion of the case of Wang Zun and the unfilial son.

remedy, he had to take the law into his own hands. (This is how I understand the vague term *zaoyu* 造獄, translated above as “unprecedented case.”)<sup>106</sup> Thus, by the mid-first century BC, one could no longer be sure of avoiding punishment merely by taking care not to break the law. One had to exhibit the right moral orientation – and, in view of a magistrate’s immense power within his district, this may have entailed desecrating his temperament and ideological proclivities.

Previous scholars have ably collected and scrutinized such examples of Confucianized legal thinking in the Han dynasty,<sup>107</sup> and it is not necessary to repeat their labors here. But a few historiographical comments are in order. As there are no documentary sources like the Zhangjiashan manuscripts for later periods of Han legal history,<sup>108</sup> we are forced to rely on summaries of such cases in narrative accounts like *Records of the Historian* (*Shiji* 史記) and *History of the Han* (*Hanshu* 漢書), which are inescapably biased. That means we, today, are left with a non-random sample. No writer of any period can possibly incorporate all contemporary legal cases into a narrative history; he or she can do no more than select the cases that best exemplify the larger intellectual trends of the day. Moreover, in the case of the *History of the Han* – which, not coincidentally, contains richer legal material than *Records of the Historian* – this problem is intensified, because Ban Gu 班固 (AD 32–92), the primary author of the work, subscribed to peculiar Confucianized legal views of his own,<sup>109</sup> commitments that can only have influenced his historiographical choices. For example, surely Ban Gu included the vignette involving Wang Zun, who went on to have an eventful career,<sup>110</sup> because it presaged his future achievements as an

<sup>106</sup> The commentator Jin Zhuo 晉灼 (fl. Jin 晉 dynasty) notes that *zaoyu* is explained in the *Ouyang Shangshu* 歐陽尚書 – which, sadly, is lost.

<sup>107</sup> E.g., Huang Yuansheng, 31–97; Huang Jingjia, 182–210; Queen, 163–81; Benjamin E. Wallacker, “The *Spring and Autumn Annals* as a Source of Law in Han China,” *Journal of Chinese Studies* 2.1 (1985), 59–72. The first systematic compilation was Cheng Shude 程樹德 (1877–1944), *Jiuchao lü kao* 九朝律考, Zhonghua xueshu jingpin (Beijing: Zhonghua, 2003), 160–74 (i.e. *juan* 7 of *Han lü kao* 漢律考).

<sup>108</sup> There are, of course, numerous administrative documents (e.g., from Juyan 居延 and Yinwan 尹灣), but these are virtually silent on matters of jurisprudence. For a well-annotated survey, see Michael Loewe, “Han Administrative Documents,” in *New Sources of Early Chinese History: An Introduction to the Reading of Inscriptions and Manuscripts*, ed. Edward L. Shaughnessy, Early China Special Monograph Series 3 (Berkeley, 1997), 161–92.

<sup>109</sup> The discussion in A.F.P. Hulswé, *Remnants of Han Law*, vol. I: *Introductory Studies and an Annotated Translation of Chapters 22 and 23 of the History of the Former Han Dynasty*, Sinica Leidensia 9 (Leiden: E.J. Brill, 1955), 309–20, remains unsurpassed. (Hulswé never completed any further volumes of *Remnants of Han Law*.) See also Gao Heng, *Qin Han fazhi lunkao*, 257–70. For a more general discussion of Ban Gu’s praise-and-blame historiography, see Anthony E. Clark, *Ban Gu’s History of Early China* (Amherst, N.Y.: Cambria, 2008), 9–15.

<sup>110</sup> Cf. Charles Sanft, “Law and Communication in Qin and Western Han China,” *Journal*

official with an activist moral sense. What we read about legal decision-making in *History of the Han*, then, is precisely what Ban Gu wanted his posterity to read. One scholar has even presented reasons to suspect that Ban Gu habitually condensed and doctored the sources that he quoted.<sup>111</sup>

The sources tell largely the same story, however, and cannot be completely inaccurate about the Confucianization of the law in Han times. For example, it is significant that Sima Qian 司馬遷 (145?-86? BC) also recorded cases of legal reasoning on the basis of the *Springs and Autumns*,<sup>112</sup> as he would have had less partisan motivation than Ban Gu for exaggerating this tendency. Moreover, the sources all point to the same figure as playing a pivotal role in Confucianization: Dong Zhongshu. This is not to say that Dong single-handedly Confucianized the law;<sup>113</sup> as we have already seen, others eagerly participated in the process, and in any case Dong could not have had so much influence if his society had not been receptive to his ideas. But no one can be said to have had a greater hand in shaping Han Confucianism.

Dong was an imperially-appointed Erudite (*boshi* 博士) in the *Springs and Autumns* who specialized in the Gongyang tradition of that text. The Gongyang tradition received imperial sanction, its prestige outstripping that of the rival Guliang 穀梁, when Gongsun Hong 公孫弘 (d. 121 BC), Chancellor under Emperor Wu 武帝 (r. 141-87 BC), compared Dong's interpretations favorably to those of a Guliang scholar named Lord Jiang of Xiaqiu 瑕丘江公.<sup>114</sup> Dong suffered some setbacks during

of the *Economic and Social History of the Orient* 53.5 (2010), 686. For Wang Zun's biography, see Michael Loewe, *Biographical Dictionary of the Qin, Former Han and Xin Periods* (221 BC-AD 24), Handbuch der Orientalistik IV.16 (Leiden: Brill, 2000), 566-67.

<sup>111</sup> Gary Arbuckle, "Restoring Dong Zhongshu (BCE 195-115): An Experiment in Historical and Philosophical Reconstruction" (Ph.D. diss., University of British Columbia, 1991), 66-76. See also the critical discussion of Ban Gu's historiography in Lü Shihao 呂世浩, *Cong Shiji dao Hanshu - Zhuanzhe guocheng yu lishi yiyi* 從《史記》到《漢書》- 轉折過程與歷史意義, Guoli Taiwan Daxue wenshi congkan 138 (Taipei, 2009), 287-359.

<sup>112</sup> E.g., "Rulin liezhuan" 儒林列傳, *Shiji* (Beijing: Zhonghua, 1959), 121.3129 (the reasoning of Lü Bushu 呂步舒 with regard to the uprising of the Prince of Huainan 淮南). Sima's own ambivalence about this reorientation of the law is reflected in his placement of the aforementioned Zhang Tang among the "cruel officials": "Kuli liezhuan" 酷吏列傳, *Shiji* 122.3137-44. On Sima's view of law, see Gao Heng, *Qin Han fazhi lunkao*, 234-43.

<sup>113</sup> Cf. Guo Changbao, 73. According to Zhu Weizheng 朱維錚, *Zhongguo jingxue shi jiang* 中國經學十講, Mingjia zhuanti jingjiang (Shanghai: Fudan Daxue, 2002), 65-95, the ideological adoption of Confucianism originally owed more to factious maneuvering within the House of Liu than to Dong's philosophizing. While Zhu is always thought-provoking, he somewhat misstates the facts when he says: "There is one thing that we need not doubt, however, and that is that Dong Zhongshu was the first to adjudicate penal cases on the basis of the *Spring and Autumn Annals*" ("Confucian Statecraft in Early China," 31).

<sup>114</sup> "Rulin zhuan," *Hanshu* 88.3617; see also "Rulin liezhuan," *Shiji* 121.3129. Cf. Michael

his career,<sup>115</sup> but his undisputed standing as the premier Gongyang exegete gave him a respected voice in legal matters. This is because the *Springs and Autumns* was taken to be a record of historical appraisals by Confucius himself, the paradigmatic judge. Confucius was thought to assign praise and blame through his subtle phrasing, and the *Gongyang Commentary*, framed as a catechism, asks for each significant section why the text uses one word and not another. The answer always has to do with Confucius's implied moral message.<sup>116</sup>

Rooted in the Gongyang tradition, Dong Zhongshu criticized Qin policies and argued that the Han government was following the same destructive path.<sup>117</sup> Before the discovery of the Zhangjiashan manuscripts, one might have asked why Dong was still complaining about the Qin laws nearly a century after the fall of the Qin state. But now we know that, at least in legal affairs, Qin models had not yet been dismantled.

Your servant has heard that the sage kings' governance of the world was as follows: when [people] were young, they were made to study, and when they were older, they were assigned positions according to their talents. [The Sage Kings awarded] rank and emolument in order to nourish their virtuous [subjects], and [enacted] laws and punishments in order to awe their evil ones. Thus the people were apprised of ritual and righteousness, and would have been ashamed to act with malice against their sovereign. King Wu [r. 1046–1043 BC] carried out great righteousness, quelling destructive bandits; the Duke of Zhou made rituals and music in order to refine them; and during the reigns of Kings Cheng [r. 1042–1021 BC] and Kang [r. 1020–996 BC], prisons were empty for more than forty years. This was indeed [a consequence] of pervading instruction and the flow of ritual and righteousness; it was surely not the result of harming [people's] flesh and skin.<sup>118</sup>

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Loewe, *Dong Zhongshu, a "Confucian" Heritage and the Chunqiu fanlu*, China Studies 20 (Leiden and Boston: Brill, 2011), 54; Chen Suzhen, 212–22; and Zhang Tao 張濤, *Jingxue yu Handai shehui* 經學與漢代社會, Zhongguo chuantong xueshu yu shehui congshu (Shijiazhuang: Hebei renmin, 2001), 128f.

<sup>115</sup> For studies of Dong's life, see Loewe, *Dong Zhongshu*, 43–81; and Marianne Bujard, "La vie de Dong Zhongshu: Énigmes et hypothèses," *Journal Asiatique* 280.1–2 (1992), 145–217.

<sup>116</sup> The most comprehensive study is now Joachim Gentz, *Das Gongyang zhuan: Auslegung und Kanonisierung der Frühlings- und Herbstannalen (Chunqiu)*, Opera Sinologica 12 (Wiesbaden: Harrassowitz, 2001). See also Zhang Duansui 張端穗, *Xi Han Gongyang xue yanjiu* 西漢公羊學研究, Wen shi zhe daxi 187 (Taipei: Wenjin, 2005), esp. 262–300.

<sup>117</sup> "Dong Zhongshu zhuan," *Hanshu* 56.2504. Dong Zhongshu's criticism of Qin law is discussed in Queen, 127–30; see also Zhang Tao, 190–204.

<sup>118</sup> Compare the similar passage in "Dong Zhongshu zhuan," *Hanshu* 56.2507.



But in [the time of] Qin, things were not the same. They were devoted to the methods of Shen [Buhai, d. 337 BC] and [Lord] Shang [d. 338 BC], and put into practice the persuasions of Han Fei [d. 233 BC]. They hated the Way of the [Five] Emperors and [Three] Kings,<sup>119</sup> making it their custom to be as greedy as wolves. They had no culture or virtue with which to instruct their subjects. They executed in accordance with names but did not investigate realities; one who did good deeds would not necessarily avoid [penalty], while one who was malicious and evil would not necessarily be punished. Therefore, the Hundred Officers all adorned their empty speech and did not look into real affairs; externally, they possessed the rituals of serving their lord, but internally they had a mind to turn their backs on their sovereign. They fashioned frauds and plotted ornately, rushing toward profit without shame. Moreover, [the rulers] were fond of employing injurious and cruel officials who taxed and hoarded without moderation, exhausting the people's resources and strength. The Hundred Surnames were scattered and perished; they were unable to pursue their business of plowing and weaving, and throngs of robbers arose. Therefore, though punishments were manifold and those [condemned] to die were as if in a train, skulduggery did not cease. Vulgarization caused things to be this way. Thus when Confucius said, "If you guide them with legislation, and unify them with punishments, then the people will avoid [the punishments] but have no conscience," this is what he would have referred to.<sup>120</sup>

臣聞聖王之治天下也，少則習之學，長則材諸位，爵祿以養其德，刑罰以威其惡，故民曉於禮誼而恥犯其上。武王行大誼，平殘賊，周公作禮樂以文之，至於成康之隆，囹圄空虛四十餘年，此亦教化之漸而仁誼之流，非獨傷肌膚之效也。至秦則不然。師申商之法，行韓非之說，憎帝王之道，以貪狼爲俗，非有文德以教訓於下也。誅名而不察實，爲善者不必免，而犯惡者未必刑也。是以百官皆飾虛辭而不顧實，外有事君之禮，內有背上之心，造僞飾詐，趣利無恥；又好用僭酷之吏，賦斂亡度，竭民財力，百姓散亡，不得從耕織之業，群盜並起。是以刑者甚衆，死者相望，而姦不息，俗化使然也。故孔子曰：「導之以政，齊之以刑，民免而無恥」，此之謂也。<sup>121</sup>

<sup>119</sup> I infer this from the Emperor's use of the phrase *wudi sanwang* 五帝三王 in "Dong Zhongshu zhuan," *Hanshu* 56.2496.

<sup>120</sup> Compare the translation in Wilhelm Seufert, "Urkunden zur staatlichen Neuordnung unter der Han-Dynastie," *Mitteilungen des Seminars für Orientalische Sprachen* 23-25 (1922), 34f.; and the partial translation in Queen, 128.

<sup>121</sup> "Dong Zhongshu zhuan," *Hanshu* 56.2510f.

The two most important points in this passage are the citation, at the end, of *Analec*s 2.3, and the statement that the Qin “executed in accordance with names but did not investigate realities” – that is to say, that they punished on the basis of the letter of the law, without concern for the moral demands of the circumstances. This was an unmistakable differentiation between the old and the new approaches to the law. It should not be surprising that the practice of soliciting local recommendations for new officials who qualified as “filial and incorrupt” (*xiaolian* 孝廉) was originally Dong’s idea.<sup>122</sup>

In a famous passage, Dong Zhongshu elaborated on jurisprudence informed by the *Springs and Autumns*:

In hearing cases in accordance with the *Springs and Autumns*, one must establish the facts and examine the source of [the defendant’s] intentions. One need not await completion [of the crime before punishing] one whose intentions are perverse. The ringleader among evil-doers is punished exceptionally harshly, while one who is basically upright is sentenced lightly. Thus Pang Choufu’s [decapitation]<sup>123</sup> was warranted, but Yuan Taotu was inappropriately apprehended;<sup>124</sup> Jizi of Lu pursued Qingfu,<sup>125</sup> but Jizi of Wu let [King] Helu go free.<sup>126</sup> In these four cases, the crime was the

<sup>122</sup> “Wudi ji” 武帝紀, *Hanshu* 6.160 and 167. Cf. Loewe, *Dong Zhongshu*, 138–40; and Zhou Guidian 周桂鈿, *Qin Han zhixue* 秦漢哲學, Daxue mingshi jiangyi xilie (Wuhan: Wuhan chubanshe, 2006), 121f.

<sup>123</sup> See *Chunqiu Gongyang zhuan zhushu* 17.2290B (Cheng 2). Robert H. Gassmann, tr., *Ch’un-ch’iu fan-lu: Üppiger Tau des Frühling-und-Herbst Klassikers*, Schweizer Asiatische Studien: Monographien 8 (Bern: Peter Lang, 1988), provides detailed notes on the historical figures mentioned in this passage. For Pang Choufu, see 210n.60: Pang was a charioteer who took his lord’s place so that the latter could go free, but was executed in his stead. This was perceived as disgraceful, as Queen, 156f., explains; cf. also Zhang Duansui, 160ff.

<sup>124</sup> See *Chunqiu Gongyang zhuan zhushu* 10.2249B–C (Xi 4); Gassmann, 273n.43. Lord Huan of Qi 齊桓公 (r. 685–643 BC) followed Taotu’s advice and moved his army along the coast, but unexpectedly became mired in swampland. Frustrated, Lord Huan arrested Taotu (but did not kill him). Conceivably, *bu yi zhi* 不宜執 could mean “was apprehended for his inappropriate [behavior],” but the *Gongyang* criticizes Lord Huan for seizing Taotu instead of rectifying his army 不脩其師而執濤塗. And as Taotu’s arrest is adjudged inappropriate in the canon, I do not understand how this example advances Dong’s general argument; for he seems to use it as an illustration of proper adjudication that takes facts and intentions into account. Cf. Queen, 143n.48.

<sup>125</sup> See *Chunqiu Gongyang zhuan zhushu* 9.2244C (Min 2); Gassmann, 275n.52. Ducal Son Qingfu killed Lord Min of Lu 魯閔公 (r. 661–660 BC); Jizi refused to let him escape. But here too Dong’s use of the example is questionable: the canon emphasizes that Qingfu was *not* executed. Cf. Queen, 143n.49.

<sup>126</sup> See *Chunqiu Gongyang zhuan zhushu* 21.2313A–C (Xiang 襄 29); Gassmann, 232n.13. Jizi, the Crown Prince of Wu, was out of the country when Liao 僚, the son of a royal concubine, inherited the throne. In 514 BC, Helu, Jizi’s nephew, killed this impostor, but Jizi declined to accept the throne or punish Helu, and left for Chu 楚. Thereupon Helu became King of Wu. (Gassmann states incorrectly that Liao was the son of King Shoumeng 壽夢 [r. 585–561 BC]; in fact, he was the son of King Shoumeng’s son, King Yimei 夷昧 [r. 543–527 BC].)

same but the sentence different, because the roots were dissimilar. Both [of the first two] deceived armies, but one was put to death and the other was not; both [of the second two] assassinated their lords, but one was put to death and the other was not. How could one hear suits and decide cases without such scrutiny? Thus when one decides a case correctly, principles are made clearer and moral instruction is furthered. When one decides a case incorrectly, one obfuscates principles and misleads the multitudes, permitting moral instruction to be impeded. Moral instruction is the root of government; legal cases are its branches. These matters lie in different domains, but their application is the same. As one must not fail to assimilate [moral instruction with adjudication], the noble man emphasizes these [undertakings].<sup>127</sup> 《春秋》之聽獄也，必本其事而原其誌。誌邪者不待成，首惡者罪特重，本直者其論輕。是故逢丑父當，而轅濤塗不宜執，魯季子追慶父，而吳季子釋闔廬。此四者罪同異論，其本殊也。俱欺三軍，或死或不死；俱弑君，或誅或不誅。聽訟折獄，可無審耶！故折獄而是也，理益明，教益行。折獄而非也，暗理迷眾，與教相妨。教，政之本也。獄，政之末也。其事異域，其用一也，不可不以相順，故君子重之也。<sup>128</sup>

Dong's historical examples are all taken from the *Gongyang Commentary* and are not easy to interpret, but, as philosophy, the passage is straightforward. Crimes are defined not by acts, but by circumstances and intent. As we have already seen, exponents of Confucianized jurisprudence did not hesitate to punish what they regarded as immorality even if it did not violate the letter of the law, just as they would freely commute the mandated sentences of those whose intentions they regarded as praiseworthy. Dong concludes here with the most Confucian assertion of all: laws exist for the sake of moral instruction, which they dare not subordinate. No other use of law, after all, could possibly be sanctioned by a Confucian moralist.<sup>129</sup>

Because of his eminence, Dong Zhongshu was occasionally called to render legal opinions in hard cases, a handful of which have been preserved in fragmentary form. There is some debate as to whether

<sup>127</sup> Compare the translations in Queen, 142f.; and Gassmann, 61f.

<sup>128</sup> Zhong Zhaopeng 鍾肇鵬, *Chunqiu fanlu jiaoshi* 春秋繁露校釋 (Shijiazhuang: Hebei renmin, 2005), 3.5.177f. This is from the "Jinghua" 精華 chapter, one of the initial chapters on *Gongyang* exegesis that are generally accepted as genuine. The two most detailed studies of the authenticity of *Chunqiu fanlu* (in any language) are Queen, 39-112; and Arbuckle, 315-542.

<sup>129</sup> Cf. Huang Yuansheng, 148f.; Zhou Guidian, 107-17; and Gao Heng, *Qin Han fazhi lunkao*, 207f.

these items were originally part of a synthetic whole,<sup>130</sup> but, for our purposes, not much hinges on this question. The more germane point is that Dong unabashedly applied his Confucian mode of legal reasoning to cases involving household affairs that, in the Qin legal system, would not have occasioned extensive deliberation.

At the time, there was a doubtful case: “Party A had no sons, so he picked up Party B, a boy abandoned by the side of the road, and raised B as his son. When B had reached adulthood, he committed the crime of homicide, and informed A of the situation. A concealed B; how should A be sentenced?” 時有疑獄曰：「甲無子，拾道旁棄兒乙養之以爲子。及乙長，有罪殺人，以狀語甲，甲藏匿乙。甲當何論？」

[Dong] Zhongshu judgment was: “A had no sons, and saved B’s life and raised him. Although he was not engendered [by A], with whom could [A] have exchanged him? It is said in the *Odes*, ‘The earworm has babes; the potter wasp bears them on its back.’<sup>131</sup> A principle of the *Springs and Autumns* is that ‘fathers provide shelter for their sons.’<sup>132</sup> As A was right to hide B, he is not to be held responsible for any charge.”<sup>133</sup> 仲舒斷曰：「甲無子，振活養乙，雖非所生，誰與易之！詩云『螟蛉有子，蜾蠃負之。』《春秋》之義，『父爲子隱』，甲宜匿乙，詔不當坐。」<sup>134</sup>

The fact that A was not B’s natural father seems to have been the difficulty in this case. As far as Dong Zhongshu was concerned, however, the lack of a blood bond was immaterial; what mattered was that A freely and steadfastly acted as B’s father, and thus should have been entitled to all the corresponding legal and moral protections.<sup>135</sup> In a seemingly related case,<sup>136</sup> Dong determined that an adopted son who, in a fury, attacked his natural father was not to be held responsible (i.e.

<sup>130</sup> For example, Michael Loewe, “Dong Zhongshu as a Consultant,” *Asia Major* (third series) 22.1 (2009), 171, states that “they can only be seen as individual items,” whereas Wallacker repeatedly refers to Dong’s “compilation” (e.g., 61) and “casebook” (e.g., 63). Chen Suzhen, 256, similarly, refers to it as a “lost book” 此書已佚, and Guo Changbao, 72, clearly thinks of it as such too.

<sup>131</sup> Mao 196.

<sup>132</sup> This phrase is not found in the received *Gongyang* (or any other tradition of the *Springs and Autumns*), but appears in *Analects* 13.18. For a similar passage in the *Gongyang*, see *Chunqiu Gongyang zhuan zhushu* 14.2274B (Wen 文 15).

<sup>133</sup> Compare the translation in Loewe, “Dong Zhongshu as a Consultant,” 175.

<sup>134</sup> The source text is Du You 杜佑 (AD 735–812), *Tongdian* 通典, ed. Wang Wenjin 王文錦 et al. (Beijing: Zhonghua, 1988), 69.1911.

<sup>135</sup> Cf. Huang Yuansheng, 37–43; Gao Heng, “Gongyang Chunqiu xue yu Zhongguo chuantong fazhi,” 14; Huang Jingjia, 173–75; Zhang Tao, 197; Queen, 144f.; and Wallacker, 63f.

<sup>136</sup> Cited immediately after the above in *Tongdian*, 69.1911.

for the relatively serious crime of assaulting one's father, as opposed to the lesser crime of assaulting a stranger).<sup>137</sup> Like all Confucians, Dong Zhongshu believed that moral judgments should be based on how people act in their social roles. One who acts as a father counts as a father, even if he is not a father by blood, and one who does not act as a father does not count as a father, even if he is a father by blood. And let us not forget Dong's larger purpose in hashing out whether A should or not should be considered B's legal father: affirming a father's duty *not* to turn his son over to the authorities, even in cases of homicide.<sup>138</sup> Nothing could be further from the Qin notion that law exists for the sake of enforcing people's obligations to the state.

Judges' increasing acceptance of the principle that mutual obligations between father and son trumped the state's regulatory interests led to a problem that would haunt Chinese courts for centuries: attacks in the name of filial vengeance.<sup>139</sup> These were inherently disruptive, inasmuch as the state could hardly let violent crime go unpunished, but, because of its Confucianized legal doctrine, it had to entertain the legitimacy of a filial child's defense. These competing concerns produced courtroom dramas that might strike modern readers as bizarre, as in the case of Xue Kuang 薛况 (d. AD 3), who hired a thug to disfigure Shen Xian 申咸, an official Erudite who had spoken ill of Xue's father, the high minister Xue Xuan 薛宣. Both the prosecution and the defense proceeded to cite the *Springs and Autumns*, the former claiming that, according to this text, one whose purpose is evil should not escape execution regardless of how the crime unfolded, the latter claiming, on the contrary, that according to the *Springs and Autumns*, guilt is

<sup>137</sup> Thus I disagree with Loewe's translation of *buying zuo* 不應坐 as "he is not due to answer a charge" ("Dong Zhongshu as a Consultant," 176); it is hard to imagine that Dong would have let off the son with no punishment whatsoever.

<sup>138</sup> Not everyone in Han government concurred. An edict from 66 BC, for example, permitted sons to conceal their fathers, but not *vice versa* – on pain of death: "Xuandi ji" 宣帝紀, *Hanshu* 8.251. Cf. Bret Hinsch, *Women in Early Imperial China*, 2nd edition, Asia/Pacific/Perspectives (Lanham, Md.: Rowman & Littlefield, 2011), 88; and Zhang Tao, 197f.

<sup>139</sup> See Nicolas Zufferey, "Debates on Filial Vengeance during the Han Dynasty," in *Dem Text ein Freund: Erkundungen des chinesischen Altertums: Robert H. Gassmann gewidmet*, ed. Roland Altenburger et al. (Bern: Peter Lang, 2009), 77–90; for a discussion of the underlying casuistry, see Anne Cheng, "Filial Piety with a Vengeance: The Tension between Rites and Law in the Han," in *Filial Piety in Chinese Thought and History*, ed. Alan K.L. Chan and Sor-hoon Tan (London: Routledge Curzon, 2004), 29–43. For the problem of vengeance killing generally, see Lewis, 80–94; Michael Dalby, "Revenge and the Law in Traditional China," *American Journal of Legal History* 25.4 (1981), esp. 270–77; Ch'ü, 78–87; and Lien-sheng Yang, "The Concept of *pao* as a Basis for Social Relations in China," in *Chinese Thought and Institutions*, ed. John K. Fairbank (Chicago: University of Chicago Press, 1957), e.g., 293ff. I do not agree with Lewis that collective punishment (such as *lian-zuo*) represented an institutionalized form of vengeance.

determined by examining the defendant's intentions, and Xue Kuang harbored no evil other than his rage at the calumnies directed against his father.<sup>140</sup> (The defense did not wholly succeed, as Xue Kuang was banished and Xue Xuan stripped of his rank.)

That filial vengeance killings were a distinctive feature of Chinese legal culture into the twentieth century is attested by the case of Shi Jianqiao 施劍翹 (1905–1979), who murdered the notorious warlord Sun Chuanfang 孫傳芳 (1885–1935) because he had brutally executed her father ten years earlier. In the widely publicized trial, Shi's lawyers appealed to the *Gongyang Commentary* and its sanction of righteous revenge.<sup>141</sup> Shi was sentenced to seven years in prison, but was pardoned by the Nationalist government soon afterwards. Only by reading the case against the long backdrop of Chinese legal history can one understand why defense attorneys would refer to the *Gongyang Commentary* in 1936.

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It should be noted, in closing, that the Confucianization of the law was not an isolated phenomenon; it was but one facet of a revived moralistic consciousness in government,<sup>142</sup> and hence was accompanied by many other intellectual developments that must be related but which lie beyond the scope of this study. One is the burgeoning interest in omenology, through which people tried to gain clues about Heaven's Mandate (and assert the legitimacy of the Han dynasty).<sup>143</sup> The relative frequency of citations of authoritative texts also changed noticeably: for example, the text known as *Rituals of Zhou* 周禮 was accorded increasing respect,<sup>144</sup> and there was an increase in references

<sup>140</sup> "Xue Xuan Zhu Bo zhuan," *Hanshu* 83.3395f. Cf. Wallacker, 66f.

<sup>141</sup> Eugenia Lean, *Public Passions: The Trial of Shi Jianqiao and the Rise of Popular Sympathy in Republican China* (Berkeley: University of California Press, 2007), 120ff.

<sup>142</sup> In English, the best study is still Michael Loewe, *Crisis and Conflict in Han China: 104 BC to AD 9* (London: George Allen & Unwin, 1974). See also Ma Yong 馬勇, *Qin Han xueshu shehui zhuanxing shiqi de sixiang tansuo* 秦漢學術社會轉型時期的思想探索, Chuantong wenhua yu xiandaihua wencong (Xi'an: Shaanxi renmin jiaoyu, 1998), 22–44; and Gu Jiegang 顧頡剛 (1893–1980), *Handai xueshu shi lue* 漢代學術史略, Minguo xueshu jingdian wenku 5 (Beijing: Dongfang, 1996), 40–46.

<sup>143</sup> Cf. Michael Loewe, *The Men Who Governed Han China: Companion to a Biographical Dictionary of the Qin, Former Han and Xin Periods*, Handbuch der Orientalistik IV.17 (Leiden and Boston: Brill, 2004), 421–56; idem, *Divination, Mythology and Monarchy in Han China*, University of Cambridge Oriental Publications 48 (Cambridge, 1994), 88–93.

<sup>144</sup> See, e.g., Michael Puett, "Centering the Realm: Wang Mang, the *Zhouli*, and Early Chinese Statecraft," in *Statecraft and Classical Learning: The Rituals of Zhou in East Asian History*, ed. Benjamin A. Elman and Martin Kern, Studies in the History of Chinese Texts 1 (Leiden and Boston: Brill, 2010), 129–54.

to Mencius 孟子 (371–289 BC) combined with a corresponding decrease in references to Xunzi.<sup>145</sup> But one of the most intriguing parallel developments is a shift in attitudes toward non-Chinese peoples, especially the Xiongnu 匈奴. Whereas the standard view in pre-imperial times was that people's civility or barbarism is determined by their actions, not their birth, over the course of the Han dynasty it became customary to attribute a fundamentally different nature to the Xiongnu, which supposedly made them impossible to civilize. This is in contradistinction to the *Gongyang Commentary* itself, which partook of the older view that barbarians can become Chinese and *vice versa*.<sup>146</sup> Many of the figures responsible for Confucianizing the law, such as Dong Zhongshu, Xiao Wangzhi 蕭望之 (ca. 107–47 BC), and Ban Gu, also placed themselves in the vanguard of this thoroughgoing reassessment of the Xiongnu.<sup>147</sup> Thus the Confucianization of the law represented not only the extension of Confucian principles to previously uncolonized terrain, but also a narrowing and hardening of Confucianism itself. Formerly, Confucianism had been open to everybody.

<sup>145</sup> I have discussed this in “Xunzi and Early Han Philosophy,” *Harvard Journal of Asiatic Studies* 67.1 (2007), 135f. and 164.

<sup>146</sup> Cf. Yu Kam-por, “Confucian Views on War as Seen in the *Gongyang Commentary on the Spring and Autumn Annals*,” *Dao* 9.1 (2010), 107, who shows that according to the *Gongyang Commentary*, “if the barbarians follow civilized codes of conduct, they are regarded as Chinese states. If Chinese states no longer follow civilized codes of conduct, they are demoted to the status of barbarians” – adding that Han Yu 韓愈 (AD 768–824) discovered this principle in the *Springs and Autumns* long ago. See “Yuan dao” 原道, in Qu Shouyuan 屈守元 and Chang Sichun 常思春, *Han Yu quanji jiaozhu* 韓愈全集校注 (Chengdu: Sichuan Daxue, 1996), VI, 2664 (with helpful examples at 2682n.61). See also Chen Suzhen, 273f.

<sup>147</sup> See my “Steppe Nomads as a Philosophical Problem in Classical China,” in *Mapping Mongolia: Situating Mongolia in the World from Geologic Time to the Present*, ed. Paula L.W. Sabloff (Philadelphia: University of Pennsylvania Museum of Archaeology and Anthropology, 2011), esp. 232–35.